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ARGUED AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

COVERING

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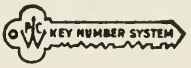

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CHANCERY CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

FROM JANUARY TO MAY 1827
BOTH INCLUSIVE

By D. J. M'CORD
STATE REPORTER

VOL. II

PHILADELPHIA
P. H. NICKLIN, LAW BOOKSELLER
No. 175, Chestnut Street
1829

ANNOTATED EDITION
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1917

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LAW

JUDGES

OF THE COURT OF APPEALS

HON. ABRAHAM NOTT.
HON. C. J. COLCOCK.
HON. DAVID JOHNSON.

CHANCELLORS

HON. HENRY W. DE SAUSSURE.
HON. WADDY THOMPSON.

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CHANCERY CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

IN JANUARY AND MAY TERMS, 1827.

JUDGES PRESENT.

HON. ABRAHAM NOTT, Presiding Judge.
" C. J. COLCOCK.
" DAVID JOHNSON.

*JOHN BLACK and BENJAMIN JONES v. JOHN BLAKELY and Wife, Administrators of Andrew Wilson.

(Columbia. Jan. and May Terms, 1827.)

[*Executors and Administrators* ⇐500.]
Executor not allowed commissions where his accounts are irregular, imperfect or unintelligible.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2131–2139; Dec. Dig. ⇐500.]

[*Executors and Administrators* ⇐82.]
An executor or trustee may at all times apply to the Chancellor for directions, as to the discharge of his trust. And if he has funds in his hands which he cannot loan, he may apply for directions or pay interest himself.

[Ed. Note.—Cited in Duncan v. Dent, 5 Rich. Eq. 12.

For other cases, see Executors and Administrators, Cent. Dig. § 335; Dec. Dig. ⇐82.]

[*Executors and Administrators* ⇐227.]
An executor or administrator's accounts filed with the Ordinary must be properly vouched, or the Ordinary should not receive it. It is his duty to strike out charges not properly vouched.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 811–818, 842; Dec. Dig. ⇐227.]

[*Executors and Administrators* ⇐227.]
If the highest evidence cannot be produced, the next must. The Ordinary may allow him time to produce his vouchers, or evidence of payment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 811—818, 842; Dec. Dig. ⇐227.]

[*Executors and Administrators* ⇐484; *Guardian and Ward* ⇐30.]
An executor or guardian should not break in upon the capital for the maintenance and education of minors without the permission of the Court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 763, 2067; Dec. Dig. ⇐484; Guardian and Ward, Cent. Dig. §§ 116–135; Dec. Dig. ⇐30.]

[*Executors and Administrators* ⇐500.]
An executor or administrator is not allowed commissions for those years that he fails to render correct accounts to the Ordinary.

[Ed. Note.—Cited in Lay v. Lay, 10 S. C. 221.

For other cases, see Executors and Administrators, Cent. Dig. § 2134; Dec. Dig. ⇐500.]

[*Executors and Administrators* ⇐456.]
The executor charged with costs, his conduct being improper.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1941–1967; Dec. Dig. ⇐456.]

[*Executors and Administrators* ⇐104.]
Annual rests in accounts against executors not allowed, but in particular cases.

[Ed. Note.—Cited in Livingston v. Wells, 8 S. C. 362.

For other cases, see Executors and Administrators, Cent. Dig. § 432; Dec. Dig. ⇐104.]

[*Executors and Administrators* ⇐104.]
When interest was ordered to be paid annually on a legacy to be paid at twenty one, for maintenance and education, annual rests will be allowed against the executor, or where an executor or administrator employs funds in his own business, and refuses to account for the profits, the Court, at its discretion, may make annual rests, and allow interest on the annual balance against the trustee. Not allowed on a mere neglect to pay over money. (Colcock, J., thought annual rests should be allowed.)

[Ed. Note.—Cited in Wright v. Wright, 2 McCord, Eq. 204; Teague v. Dendy, 2 McCord, Eq. 212, 16 Am. Dec. 643; Myers v. Myers, Bailey, Eq. 29; Brown v. Vinyard, Bailey, Eq. 462; Duncan v. Dent, 5 Rich. Eq. 11; Hug-

gins v. Blakely, 9 Rich. Eq. 410; Livingston v. Wells, 8 S. C. 362, 363.

For other cases, see Executors and Administrators, Cent. Dig. § 432; Dec. Dig. ⟸104.]

On sums reported to be due and the report confirmed.

[*Executors and Administrators* ⟸104.]

[The omission of the administrator to render annual accounts will not, it seems, change the rule as to charging him interest on annual balances in his hands.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 431; Dec. Dig. ⟸104.]

[This case is also cited in Buerhaus v. De Saussure, 41 S. C. 492, 19 S. E. 926, 20 S. E. 64, regarding the proper method of vouching accounts.]

Bill by the complainants, the guardians of several minor children, against the defendants, the administrators of their father's estate. It appeared from the Commissioner's report, that in 1818 and 1819 the defendants received of their intestate's estate upwards of $3000, belonging to the minor children. The Commissioner charged the defendants with the amount and interest from the 1st of March 1818, and the 1st of January 1819, the periods when the moneys became due, and allowed the defendants a credit of $121.57 per

*2

annum, *with interest from the end of each year, from 1818 to 1826, for the board, clothing, and tuition, of the children. It was objected by the complainants, that it was wrong to allow interest on the sum thus expended by the defendants; inasmuch as the amount so advanced was not equal to the annual interest of the principal sum belonging to the children in defendants' hands.

The accounts were stated by the Commissioner in the following manner.

The Administrators Dr.

To amount of first sale of property	$1206 07	
Interest from 1 March 1818 to 1 January 1826	661 30	
To amount of second sale	3206 06	
Interest from 1 January 1819 to 1 January 1826	1570 96	
To cash received in 1817 from debts due intestate		91 96
Interest from 1 January 1818 to 1 January 1826	51 49	
To cash received in 1818 from debts due intestate	14 68	
Interest on $7 34 from 1 Jan. 1819 to 1 Jan. 1826	3 59	
Interest on $7 34 from 1 Jan. 1820 to 1 Jan. 1826	3 08	
	$6809 19	

*3

*Cr.

By amount paid by administrator and administratrix for debts due by the estate, together with interest on those payments up to 1 January 1826	$ 705 69	
	$6103 50	
Deduct for the widow, Mrs. Blakely, one-third	2034 50	
	$4069 00	

Dr.

Add two-thirds of rent of land in 1818	$ 40 00	
Interest from 1 January 1819 to 1 January 1826	19 60	
Add two-thirds of rent of land in 1819	40 00	
Interest from 1 January 1820 to 1 January 1826	16 80	
Add two-thirds of rent of land in 1820	30 00	
Interest from 1 January 1821 to 1 January 1826	10 50	
		$4225 90

*4

*Cr.

By boarding and clothing children, tuition, &c. in 1818	$ 121 57	
Interest from 1 Jan. 1819 to 1 Jan. 1826	59 57	
The same in 1819	121 57	
Interest from 1 Jan. 1820 to 1 Jan. 1826	51 06	
The same in 1820	121 57	
Interest from 1 Jan. 1821 to 1 Jan. 1826	42 55	
The same in 1821	121 57	
Interest from 1 Jan. 1822 to 1 Jan. 1826	34 04	
The same in 1822	121 57	
Interest from 1 Jan. 1823 to 1 Jan. 1826	25 53	
The same in 1823	121 57	
Interest from 1 Jan. 1824 to 1 Jan. 1826	17 02	
The same in 1824	121 57	
Interest from 1 Jan. 1825 to 1 Jan. 1826	8 51	
The same in 1825	121 57	
		$1210 84
		$3015 06
Deduct for amount received by intestate in his life time, instead of defendants		50 00
Due the minors on 1 Jan. 1826		$2965 06

To this report both parties excepted.

*5

*De Saussure, Chancellor. The Commissioner reports a balance of two thousand, nine hundred, and sixty-five dollars, six cents, due by the defendants to the minor children of Andrew Wilson, with interest from the 1st of January 1826. To this report the defendants except, because they are not allowed commissions for moneys received and paid out. The Commissioner overruled the exception; as it appeared from the answer of both the defendants, that the returns made by them to the Ordinary were irregular, imperfect and unintelligible. It is not easy to draw the line exactly between those returns made to the Ordinary, which are so regular and exact as to entitle the executor or administrator to his commissions; and those returns which are so incomplete as to take away his right. The statute of the 13th of March 1798 enacts "that if any executor or administrator shall neglect to render such annual accounts (as are before directed), he shall not be entitled to any commissions for his trouble in the management of said estate." The account directed to be made an-

nually before the Ordinary is to be a "just and true account, upon oath, of the receipts and expenditures of the estate, the preceding year." The account may be just and true in most particulars, and made in good faith; but it may be defective or erroneous in some particulars, through mistake or misapprehension. In such case, I do not think that the executor ought to be deprived of his commissions. On the other hand, accounts may be regularly returned but be so imperfect, erroneous and defective, as not to answer the purposes of the statute, which were to enable the heirs and creditors to see and judge how the affairs of the estate were managed, and the funds applied. In such a case, the accounts would be altogether illusory, and the statute would apply.

In the case before us, the Commissioner states the accounts rendered to have been ir-

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regular, imperfect and *unintelligible. This, I fear, comes within the exclusion of the statute; and the exception was properly overruled by the Commissioner.

Another exception was made on the ground, that the Commissioner allowed interest on the board of the children, from the end of each year; when the amount of the board exhausted the interest due, at the end of each year: and the board should always be paid out of the interest, which did not draw interest.

This exception is founded on the principle, that the children entitled to an estate must, of necessity, be supported within the interest of the estate. This ought to be done where it can be done, and even as much of the income laid up as possible. But if the income should really be inadequate, then the Court would sanction the breaking in upon the capital; for subsistence and education are more essential to the well being of the minors than accumulation. And as the Court will allow it when applied to, so it will sanction it when done; provided that, after a rigorous inspection, it should appear, that the expenditure was highly proper, if not indispensable.

The Commissioner having reported in favor of the allowance, I presume it was indispensable in this case. When allowed, interest follows of course, where interest is allowed the estate against the executor on all his receipts. The Commissioner overruled the exception, and his order is confirmed.

From this decree both parties appealed, on the grounds taken in the exceptions to the report of the Commissioner. The defendants besides contended, that the estate should pay the costs.

Irby, for the complainants. The administrator is not entitled to commissions unless he makes annual returns, 4 Desaus. Rep. 464.

*7

*P. Farrow, contra.

Curia, per COLCOCK, J. The question raised by complainants' counsel in this case admits of no doubt. The act of 1798 requires executors and administrators to make annual returns to the Ordinaries of the respective districts. Now, had this executor complied, how would his accounts have been made out? At the end of 1818, which appears to be the year the money came into his hands, he would have stated the sum of (say) $3,000, as a debit against himself, with the interest thereon, making a sum of $3,210, and then credited himself with the annual expenditure, which, it is said, was $121.57 cents, leaving a balance of $3,088.43 cents in his hands, with which he would be debited for the next year 1819; at the conclusion of which the interest would again be calculated, and the expenditure deducted, and so on yearly.

Shall he then derive a profit from neglect of duty? This is a question which can receive but one reply. It is in vain that the complaint of hardship is urged, or that the Court should be told, that the executor is honest, and meant well. He has undertaken the performance of an important duty, and the difficulties must, or ought to have been foreseen. If they prove too great, he may procure assistance. He is allowed a commission, and, for extraordinary services, additional compensation; and at all times may apply to the Court for direction, as to the manner in which he shall discharge the trust. When his accounts are regularly made out and vouched before the Ordinary, if the annual balances which remain in his hands are small, and he does not wish to be charged with interest, he may loan out the money; or if that cannot be effected, let him so state the matter to the Court, and he will be directed how to dispose of it. But it is mere mockery for an executor to file

*8

an account which is *not vouched. What information can be obtained from such an account? The Ordinary ought not to receive it. It is his duty to strike out such charges as are not properly vouched; then to strike the balance and calculate commissions on the receipts and expenditures thus established. It is asked, shall an executor lose the benefit of a payment, because he can not produce the receipt given for the money paid? The affairs of an executor are to be governed by those general rules which apply to the common concerns of other men. If the highest evidence can not be produced, the next must be produced. As to his returns to the Ordinary, he is not limited to a day. If the account be filed yearly, he complies with the requisition of the law. If then any difficulty arises, he can always be allowed time to produce such evidence as may appear to be wanting to establish a payment. If he is before the Commissioner upon a final settlement, any satisfactory evidence of payment is sufficient.

Although the Court concur in the general

observations which are made by the Chancellor, as to the propriety of breaking in on the capital, for the maintenance and education of the children, when it is indispensably necessary, yet the question does not arise in this case, and the Court would avoid expressing any opinion, which might seem to imply a power in an executor to do so, to the utter destruction of an estate, without the sanction of the Court. It is not possible, in this case, for the Court to perceive what is due by the executor to the minor children. The case must be sent back to the Commissioner. His method of stating the account may be the more easy and convenient, but it is utterly incorrect in point of principle. The account must be made out with annual rests, according to the principles laid down at the beginning of the opinion; and if in the course of any year, during which the execu-

*9

tor is charged with interest, *he should pay a claim, he of course may be allowed interest on his payment to the end of the year, when the balance is to be stricken.

Having disposed of the grounds of appeal on the part of the complainant, I proceed to examine those on the part of the defendants.

The Commissioner refused to allow them commissions, and the Chancellor supported his decision; and this Court concur with him in his views of the exception. The act of assembly is express on the subject, and imperative on the Court. He failed to make returns; or those which he did make were utterly unintelligible, which is equally a default of duty. He is therefore not entitled to commissions. We would not be understood to say, that mere trifling errors are sufficient to deprive the executor of this claim. We have before intimated how they may be avoided or corrected. If an executor should make out his accounts properly for several years, and then fail to do so, so long as he discharged his duty, he would be entitled to commissions; but from the moment he fails to render his annual accounts, he forfeits his claim to them.

The second ground is to amend the decree, so as to order that the costs be paid out of the estate.

There is no foundation for this claim: the executor has been in default from the commencement of his administration. He has, by his improper management of the estate, rendered it necessary that these legal proceedings should be instituted against him, and the Chancellor has very properly exercised his discretionary power by determining that he should pay the costs.

NOTT, J. I concur in the opinion which has been delivered in this case, except in that part allowing annual rests in the calculation of interest. The rule for calculating interest has long been settled in this

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state; and I *cannot lay it down with more precision than in the words of Chancellor Kent, in the case of Connecticut v. Jackson, 1 Johns. Cha. Rep. 17. The rule for casting interest when partial payments have been made, is, to apply the payments, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payments be less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal until the period when the payments taken together exceed the interest due; and then the surplus is to be applied towards discharging the principal: and interest is to be computed on the balance of principal, as aforesaid. That method of calculating interest has been settled by the decisions of our Courts for more than thirty years. There are indeed exceptions to this rule. In the case of Bowles et ux. v. Drayton, 1 Desaus. Rep. 496, [1 Am. Dec. 689,] where a testator had given a legacy to his daughter, to be paid on the day of her marriage, or on her arrival at the age of twenty-one years, and directed the interest thereon to be paid annually for her maintenance and education, the Court allowed interest on the arrears of interest, because the will directed that sum to be paid annually; and the provisions of the will ought to be complied with. So when an executor or trustee employs money in trade, or otherwise, for his own benefit, and refuses to account for the profits, the Court may in its discretion make annual rests, and make him pay interest on those balances. Schiefferlin v. Stewart, 1 Johns. Cha. Rep. 629. But I have never known it to be allowed on a mere neglect to pay over money. I do not think, therefore, it ought to be made a general rule; but ought to be adopted only in special cases, and those cases, like every exception to a general rule, must depend

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*upon their own peculiar circumstances. Perhaps where a sum has been reported due by the Master, and that report has been confirmed by the Court, interest ought to be allowed; because then it may be considered a sum liquidated.

Mr. Justice JOHNSON concurred in the views expressed by Mr. Justice NOTT.

2 McCord, Eq. 11

FINSLEY CHEWNING and Wife v. JOHN PROCTOR, Administrator of William Baker, deceased.

(Columbia. Jan. and May Terms, 1827.)

[*Mortgages* ⇐464.]

Upon the foreclosure of a mortgage given to secure the payment of a bond, the bond must be produced (if not shewn to be lost or destroyed), as the highest evidence of the debt. The recital in the mortgage is not sufficient.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1362; Dec. Dig. ⇐464.]

[*Compromise and Settlement* ⇐23.]

Giving a bond and mortgage furnishes a presumption of the liquidation of all accounts before their date between the parties.

[Ed. Note.—Cited in Cothran v. Knox, 13 S. C. 511; Ex parte Middleton, 42 S. C. 181, 20 S. E. 34.

For other cases, see Compromise and Settlement, Cent. Dig. § 92; Dec. Dig. ⇐23.]

[*Appeal and Error* ⇐1009.]

The Court does not listen to appeals on matters of fact from the Chancellor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. ⇐1009.]

This case was heard upon the defendant's exceptions to the report of the Commissioner.

The bill stated that Huldah Goodman, on the 1st of January 1818, by her written obligation bearing date the day and year aforesaid, stood bound to one William Baker or his certain attorney, in the sum of $266.13, payable on or before the 1st of January 1819, with interest from the date. That on the same day, to secure the payment of the said writing obligatory, she executed to the said William Baker a mortgage of the land on which she lived, containing 162½ acres, conditioned to be void on the payment of the money, according to the condition of the obligation aforesaid. That in 1823 the said Huldah intermarried with the defendant Finsley Chewning, and that they had not paid the sum of money according to the condition of the bond, and that William Baker died, and plaintiff administered on his estate.

*12

*The bill prayed, that defendants might answer all the allegations contained therein, and that the mortgage might be foreclosed.

The defendants put in their joint and several answers, by which the defendant Huldah admitted, that being indebted to a certain Thomas Goodman, in the sum of $129.50 with interest from the 4th of June 1816, the payment of which was secured to the said Thomas by a mortgage of her land, she agreed with William Baker, if he would pay to the said Thomas Goodman the amount of his debt and take up his mortgage on the land, she would secure him, the said William Baker, for the money he might so advance, by a mortgage on the land; which, on the 27th of December 1817, William Baker paid, amounting to $142.68. On the 1st of January 1818 she executed a mortgage intended to secure the payment of the money advanced to Thomas Goodman; but stated unequivocally that if the obligation on which the mortgage to Baker was founded was for any other or greater sum than the amount paid by him to Thomas Goodman of $142.68, that it was a fraud and imposition on her and ought not to be enforced.

They admitted their intermarriage, the death of Baker, and administration on his estate by the plaintiff.

The defendant Huldah, further answering, stated that William Baker, from the beginning of the year 1816 to his death in June 1823, lived with the defendant on her plantation, working for a share in the crop; during all which time, he received the whole proceeds of the crops raised on the plantation, which, after allowing all credits and paying off the mortgage, would leave a balance in favour of the defendants; which they hoped to establish by proper proofs and vouchers.

On hearing the case upon the bill and answer, the matters of account were referred

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to the Commissioner; and *upon the coming in of his report, the defendants put in the following exceptions:

First. That the Commissioner allowed to complainant $266.13, as due upon the debt secured by the mortgage, when the complainant produced no evidence of the debt, but relied solely on the admissions made in the answer, which stated the debt to be $142.68.

Second. That the Commissioner did not allow the defendants the crop of cotton sold by William Pinchback in 1817, and paid over by him to William Baker, amounting to $210.-39¾.

Third. That he did not allow defendants the price of cotton sold by Thomas Hill in 1822, as charged in exhibit A.

On hearing the above exceptions, his honour Chancellor De Saussure overruled them; from which decree the defendants appealed, and moved the Court of Appeals to reverse his decree on each exception.

Dunlap, for the appellant. The production of the mortgage alone is not sufficient evidence of the debt. It only recites the single bill. The mortgage was only secondary evidence of the single bill, which should have been produced, being the highest evidence of the debt; and if the answer is taken, the whole of the answer must be given in evidence. The non-production of the single bill was not an oversight, as appeared on reference before the Commissioner. No copy of the single bill was exhibited, though the copy of the mortgage was. The mortgage was payable according to the condition of the single bill. There is no doubt the amount recited in the mortgage is the penalty, and not the sum actually due. The answer, in its statement of the amounts due, gives exactly one half of that set forth in the mortgage,

and which doubtless was the true amount due.

*14

*Caldwell, contra. The Commissioner refused to take into account matters previous to the date of the mortgage. The single bill was not produced, because it was not in the power of the complainants; as upon the death of Baker, at Goodman's house, the single bill fell into the hands of the defendant, and nothing remained but the mortgage.

Curia, per JOHNSON, J. The question propounded as the first ground of this motion is, whether the recital of the bond in the mortgage is, of itself, sufficient evidence of the debt, without the production of the bond.

Generally, the party making a recital is concluded by it, and he is estopped from saying that the fact recited is not true; but when the recital points to higher and better evidence of the fact, which is in the power of the party, it falls within the universal rule, that the best evidence which the nature of the case admits of must be produced. It is necessary to guard against the effect of a misrecital: and may be compared to the common case of offering a copy in evidence. When the original is in existence, a copy is excluded on account of the danger of error; and the same reason applies, with equal or greater force, to a recital.

There are other considerations which apply more peculiarly to the present case. This was a bond for the payment of money, assignable under the act of the legislature, and the production of it is rendered necessary to guard against frauds that might arise out of a transfer; and it is well known, too, that papers of this description serve as almost the only record of receipts and payments; and the circumstance of keeping it out of view, without accounting for its destruction or loss, gives rise to a suspicion that some unfairness was intended.

Again, the case in itself furnishes, perhaps, as strong an illustration of the necessity of

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requiring that the bond *itself should be produced, as any that can be readily conceived. The mortgage recites, that, "whereas Huldah Goodman, by her written obligation bearing date, &c. stands bound to the said William Baker in the penal sum of $266.13, the condition of the said sum of $266.13, payable on or before the first day of January 1819, with interest from the date, &c." Now it is apparent, that the condition has been misrecited, or it involves the incongruity of a penal bond, conditioned to pay the penalty, which would of itself be conclusive as to the case.

The discount claimed for the sales of the crop of 1817 was properly rejected. That transaction preceded the execution of the bond and mortgage, which in themselves furnish a presumption of the liquidation of all accounts between the parties: and although this, as a mere legal inference, might be repelled perhaps by very slight circumstances, none exist in this case; on the contrary, the length of time which has elapsed without any demand for the discount having been made, confirms the presumption.

The remaining ground involves a matter of fact only, and the Court see no reason to dissent from the conclusion of the Commissioner and the Chancellor in relation to it.

The case is therefore referred back to the Commissioner, to give the complainant an opportunity of producing the bond, or accounting for its loss or destruction, and it is ordered and decreed that he report thereon, in conformity with this opinion.

Decree affirmed.

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2 McCord, Eq. *16

*JOHN S. EDWARDS, GRAVES SPEARMAN and Wife, Administrators of John Taylor v. FRANCIS B. HIGGINS, JOHN N. LINDSEY, HENRY COATE, and CLEMENT MITCHELL.

(Columbia. Jan. and May Terms, 1827.)

[*Infants* ⟸50.]

The rules as to necessaries for infants are the same in Equity as at Law.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 114, 115, 117–127; Dec. Dig. ⟸50.]

[*Guardian and Ward* ⟸33.]

An infant is not even bound by his contracts for necessaries, if his guardian, who could have supplied him, was at hand.

[Ed. Note.—Cited in Markley v. Singletary, 11 Rich. Eq. 402.

For other cases, see Guardian and Ward, Cent. Dig. § 142; Dec. Dig. ⟸33.]

The bill was filed in this case to obtain relief against a judgment at law, obtained in the name of Mr. Higgins, the Commissioner, on a bond, given by the late John Taylor for the purchase of a tract of land, sold for the purpose of partition by Commissioner Higgins, in which Taylor, Sarah Stribling (afterwards Mitchell), and A. Stribling were jointly and equally interested. Sarah Stribling married C. Mitchell, one of the defendants, whilst they were both under age. Mitchell was anxious to get paid his wife's proportion of the money due on the bond, and he applied to John Taylor for payment. Taylor made him several payments, partly in money and partly in horses. These applications were repeated by Mitchell, who went to the house of John Taylor soliciting payments. It was in evidence that payments were made; but it was also proved that Taylor knew that Mitchell and his wife were under age. This, together with the fact proved of his putting a higher value on the horses delivered in part payment than they

were worth, was relied upon by the defendants, Mitchell and Lindsey,—who afterwards purchased from Mitchell the debt due by Taylor,—as a sufficient ground for refusing to allow Taylor these payments, in discount.

De Saussure, Chancellor. How honest the defence set up may be is not for me to say; but a Court of Justice ought not to permit it to prevail, if it can help it; for it is proved that some of the payments were with the

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*knowledge, and in the presence of Henry Coate, the guardian of Mrs. Mitchell, and were drawn in his hand writing. This does seem indeed to come very closely to consent and approbation of the payments. Here then is a very mixt and doubtful state of things. Lindsey, the other defendant, is son-in-law to Coate, and after these transactions, and with a knowledge of these payments, he bought from Clement Mitchell his interest in this debt. It is stated, and not denied, that he purchased for a price considerably less than the amount of the debt, supposing these payments by Taylor and his representatives should not be allowed, and that with the knowledge of Coate, who was well acquainted with the payments which had been made. There is a strange looseness in all these transactions, on all sides; and all the parties are in fault except the Commissioner. The pure justice of the case would be, to give Taylor and his representatives credit for the actual cash payments, and the real value of the property delivered to Mitchell, and to compel Taylor's representatives to pay the balance. But we must go by rules. If the plea of infancy by Mitchell is applicable, and is a legal bar, we must obey the law. Infancy is, in general, a bar to liabilities for contracts, except for necessaries. Does the rule apply to receipts? It was argued that receipts are not contracts. That is true. But I fear the principle applies, that "you shall not deal with infants, because of their immaturity of understanding, and incapacity to transact business," in the language of the law. It is meant as a shield to protect them from injury. It is often used as a sword to do wrong to others, as in the case before us. By a strange anomaly, persons under twenty-one years of age are allowed to be witnesses of the contracts of others, yet not to contract themselves, except in some particular cases. They are indeed permitted to contract marriage, the most solemn of all transactions,

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and *yet they are not allowed to contract for the finery they wear at their marriage. They may be witnesses to give evidence in civil and criminal cases, which may take away the lives of the parties against whom the evidence is given, yet they cannot contract, and be bound for it, for the horse on which they ride to Court, in order to give that evidence. Minors up to the age of twenty-one years in their own affairs, they may act much earlier as executors, and manage great estates, but not their own little affairs.[1] They may be attorneys in fact, and transact large affairs for others, yet nothing for themselves. I state these anomalies to shew that it is a difficult subject. There must be some rule, yet there cannot be framed a rule which may not work injustice. In the case we are considering, Mitchell represented the interest and right of his wife. Now, as an infant is allowed to contract a valid marriage before twenty-one years of age, he must be allowed to contract such debts for the maintenance of his wife and children as are essential to enable him to sustain the relation of husband and wife. But they must be reasonable and necessary expenses. See Reeves's Dom. Relat. p. 234. In the case before us, the husband solicited payments as necessary for the support of his family, and there is no doubt he was in necessitous circumstances. I acknowledge I have considerable difficulties in this case, but I must come to a conclusion. What is the honesty and justice of the case is plain enough. He who pays a debt once ought not to be compelled to pay it again; unless guilty of fraud and imposition, and then only to the extent of the imposition. He who receives payment of a debt once cannot, honestly, ask for the payment a second time, unless he has been imposed upon, and then only to the extent of the imposition. The leaning of every correct mind must then be unfavourable to the demand of a second pay-

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*ment. Yet it is agreed, that infancy must have protection against its own follies, and the cunning rapacity of others. So far, therefore, as an imposition was practised by John Taylor on Clement Mitchell, by placing a higher value on the horses delivered in payment, relief must be given, notwithstanding the receipts. As to the bona fide amount of the payments, I incline very strongly to think, John Taylor's representatives ought to have credit for them. Clement Mitchell, though a minor, was allowed to contract marriage: he did so; and was poor, and supported his family with difficulty. What is necessary to sustain the relation of husband and wife, he is allowed to do, or contract to do. Mitchell earnestly solicited payments from Taylor, to enable him to sustain the burthen of his family, and the relation and duty of a husband. It was a debt due to the wife, and she had a right to subsistence out of it. Some of the payments were made in the presence and with the knowledge of Coate, the guardian, who, it is stated, wrote some of the receipts. This is a very strong, indirect sanction, qualified even as it was by Coate. The

[1] By the act of 1824, minors cannot act as executors.

age of Mitchell was nearly, if not entirely, twenty-one years of age, at the time of these transactions. Now the receipt of a cent after attaining that age, or the acknowledgment of the payments and the balance really due, would sanction all the preceding transactions.

In 1 Vern. 132, it is stated, that an agreement being void (or, as I would say, voidable) against an infant, was yet supported, the infant having received interest on it, after he was of full age. So, even as to real estate, if an exchange is made, and the infant continues in possession after he comes of age, he shall be bound by it. 2 Vern. 225.

I do not think that the assignment by Clement Mitchell to Lindsey, the son-in-law of Coate, alters the case. He knew of the pay-

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ments, and purchased the claim of *Mitchell, on the representatives of Taylor, on speculation. He therefore stands in the shoes of Clement Mitchell, and can have no more or other protection than Mitchell. The result is, that I must decide for the complainants, though with doubt and hesitation as to the law. It is therefore ordered and decreed, that it be referred to the Commissioner to examine and report what payments were made by John Taylor, or his representatives, on his bond, to the Commissioner; and that such payments as were made in horses or other property be reduced to their proper value; and that these payments be credited on the bond of Taylor, and his estate held liable only for the balance. And that, in the mean time, the Commissioner, and Clement Mitchell, and J. W. Lindsey, and the Sheriff, be restrained from collecting the money on the judgment at law.

From this decree the defendants appealed, on the following grounds, viz.

"Because the contracts and receipts which Clement Mitchell executed with John Taylor, in his life time, were voidable, as Clement Mitchell was an infant, under the age of twenty-one years; that they were not for necessaries; and that he never confirmed them since he arived at the age of twenty-one years: and that they therefore ought to be set aside, and the circuit decree reversed.

J. J. Caldwell for the appellant. Infants are not bound by their contracts, except for necessaries. A horse is not a necessary article. Bates v. Counts, Harp. Rep. 404. Rainwater v. Durham, 2 Nott & M'Cord, 524. The Courts of Equity have not extended the rule further than the Law Courts. From Mitchell's necessitous circumstances, the Chancellor assumed, that the money paid, and horses delivered, were necessary to en-

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able him to sustain *the duties of a husband; but there is no proof on the subject. If an infant even purchase an article necessary to carry on trade or business, he is not liable. 3 Salk. 196. It is admitted, that if an infant assume a debt after he comes of age, he is liable; but this case furnishes no such evidence: the payments were all made in a short time, and cannot be put on the footing of necessaries. 1 Johns. Cha. Rep. 3. 4 Vesey, 362.

Bauskett, contra. If a female ward marry, the rights of the guardian cease over the person. But it is doubtful if the same effects be produced as to property. Reeves's Dom. Rel. 327. It is admitted that a minor cannot make a contract to bind himself. There is a distinction between such contracts and releases. The infant husband would have a right to the wife's choses in action and the possession of her personalty, and therefore might give releases for them. 2 Vern. 225. An acquiescence in a transaction during minority, after full age, will amount to an affirmation.

O'Neil, in reply. The receipts are the only evidence of payment. These Mitchell was incompetent to give effect to: his answer then was the only evidence. The right to receive the money was in Higgins. The receipt therefore was no more than a contract to release. Cro. Car. 490.

Curia, per COLCOCK, J. The doctrine of law, by which this case must be decided, is too familiar to require much comment. An infant is not bound by his contracts, except for necessaries; and for them, only when he has no natural or legal guardian at hand to provide them. And in this case, the guardian was at hand, and all necessaries that were required could have been obtained in a legal manner. There could not be found in the

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books a *case which would more satisfactorily expose the wisdom of this doctrine of the law; a doctrine equally obligatory on a Court of Equity as on Courts of Law. While the law was pursuing a course calculated to protect the rights of this infant pair, Taylor interposes and by his arts defeats, or attempts to defeat, its wise and benevolent intentions. The officer of the Court is made the repository of the property of the infants for a time; and a guardian is appointed to take care of, and preserve those of the wife. Taylor, notwithstanding this, pays money to this young man, and sells him some horses at nearly double their value; and this, after repeated warnings on the subject: and now it is said by his representatives, that it is hard they should be compelled to pay this money twice. He well knew, that these receipts could not be set up against his bond. If then he chose to lend this young man so much money and sell him horses, he must have intended to rely on his honour for remuneration. The answer of Clement Mitchell charges imposition on Taylor, and states that the last receipt includes all he ever received. And when we look to the assignment, I think it is clear that he meant to allow this receipt

as a payment, and that he has sold only so much of his demand as may remain after that sum shall be deducted. In this point of view, he may be said to have confirmed this receipt, which, though voidable as an act done while an infant, may be made obligatory after he has arrived at age. But as to the horses, or any other sums of money, if any such were received, there is no principle, which we can apply, by which they can be admitted as payments. The amount of the last receipt then being deducted, the complainants are liable to pay the balance; and it is ordered that the decree of the Chancellor be so modified as to meet this view of the case.

Decree modified.

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2 McCord, Eq. *23

*FRANCES E. BUSSY and Others by Charles Bussy, Guardian v. THOMAS M'KIE and Others.

(Columbia. Jan. and May Terms, 1827.)

[*Equity* ⇐17; *Wills* ⇐695.]

Equity will not entertain jurisdiction merely to construe a will. Nor will it entertain jurisdiction of a cause involving titles to land, when no discovery or partition is sought; the defendant not being in possession of any title deeds necessary to enable the complainant to sue at law, and no other equity existing.

[Ed. Note.—Cited in Butler v. Ardis, 2 McCord, Eq. 66.

For other cases, see Equity, Cent. Dig. § 39; Dec. Dig. ⇐17; Wills, Cent. Dig. § 1666; Dec. Dig. ⇐695.]

[*Wills* ⇐698.]

A Court of Law is as competent to construe a will as a Court of Equity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1676; Dec. Dig. ⇐698.]

The bill in this case was filed to obtain the construction of the Court on the will of Joseph Hightower, who died in June 1811. The will contained several devises and bequests of real and personal property to the wife of the testator, and to his children, with various limitations and remainders. Some parts of the property had been sold to third persons, who claimed as bona fide purchasers. Several of the legatees were dead. The bill prayed that the defendants might be made to answer, whether they did not come to the possession of the property with a full knowledge of the existence of a will of Joseph Hightower, and of the rights of the complainants under the will; and that they might be decreed to deliver up the property, and to account for the increase and hire thereof; that a writ of partition be issued to divide the Cherokee pond plantation, and other real property, among the complainants, agreeably to their respective rights, under the will; that the settlement of the estate of Hightower be ordered; and that the complainants might receive the residue of the estate, if any, after the payment of the debts of Hightower.

The defendants objected to the jurisdiction of the Court, on the grounds, that it was merely a construction of the will of Joseph Hightower that was asked for, which the Court of Law could as well try and decide, as to the lands, in a suit to try titles. That as to the personal estate, an action of trover would lie, and there was perfect remedy at law; that there was no allegation of fraud, or loss of papers, or want of discovery, for that the complainant had set forth his title

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correctly; and that, at all *events, the legal representatives ought to have sued, and not the heirs.

On the part of the complainant it was urged, that Hightower had left a large property, and a large family; and that there had been many successive deaths, which produced various successions under the will, which required construction. That the construction of wills was a ground of equitable jurisdiction. That the bill sought a discovery, and demanded also an account for hire, and also prayed a partition. That the interests were various, and it would require many issues at law to try them; and the prevention of a multiplicity of suits was of itself a ground of equity jurisdiction.

De Saussure, Chancellor. Formerly there would have been no doubt as to the jurisdiction of the Court under such circumstances; latterly the jurisdiction of the Court is questioned in many cases not heretofore regarded as questionable. The Court is urged on the one hand to avoid the usurpation of power and jurisdiction; and on the other it is pronounced an useless tribunal, unless it interposes its authority, and gives relief. This places the Court in a painful situation, and verifies the expression of Lord Kames, "that in these limited jurisdictions, it is often more difficult to discern what comes directly within the powers and duties of the Court, than to discover and decide on the merits of the particular case."

I disclaim any desire to enlarge the jurisdiction of the Court; and I feel that I should be relieved from many painful and heavy causes if the jurisdiction should be limited as narrowly as is sometimes urged by counsel. On the other hand, I have no desire to shrink from the performance of any duty that regularly devolves on me. In this state of mind, I am anxious to be guided by the wisdom of the intelligent tribunal which is

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authorized to *decide on all questions of right, as well as on the boundaries of the jurisdiction of all inferior Courts. In order to obtain this desirable object as soon as possible, I have come to the determination that it would be better to sustain the plea to the jurisdiction of the Court on such reasonable grounds as produce a doubt in my mind.

In the case before me, able counsel have argued seriously and earnestly against the jurisdiction of the Court; and, without producing conviction, have, at least, occasioned doubt. It is therefore ordered and decreed that the objection to the jurisdiction of the Court be sustained, and the bill dismissed: and I request that the case may be brought before the Court of Appeals for its judgment.

Ford, for the complainants, who appealed. The case made out by the bill and answers was such as had always been, heretofore, entertained by the Court of Equity. As to the tract of land in the possession of Thomas M'Kie, the complainants, and defendants are tenants in common under the will of Joseph Hightower: and it is submitted that the Court of Equity has always heretofore entertained exclusive jurisdiction of partition in such cases, and that the Court of Common Pleas has no such jurisdiction under the act, except in cases of intestacy. The complainants claiming a right of action derived from the will of Joseph Hightower, the Court ought to entertain jurisdiction of a bill against all the defendants, for the purpose of relieving all the complainants from the inconvenience, litigation and expense in which they must be involved in separate suits at law, in case their alleged rights under the will should not be sustained; the construction of wills is of itself a ground of equitable jurisdiction; and outstanding deeds, improperly executed, should have been ordered to be cancelled. But the case principally rests on

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the ground of its being a case of par*tition. If the limitation over be good, then the sole right vested in the complainants, and there is no ground for jurisdiction. If the limitation over be bad, then the complainants are tenants in common with M'Kie, and the Court has jurisdiction.

The Court is therefore obliged to give construction to the will, before the jurisdiction can be determined.

Bauskett, on the same side. The Chancellor's decree cannot be supported, unless the Court decide that the executory devise over is good.

Thompson, in reply. Admitting that the bill contains a prayer for partition, yet, after sustaining the jurisdiction, the Court may have to decree the right of the whole tract of land, which would be trying titles. Courts of Equity may have concurrent jurisdiction with Courts of Law, in partition and dower; but it is not every case of dower or partition that entitles the party to come into Equity; there must be some particular cause, or fact, of an equitable nature, where the titles are not disputed.

Curia, per NOTT, J. The bill in this case contains various matters, of which it is unnecessary that this Court should take any notice; as the only question, submitted to our consideration, is that which relates to the land in the possession of the defendant M'Kie. The complainants claim as devisees under the will of their grandfather Joseph Hightower; and the whole case turns upon the construction of his will. It is not pretended that the defendant has any title deeds in his possession, which are necessary to enable complainants to sustain an action at law. No discovery is sought. No ground of equity is alleged, other than that the construction of wills is a matter of Equity jurisdiction. But a Court of Law is as competent to give construction to a will as a Court of

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*Equity. It is said that the Court has jurisdiction in all cases of partition. It will be time enough to decide that question when the case shall occur. There is no question in this case respecting partition. The complainants ask for the whole land, and not for a part. They do not admit that the defendant is entitled to share the property with them. The complainants had a plain and adequate remedy at Law; and the bill was therefore properly dismissed. The decree of the Chancellor is therefore affirmed.

Decree affirmed.

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2 McCord, Eq. 27

JOHN H. GARRETT, Administrator of Elizabeth Day Deceased v. JOHN DAY, Administrator of James Day Deceased.

(Columbia. Jan. and May Terms, 1827.)

[*Judgment* ⇐⇒740.]

A mistake in a former decree, in a case where the same persons were parties, but on a point in which their interests at that time were not in litigation, is not conclusive upon the parties, in a subsequent suit, where that point comes in litigation between them.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1268; Dec. Dig. ⇐⇒740.]

William Hall died intestate in 1812, leaving a widow, Elizabeth, and four children. The widow administered upon his estate, and afterwards intermarried with James Day, who thereby became administrator in right of his wife, and also became possessed of the personal estate.

Upon proceedings had in the Court of Equity in 1817, between the distributees of the estate of William Hall deceased, the real estate was sold by the Commissioner of the Court; and James Day became the purchaser, and gave his bond for the whole amount of the purchase money, without deducting his wife's share; and afterwards, and before the bond became due, or any part had been paid thereon, James Day died; and his wife surviving him administered on his estate,

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together with *John Day. Afterwards in September 1820, the widow, Elizabeth Day, died intestate; and John H. Garrett admin-

istered alone upon her estate. In 1821 a bill was filed by John H. Garrett and wife, and others the children of William Hall deceased, against John Day as administrator of James Day (who was administrator in right of his wife, and was possessed of the estate of William Hall deceased), for the purpose of recovering their distributive shares of their father's estate, as well real as personal. In that case, upon an appeal from a decision of the Circuit Court, upon exceptions to the report of the Commissioner, the Court of Appeals in Columbia decided in substance, that the purchase made of James Day of the real estate of William Hall deceased, and giving his bond for the purchase money, without having deducted his wife's share, or having paid any part in his life time, was not such a reduction of her interest into possession, as would vest it in him absolutely, in virtue of his marital rights; but her interest survived to her, and was subject to distribution under the act of 1791.

But upon a settlement of this case, the administrator of James Day was allowed and permitted to retain in his hands the one-ninth part (amounting to $576.80 cents, with interest from the 5th of October 1819) of the whole amount of the sales of William Hall's real estate, on the mistaken supposition that James Day had survived his wife, and was therefore entitled to one third of her third of that estate. In this suit between the children of William Hall as complainants, and the administrator of James Day defendant, the rights and interests of the estate of Elizabeth Day were unattended to, and entirely unrepresented, inasmuch as the attainment of the objects of this suit left her estate clearly unaffected. The present bill was filed by John Day as administrator of James Day, against John H. Garrett as administrator of Elizabeth Day, for the purpose.

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among other things, *of effecting a permanent settlement between their respective estates.

The Commissioner made out a report of the mutual accounts of the two estates, and refused to allow the above sum of $576.80 cents, as a credit to the estate of Elizabeth Day. The defendant Garrett filed exceptions to the Commissioner's report on the following grounds.

First. That the Commissioner did not give credit to the estate of Elizabeth Day for the amount of one-ninth of the purchase money and interest arising from the sales of lands belonging to the estate of William Hall deceased, which was received by the estate of James Day, on a settlement with the distributees of Hall's estate.

Second. That this amount, although received by the estate of James Day on a settlement with Hall's distributees, was received for the benefit of the heirs or representatives of Elizabeth Day, inasmuch as it never vested in James Day in his life time, his wife Elizabeth being the survivor, and the land being part of her inheritance.

Chancellor Thompson at June term 1825 overruled the exceptions; from which decision the defendant John H. Garrett appealed, on the grounds made in the exceptions to the Commissioner's report.

Bauskett, for the appellant, cited 1 Philip's Ev. 263. 3 Day's Rep. 138.

Butler and Thompson, contra.

Curia, per COLCOCK, J. The question presented for our determination is, whether John Day, as administrator of his brother's estate, shall be allowed to retain in his hands the one-ninth of William Hall's estate, which was decreed to him in the decision of the first case, on a mistaken view of the facts

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of that case? That the facts *were mistaken, admits of no doubt. It is shown to the Court by John Day himself, who is now filing a bill against John H. Garrett as the administrator of Elizabeth Day, to account for property purchased by her at the sale of her husband James Day's estate; and in the decree delivered by Judge James at the May sitting of the Court of Appeals for 1823, he states expressly, that the wife died before the husband. It would be difficult to meet the justice of this case if the parties stood before us in the same situation in which they stood before the Court which made that decree. But their situations are materially changed, and therefore I think justice can be done without any violation of those wholesome and well established rules, by which parties are prevented from reinvestigating the judicial decisions of the country. John Day is now the applicant to this Court to compel John H. Garrett to do equity: and I think we have a right to say, "we will not aid you without requiring that you yourself shall also do justice. It is true that you have obtained a decree for one-ninth of William Hall's estate; but you show us that it was improperly obtained, perhaps not by fraud, but clearly by a mistake." But, it is replied, the mistake might have been rectified by the present defendants. They rejoin, "it was not incumbent on us to do so on that occasion; for we were then asking for our share of our father's estate; but now we are asking for our share of our brother's. Then we received all and perhaps more than we were entitled to, as our portion of our father's estate. We had nothing to complain of: what you withheld was a part of our mother's share of her husband's estate, which we were not then claiming, and which could not have been adjudged to us: first, because it was not asked for, and secondly, because no administration was granted to us of her estate."

It is contended by the complainant's coun-

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sel, that if *the sum be allowed to the de-

fendants, it will be reversing the decision of the former Court: but it is not so in fact. The decree stands: we do not pretend to reverse it. We say to the complainant, "you have obtained a decree, by which the rights of one not before the Court were affected. That which you claimed for your brother was your sister's: and although you then had a right to withhold it from the defendants, you have no such right now." To illustrate this matter further. Suppose a proper view of the facts had been taken at the time of the first decision. Hall left some children and a widow; the children were entitled to two-thirds of his estate, and no more. And this was the only question which the Court were called on by the pleadings to decide. The widow was entitled to one-third; but whether James Day, her second husband, had acquired a right to the whole, or only to a part of her third, was not a question made; and the determination on that point was gratuitous, extrajudicial, and made on a mistaken view of the facts. James Day had not so reduced to possession his wife's portion of her first husband's estate as to be entitled to any part of it, and he died before his wife; so that her rights remain as though she had never been married to him. Her representatives are now entitled to the third of their father's estate which belonged to their mother: consequently, the sum which John Day retained as his brother's is now the property of the defendants. As to what disposition the administrator may make of the property which may come into his hands, is not now a question to be considered by the Court.

The decree of the Chancellor is reversed; and the accounts again referred to the Commissioner, to be adjusted on the principles of this decree.

Decree reversed.

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2 McCord, Eq. *32

*B. and L. GARDNER v. SARAH HARDEN.

(Columbia. Jan. and May Terms, 1827.)

[*Life Estates* ⇐6.]

Where there is no reasonable ground for apprehension, on the part of a remainder man of the tenant for life of personal property, the Court will only order the tenant for life to give a schedule of the property. In case, however, of danger, or just apprehensions of it, the Court will order security to be given to the remainder man.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 18, 23; Dec. Dig. ⇐6.]

[*Life Estates* ⇐6.]

Cases of this sort are left to the discretion of the Chancellor, and his order will not be disturbed, unless improperly exercised.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 18; Dec. Dig. ⇐6.]

The bill stated that the complainants were entitled (in common with their sister Rebecca Old, not a party to the suit) under the will of Robert Gardner their late father, and former husband of defendant, to the property in remainder, after the termination of the life interest of defendant, in the negroes, Somerset, Lucy, Harriet and Edmund: that Somerset had been sold or carried off to the western country by the defendant, or her late husband William Harden, and that the other negroes were still in her possession. That they had ample cause to believe, and did verily believe, that the defendant was then preparing to remove to some other state or place, without the limits of this state, and perhaps to Alabama; that they were credibly informed by different persons in whom they placed the utmost reliance, that she had repeatedly declared, that she would move during the fall or the ensuing winter, and would run or take off the negroes. The bill prayed a writ of ne exeat against the defendant; and also, that she might be compelled to give security for the forthcoming of the property after the termination of her life interest.

The answer of the defendant admitted the will of Robert Gardner; her possession of Lucy, Edmund and Harriet, and the sale of Somerset by her late husband William Harden and the subsequent death of the negro. She claimed an absolute right to the negroes, independent of the will, in the following manner, viz. Somerset, Lucy and Harriet were sold under a great number of magistrate's executions against the estate of Robert Gardner in 1807, when there were no funds of the estate in the defendant's hands.

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She purchased them *with her separate property. Harriet, while a child, was given by the defendant to her daughter, and afterwards taken back in exchange for another negro. Edmund was sold on the 10th of December 1810, as the property of Robert Gardner's estate, under an order from the Ordinary, and purchased by William Harden some time before his intermarriage with the defendant. Edmund and Lucy, after the death of Mr. Harden, were sold as his property and purchased by the defendant.

The defendant positively denied the charge of the bill, "that she had repeatedly declared that she would move during the ensuing fall or winter, and would run or take off the negroes." She averred that she had no intention of leaving the state speedily or clandestinely. She admitted that she had often and openly expressed her wish to remove to another state, where most of her family and friends resided, if she could settle her affairs here; but she had never commenced the preparation necessary for a removal.

On the trial, the death of Somerset was proved, and that he had been hanged in the western country; and the value of the other negroes proved to be about $1,000. No other testimony was offered on either side.

De Saussure, Chancellor. With respect to

the question, whether there is just ground to believe that the rights of the complainants are endangered by the conduct of the defendant. I can have no doubt. The defendant, on her second marriage, permitted her husband to dispose of some part of the property. She admits that he sold some portion of it; and she sold others of the slaves. One called Somerset was sent out of the state, and sold to strangers, beyond the reach of complainants, and perished, by due course of law, for a crime to which he was exposed in his new situation. The defendant also al-

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lowed sales for magistrate's fees; and *she does not pretend to hold them under the will of her first husband; but under the various alterations, exchanges, &c. which have been contrived or permitted to be made. And Somerset is utterly lost by her misconduct. Under these circumstances, it is vain to say, that there is no danger to the rights of complainants. The danger is not merely suspected or ideal, but has existed, and indeed actual loss has occurred; and there must remain well founded apprehensions as to the remainder.

The only question then which remains is, whether the complainants are entitled to any, and what security, for the protection of their interests? It is usual in such cases, where there does not exist cordial harmony and confidence between the parties, to require a schedule of the property in question, to be signed by the tenant for life, and delivered to the remainder men as evidence of their rights. And where there is no reasonable ground of apprehension for ill intentions, that is sufficient. In case, however of real danger, the protection furnished must be increased. In this country, the facilities of removing personal property out of the state are so great, that a stricter watch and a prompter protection than in other countries is requisite. That remedy is given in England, where security is required, in many cases, for the forthcoming of the property, at the death of the tenant for life. In this state, it has often been ordered, both before and since the case of Elgin, in 4 Desaus. Rep. 26. The amount of the security need not be exactly proportioned to the value of the property. The negroes that are living were valued at about $1000; besides Somerset, at about $500, or $600. He ought not to be included. The injury has been sustained and the complainants may seek their remedy for the injury; but that is not for this Court.

It is therefore ordered and decreed, that

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the defendant *Sarah Harden, do give bond, with good security, to be approved by the Commissioner, for the forthcoming of the slaves in question (by name), except Somerset, at the termination of the life estate; and for the delivery thereof, with the issue of the females, to the complainants. The penalty of the bond to be in fifteen hundred dollars.

——, for the defendant, who appealed. This bill is for a ne exeat; and there must be proof of acts of danger to authorize the Court to interfere. But there is no case of the writ issuing upon mere threats of leaving the country. The rights of the tenant for life should not be impaired by a hasty interference. Where the object is to restrain a contemplated removal from England to a colony, the English Courts require a stronger case than where the contemplated removal is to a foreign country. Beames's Ne Exeat, 45. The argument is much stronger, when the removal is only to another state, a component part of the same country, where equally just laws prevail, and afford adequate remedy. Besides the affidavit should have stated the circumstances positively, shewing the intention of the defendant to go abroad, or proof of his declarations. Beames's Ne Exeat, 24. This is the settled doctrine in cases of ne exeat; and there is no reason why the same rule should not govern these cases, which are in the nature of quia timet. The answer of the defendant denies the intention of immediate removal.

Ford, contra. Admitting that the doctrine, that the remainder man can have security for the protection of the property from the tenant for life, is much modified here, and that there must be danger to induce the Court to grant this kind of security (1 Mad. Ch. 2 P. Wms. 103), the facts are quite sufficient in this case to induce the Court to order the security to be given. The sales made were entirely inconsistent with the rights of the parties.

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*We rely generally upon Latimer v. Elgin, 4 Desaus. 26. The admissions in the answer are sufficient, Roddam v. Hetherington, 5 Ves. 91.

——, in reply, cited Musgrove v. Wolford, Harp. Ep. Rep. 75, and Reese v. Halloway.

The writ can only issue, upon a certain equitable money demand. 2 Madd. Ch. 227.

The whole of the defendant's answer should be taken; and it shews no danger or cause for apprehension. Besides, the sales of the negroes were forced under magistrate's executions.

Curia, per NOTT, J. All cases of this sort must depend, in a great measure, on their own peculiar circumstances.

They must therefore be left, very much, to the discretion of the Judge to whom the application is made. It does not appear to this Court, that the power has been improperly exercised on this occasion. The motion must therefore be refused, and the decree affirmed.

Decree affirmed.

2 McCord, Eq. 36

JOHN THOMAS and Wife v. WILLIAM SHEPPARD.

(Columbia. Jan. and May Terms, 1827.)

[*Contracts* ⇐92.]

Where there is a legal capacity there cannot be an equitable incapacity.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 411–414, 1153, 1155; Dec. Dig. ⇐92.]

[*Contracts* ⇐94.]

No ground for relief against a contract that it was injudicious.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420–430, 1160, 1164, 1165; Dec. Dig. ⇐94.]

[*Husband and Wife* ⇐12.]

Equity cannot settle the wife's property upon her, after it has been reduced to possession by the husband. The Court only settles the wife's Equity upon her where it is necessary for the husband, or those claiming under him by voluntary assignment or bona fide purchase of her interest, to come into Equity to obtain possession of it.

[Ed. Note.—Cited in Heath v. Heath, 2 Hill, Eq. 107; Bouknight v. Epting, 11 S. C. 78.

For other cases, see Husband and Wife, Cent. Dig. § 58; Dec. Dig. ⇐12.]

[*Contracts* ⇐92.]

[Equity will not set aside a contract on the ground of a great superiority of intellect in one of the parties, if the other party was of legal capacity to contract.]

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1153; Dec. Dig. ⇐92.]

[This case is also cited and approved in Bouknight v. Epting, 11 S. C. 71.]

The bill in this case stated that Mrs. Thomas, the wife of complainant, was the only child of Caleb Gilbert deceased, and the only legitimate child of Mrs. Gilbert also deceased. That the defendant married an illegitimate child of Mrs. Gilbert. The complainant Mrs. Thomas inherited from her father and moth-

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er a small tract of land; *and was entitled to the whole of her mother's personal estate, which had been sold by her administrator to complainant Thomas, and constituted the greater part of the personal property in his hands. The complainant Mrs. Thomas was very young at her marriage, being only about sixteen years of age at the hearing of the cause. The complainant Thomas was working a farm with his mother-in-law, Mrs. Gilbert; and at her death acquired possession of the land. Thomas was a very ignorant, inexperienced young man. On the death of Mrs. Gilbert, the defendant insisted on having her estate divided between his wife and Mrs. Thomas. This proposition being rejected, he said that he would have the whole estate. In a short time, Sheppard proposed to sell to Thomas a negro woman and her children, whom he represented to be very valuable; that he would wait for the purchase money three or four years; and that the negroes would in that time make the money. On these representations, Thomas bought the negroes for about $1000, (which was $300 or $400 more than their value) and gave his note payable in a short period, and executed a mortgage of the negroes. Soon after this Sheppard, representing that the mortgage did not sufficiently secure him, induced Thomas to confess judgment; and immediately directed the Sheriff to levy the execution on the land, the negroes and the other personal property; which was accordingly done. Sheppard himself, under the levy, took the negroes into possession, for safe keeping. All these transactions occurred, in a few months after the sale of the negroes by Sheppard to Thomas.

The answer denied most of the allegations.

Thompson, Chancellor. The bill so fully details the circumstances of this case, that it is considered as unnecessary to advert to them in this decree. The answer unequivocally denies every important allegation in the

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*bill. It therefore became necessary for the complainant to resort to parol evidence to support his case. The principal grounds relied on by the counsel for the complainant to vacate and annul the contract are, first, imbecility of intellect; and secondly, fraud exercised in procuring it. The evidence on the first ground has entirely failed in the object for which it was introduced. It went to establish the fact, that he was not one of the brightest of men, but that he had good, plain, common sense, and was capable of making small contracts, but not one to so large an amount. And I do suppose, that this opinion was founded more on the state of his funds than of his intellects. It appears, that some time before the contract, he had sense enough to marry a girl of a handsome little property. It is contended, that Sheppard is a man of far superior intellectual faculties to Thomas; and that therefore upon this ground the contract ought to be set aside. If that were the case, not one contract in ten thousand would stand; because it almost amounts to an impossibility to equalize talents; and hence it is a rule of law, that where there is a legal capacity, there cannot be an equitable incapacity. There is also another rule of law, which operates against the complainant, that no man shall be permitted to stultify himself.

The second ground relied on is, that Sheppard exercised a fraud on the complainant. It is positively denied in the answer, which has not been disproved according to the rules of law. With respect to the indulgence said to have been promised by Sheppard to Thomas, it is not satisfactorily established. Besides, if it had been, it was waived by his having confessed judgment and frequently acquiesced in Sheppard's proceeding thereon. It is very probable, that he had his views on the land; but there consisted no fraud in this, unless he (Sheppard) made use of misrepresentations, circumvention, or other un-

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due or unfair means,—which have not *been proved. If Thomas had made an advantageous bargain, this Court would never have heard any thing of this suit; but as it has turned out disadvantageous, it is attempted to be set aside. The Court considers contracts of such a solemn nature, that it will never interpose to set them aside; unless it be proved, to a demonstration, that there has been unfairness, fraud, imposition, or an undue advantage taken of the party complaining. The contract, if entered into by parties able to contract and willing to contract, will be enforced. But, inasmuch as the land, and some or all of the personal property, was, by the complainant, derived from his intermarriage with his wife, a very young and inexperienced girl, scarcely arrived at the age of puberty, the Court will protect her rights. It is therefore ordered and decreed, that the Commissioner of this Court do cause a settlement to be made on her, in trust, of all the real and personal estate which belonged to her at the time of her marriage; and which is now in the possession of the complainant, John Thomas. And that the defendant Sheppard be perpetually enjoined from proceeding to recover the same or any part thereof either in Law or Equity. Each party to pay his own costs.

From this decree the defendant appealed, on the ground that personal property in the possession of the husband, and the husband's estate in the lands of the wife, ought to be liable to the defendant's judgment and execution at Law.

J. J. Caldwell, for appellant.
O'Neall, contra.

Curia, per COLCOCK, J. In this case, the Court concur with the Chancellor in that part of his decree by which he refuses to an-

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nul the contract entered into be*tween the complainant John Thomas and the defendant William Sheppard. It does not appear that Thomas is so deficient in understanding as to be incapable of making a contract; and the circumstances of fraud and imposition stated in the bill are positively denied, and were not supported by the proof adduced by the complainant. The bargain was an injudicious one, and the consequences will be distressing, but that is not a ground of relief.

The decree however, so far as it directs a settlement of the wife's estate on her, must be set aside. Where a husband's claim to his wife's property must be asserted by suit in Equity, if there be no agreement between them previous to marriage, it is an established rule (though, as some have thought, of doubtful policy) that the husband will not be allowed to obtain the possession of it, without making a provision for her, 1 Madd. Cha. 386. 1 Roper on Husb. & Wife, 256. But where the husband is in the actual possession of the property, and has even imprudently encumbered it with judgments and executions, it is not in the power of the Court of Chancery to rescue it from these legal liens of his creditors and settle it on his wife. The rule which is laid down as to the husband is carried so far, as to apply to his voluntary assignee, and even to a purchaser for a valuable consideration of the wife's interest from the husband, who are compelled to come into Court to assert their rights. And this I think, is going far enough; but it will be remarked, that it is not interfering with vested rights; with those liens, which are created by the operation of the law acting directly on the property in the possession of the husband. The Court says to these claimants, "You have brought no other right than the husband would have had. Had he applied, we should have required him to make a settlement, and we therefore require you to do the same: the property was subject to this equitable lien." And such is the first

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case referred *to by the complainant's counsel, Kenny v. Udale, 5 Johns. Cha. Rep. 464, in which Chancellor Kent takes a most extensive view of the whole subject, and refers to a number of cases; in all which, it will be observed that, the aid of the Court was necessary to obtain the right, or the wife was a ward of the Court, or the property vested in trustees.

The counsel however have referred to some cases which do certainly approach nearer to the present, but in which I think there is an obvious ground of distinction. I say some cases, though they in fact are the same cases. The same complainant, at different times, claims the protection of the Court against the creditors or assignees of her husband. The first is Haviland v. Meyers, 6 Johns. Cha. Rep. 25, and the other Haviland v. Blome & Meyers, Id. 178. In these cases the wife had obtained (as is stated in the second case very fully) a divorce from bed and board; and the Court is directed in such cases, by the statute authorizing divorces, to make orders for the suitable support and maintenance of the wife and children out of the husband's property, but he having none, the property which came to the wife from her father was settled on her. In the first case it is said the husband had commenced ejectments to recover the land, and was seeking to recover her personal property. And in both cases it is stated that the fact of the husband's having abandoned the wife was known. Now, although a lien is spoken of in this case as being created by the judgment, yet it is clear that the property never was in the possession of the husband, and the attempt to levy was after the decree settling the purchase on the wife. In page 180, the Chancellor says, "this decree [of divorce] was known to each of the

defendants before they caused executions on judgments against Haviland to be issued and levied on that estate. This is understood to be a fact admitted by their answers." So

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that the mari*tal rights of the husband were destroyed before the levy. It is expressly said by all the writers on this subject, that if the husband has acquired the possession of the property, the Court will not interfere; and some have gone so far as to say, cannot interfere. 1 Madd. Cha. 387. Clancy on the Rights of Married Women, p. 190. Here the defendant is in possession. It is said he entered as tenant to his mother-in-law, but on her death the descent was cast on his wife, and he surely was no longer tenant under the lease.

Every thing which relates to the doctrine of supporting this equitable claim of the wife admonishes us as to the caution necessary in the applications of it. When we inquire into its origin, we are informed that it is sufficient to know, that it is a settled rule of the Courts of Equity; and that it has been acted upon from a very early period. Lord Eldon calls it "a mere creature of the Court, founded altogether on its practice." And it is said no one who looks to the object of it, and observes its application, can doubt that it has introduced a wholesome qualification of the common law. The late Master of the Rolls, Sir William Grant, in the case of Murray v. Elibank, says, "with regard to this equitable right which a married woman has in this Court to a provision out of her own fortune before her husband reduces it into possession, it stands upon the principal doctrine of this Court. It is in vain to attempt by general reasoning to ascertain the extent of that doctrine; we must look to the practice of the Court itself." And Lord Hardwicke, speaking of it, says, "that it resembles the paternal care which Equity exercises for their benefit; and that as a father would not have married his daughter without insisting on some provision; so Equity; which stands in loco parentis, will not do it;" in which language there is discoverable a considerable

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limitation to *the exercise of the power. It is the power of a judicious parent.

Now, although I am ready to acknowledge that the exercise of such power is wise and proper, and that it may be considered in the hands of the Court as a wholesome modification of the common law, and may on proper occasions be well applied to the relief of unfortunate females, yet I am not disposed to become a knight errant in their cause.

The decree is therefore reversed so far as it directs a settlement on the wife, and in other respects affirmed.

Decree modified.

2 McCord, Eq. 43

CHARLOTTE M'DOWELL and Others **v.** HARRIET CALDWELL, Administratrix, and JOHN CALDWELL.

(Columbia, Jan. and May Terms, 1827.)

[*Guardian and Ward* ⇐174.]

The surety to a guardianship bond is liable as well for moneys received before the execution of the bond for the estate, as for moneys afterwards raised and not accounted for.

[Ed. Note.—Cited in Simkins v. Cobb, 2 Bailey, 64; Joyner v. Cooper, Id., 203; Trimmier v. Trail, Id., 486; Treasurers of State v. Taylor, Id., 533; Gray v. Brown, 1 Rich. 364; Schnell v. Schroder, Bailey, Eq. 339; O'Neall v. Herbert, Dud. Eq. 32; Field v. Pelot, McMul. Eq. 393; O'Neall v. Herbert, Id., 497; Todd v. Davenport, 22 S. C. 150; Hall v. Hall, 45 S. C. 178, 22 S. E. 818.

For other cases, see Guardian and Ward, Cent. Dig. § 591; Dec. Dig. ⇐174.]

[*Guardian and Ward* ⇐174.]

Whatever may be found due on the breach of a bond for money, or performance of covenants (as in the case of a guardianship bond), ranks as a bond debt.

[Ed. Note.—Cited in Rice v. Cannon, Bailey, Eq. 173.

For other cases, see Guardian and Ward, Cent. Dig. § 590; Dec. Dig. ⇐174.]

[*Guardian and Ward* ⇐30.]

Where minors were invited by their guardian to reside with him gratuitously, they shall not afterwards be made to pay board. But the guardian will be allowed for clothing and other necessaries furnished them.

[Ed. Note.—Cited in Teague v. Dendy, 2 McCord, Eq. 211, 16 Am. Dec. 643; Crosby **v.** Crosby, 1 S. C. 348, 349.

For other cases, see Guardian and Ward, Cent. Dig. § 121; Dec. Dig. ⇐30.]

[*Guardian and Ward* ⇐30.]

A guardian is not authorized to break in upon the capital of his ward for his maintenance, except under peculiar circumstances. And if the guardian advances beyond the income, as a general rule he will not be allowed interest on a balance due for maintenance.

[Ed. Note.—Cited in Teague v. Dendy, 2 McCord, Eq. 211, 16 Am. Dec. 643; Guerry **v.** Capers, Bailey, Eq. 161.

For other cases, see Guardian and Ward, Cent. Dig. § 129; Dec. Dig. ⇐30.]

[*Guardian and Ward* ⇐68.]

A guardian is entitled to be reimbursed his expenses in prosecuting a claim of his ward's, or in selling a tract of land for him.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 270; Dec. Dig. ⇐68.]

[*Appeal and Error* ⇐1009.]

This Court reluctantly interferes with decrees on facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. ⇐1009.]

[*Trusts* ⇐312.]

If a person standing in a fiduciary situation suffer his transactions to be involved in obscurity, which with proper care he could have prevented, the lowest estimate will be put upon his remuneration, should he be entitled to any.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 431; Dec. Dig. ⇐312.]

This Bill was filed by Charlotte M'Dowell, Agatha M'Dowell, and Patrick M'Dowell,

against Harriet Caldwell administratrix of William Caldwell deceased, and John Caldwell. The bill charged, that William Caldwell, at the June term of the Court of Equity for Newberry district in 1818, was appointed guardian of the complainants, and their brother James M'Dowell since deceased; that in April 1817 he, together with John Caldwell as his surety, gave bond to the Commissioner for the faithful discharge of his duty. That William Caldwell during his guardianship had received the sum $6,401.31½ on ac-

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count of his guardianship, of which an *account was claimed from the defendants; and that the amount which William Caldwell might be found in arrear might be decreed to rank as a bond debt, and paid accordingly by his administratrix; and in the event of his estate being unable to pay the whole, that then the surety, John Caldwell, might be decreed to pay the balance.

The defendant, Harriet Caldwell, answered and admitted that William Caldwell was guardian, as stated; and that he had received the amount charged by the bill.

The defendant, John Caldwell, answered and admitted the appointment of William Caldwell, and the execution of the bond: he did not know nor admit the receipt by William Caldwell of the sum charged in the bill. He concurred with the complainants that the amount which might be found to be in arrear on the guardianship of the said William should rank and be paid as a bond debt.

At June term 1825 the case came on for hearing before his honour, Chancellor Thompson, and his honour decreed that the matters of account in the case should be referred to the Commissioner, and that he should make his report to the next Court, regarding the amount received by William Caldwell, as guardian, as a bond debt.

The Commissioner in obedience to that order was attended by the parties: he examined the accounts and submitted a report to the Court in June 1826, rejecting a greater part of the complainants' claim, and reporting a balance against them, and in favour of William Caldwell, deceased of $3,022.84. To this report the complainants filed exceptions, and the case was heard upon the report and exceptions.

That the complainants' first exception was, "that the Commissioner rejected the charge founded upon the receipt of William Caldwell, deceased, for a note on Harris & Bowen

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for $887.83 with interest, which note, *whatever might have been the form of the receipt, belonged to the complainants, was intended for their use, and therefore must have been collected by him for them, as guardian."

His honour overruled so much of that exception as sought to make the surety, John Caldwell, liable for that sum, but sustained so much of the exception as sought to make the estate of William Caldwell answerable for the same, as a bond debt. The following were the facts in relation to that part of the case. In June 1818 William Caldwell was appointed guardian, and on the 17th of April 1819 gave his bond. It appeared that on the 4th of April 1818 William Caldwell received of James Blocker a note on Harris & Bowen, originally for $887 83 cents; but, at the time he received it, amounting to $1,006 8 cents. This note was payable to Patrick M'Dowell deceased, the father of complainants, and when collected, the amount of it was for their use, and on account of their share of their father's estate. In the first and only return ever made by William Caldwell, as guardian, in 1819, he charged himself with $100 received on Harris & Bowen's note, for the use of complainants. In a conversation had with major Black, which was proved before the Commissioner, William Caldwell, speaking of Harris & Bowen's note, said, that since he had obtained funds, he should take the boys, Patrick and James M'Dowell, from trades, to which they had been previously bound and send them to school. It was also proved that he had actually paid the board of Patrick and James M'Dowell while at George Bowen's, by crediting Harris & Bowen's note with the amount of their board. William Caldwell collected the amount of the note at different times, long subsequent to his receipt of the note, and to the execution of the guardianship bond.

The complainants' second exception was,

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"because *the Commissioner rejected the charge founded on the receipt by William Caldwell of $200, on John Collins's note, which note he received from the estate of Alexander M'Dowell."

On this exception his honour remarked, "I presume, however, there can be no doubt, that it is a charge on the estate, but not as a bond debt; and I decide accordingly on the exception. This power cannot affect the surety Mr. John Caldwell, only so far as the money was received by William Caldwell, after he joined in the surety bond. The payment of $100 on the 27th of February 1822, and of $100 on the 23d of December, come clearly within the surety bond."

The following were the facts in relation to this part of the case.

The complainants were entitled to a moiety of the estate of Alexander M'Dowell deceased, under his will. William Caldwell received from that estate John Collins's note, and collected upon it, on the 27th of February 1822, $100, and on the 23d of December 1823, $100. The note was received by Caldwell for and on account of complainants' part of the estate of Alexander M'Dowell; and the money collected was received for their use.

The complainants' third exception was, "that he rejected the charge founded on the receipt, by Caldwell, of $400 from James Blocker."

His honour overruled the exception. The facts in relation to this exception were, that, on the 10th of June 1824, William Caldwell received of James Blocker $400 in part payment of Davidson & Blocker's bond to the late Alexander M'Dowell. He gave Blocker a receipt, promising that that sum should be credited on the bond, and should bear interest from that time. It was not pretended that the complainants were not entitled to this money; but it was urged that Caldwell

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*did not receive it as guardian, and ought not therefore to account for it in that character. To that it was replied, that it was immaterial how, or in what character, he received it, provided it was the recovery of his wards. And that the payment to him of so much, on Davidson & Blocker's bond, would be, pro tanto, an extinguishment of their share of Alexander M'Dowell's estate, and of necessity would, in equity, be a payment of that much on Davidson & Blocker's bond.

The complainants' fourth exception was, "that the Commissioner rejected the charge of $281 for money received by William Caldwell from E. Drummond, for land of the estate of Alexander M'Dowell."

His honour overruled the exception. As to this exception the facts were as follows.

The will of Alexander M'Dowell directed his executors to sell his real estate out of Charleston whenever they should think proper. Mr Cheves, one of the executors, living in Philadelphia, and Mr M'Dowell, the other executor, living in Charleston, it was inconvenient for them to execute that portion of the will. Mr M'Dowell therefore, in the name of himself and his co-executor, after William Caldwell had been appointed the guardian of the complainants, made an application to the Court of Equity, and obtained an order, authorizing William Caldwell, as the agent of the executors, to sell and convey, at private sale, several tracts of land in Spartanburgh. He accordingly sold one tract to Ephriam Drummond for $281, and received the money. It was not pretended that the proceeds of this sale did not belong to the complainants; but it was contended that Caldwell received it as the agent of the executors. It was in proof before the Commissioner that, had not Caldwell been the guardian of the complainants, he never would have been appointed the agent of the executors; and that they considered all mon-

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eys received by *him, as their agent, as payments to him, as guardian. All the expenses attending the application to the Court of Equity, for the sale of the lands, were paid by Caldwell, and were allowed in the Commissioner's report, as charges against the complainants.

The complainants' fifth exception was sustained, and it is unnecessary to notice it.

The complainants' sixth exception was merely one on facts, involving no legal question.

The complainants' seventh exception was, "that the Commissioner had erroneously charged Charlotte M'Dowell and Agatha M'Dowell with their board, notwithstanding they were invited by Mr and Mrs Caldwell to live with them, on the assurance that they should be free from all charge for boarding; and the evidence shewed that Mr Caldwell never intended to charge. His honour overruled this exception. The evidence upon this part of the case was in substance, that shortly after their marriage Mr and Mrs Caldwell invited Charlotte and Agatha M'Dowell to live with them, saying that it should be without charge. Major Black proved, that about the time of Mr and Mrs Caldwell's marriage he offered to Charlotte that she might live with his family without any charge; and that Mr Watts made the same proposition to Agatha; and he was perfectly satisfied, he said, that if Charlotte or Agatha had supposed that they had to pay board at Mr Caldwell's, that they never would have gone to live with him. He thought that their services in Mr Caldwell's family were well worth their board. Mrs Caldwell, the defendant, was examined, and stated that her sisters, Charlotte and Agatha, came to live with her and her husband upon their invitation; that her husband never intended to charge them board; and that their services were worth their board. Other witnesses concurred in saying that they were very industrious, and far from being extravagant in any respect.

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*The complainants' eighth exception was, "that if they, the complainants, were liable to account for their board, the Commissioner had made an extravagant estimate of their board and expenses by a lumping estimate, whereas he ought to have confined himself to the vouchers produced."

His honour thinking that the amount allowed by the Commissioners for board and expenses was rather high, reduced the allowance twenty-five per cent., and beyond that overruled it.

All the vouchers and evidences of payments ever made by Caldwell for board or expenses of the complainants, were produced on the reference. Major Black proved that he, in a few days after Mr Caldwell's death, examined the papers, and that the vouchers produced were all that were in his possession.

Mr Caldwell's book of charges was also produced. The complainants contended that the Commissioner should confine himself to the vouchers and charges produced, in making allowance for board and expenses. But in order that Mr Caldwell's estate should not suffer in any point of view, they offered to make it part of the report and decree, that the defendants should be allowed twelve months to collect evidence of other charges

against them; and if any could be established, that they should be deducted from the amount decreed in their favour. The Commissioner however rejected the vouchers, and resorted to the opinion of witnesses as to the probable amount of board and expenses: and the result of that examination was, as the appellants' brief stated, "that he allowed for board and expenses, and interest thereon, the extravagant amount of $6.903.06; and the effect of his Honour's decree was still to allow $5.177.30, when the complainants allege, and so the fact will turn out on examining the vouchers and hearing proof of every payment, that William Caldwell during

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his guar*dianship never paid $1500 on account of the complainants' board and expenses."

The complainants' ninth exception was, "that the allowance for maintenance ought not to bear interest."

His honour overruled the exception.

The complainants appealed, and moved the Court of Appeals to reverse the Circuit decree in part, and for a decree for the complainants on the following points.

First. "That the complainants' first, second, third, and fourth exceptions ought to have been sustained, and the Commissioner directed to charge the amount of Harris & Bowen's note, the amount received on John Collins's note, the amount received from James Blocker on Davidson & Blocker's bond, and the amount received from E. Drummond for sale of lands, against the estate of William Caldwell, as a bond debt."

Second. "That the complainants' seventh exception ought to have been sustained, and the Commissioner directed to make no allowance for the board of Charlotte and Agatha M'Dowell, inasmuch as they were invited to live with Mr Caldwell, and he never intended to make any charge."

Third. "That the complainants' eighth exception ought to have been sustained, and the Commissioner directed to make no allowance for board or expenses, except where payments were vouched or proved."

Fourth. "That the complainants' ninth exception ought to have been sustained, and the Commissioner directed not to allow interest on the allowance for maintenance and expenses, inasmuch as the income of the wards' estate ought to be applied in the first instance to their maintenance."

Fifth. "That if any portion of the moneys received by William Caldwell for complainants should not be entitled to rank as a bond

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debt, that then the Commissioner *ought to be directed to apply it, in the first instance, to the payment of board and expenses, and leave such sums as are entitled to rank as a bond debt untouched, until the former is extinguished."

Sixth. "That the complainants ought not to be charged with the expenses of the case of Black and wife and others v. M. Junkin, and the expenses attending the sale of the land sold to Drummond, all which were allowed in the Commissioner's report, unless the amount received by Caldwell from Drummond, and from James Blocker, and from Harris & Bowen, were to be charged as a bond debt against his estate."

Seventh. "That if the estates of William Caldwell, and John Caldwell his surety, were to be charged only with such sums as were received by William Caldwell subsequently to the execution of the guardianship bond; then, in the settlement of the accounts in this case, they should not be credited or allowed for board, expenses, or payments, anterior to that period."

O'Neall, for the appellants. It is strange doctrine that the principal should be liable as for a bond debt, and yet the surety not also be liable as for a bond debt. No matter how a guardian receives property of his wards, whether as guardian or not, he is always liable for it as guardian. He can receive his wards' property in no other character. It is in vain for him to say he received it as agent for another party. He cannot divest himself of the equitable character of guardian. Caldwell was entitled to retain, because he was guardian to the distributees of Patrick M'Dowell. Even though he received it as agent for the administrator of Patrick M'Dowell, yet the Court will hold him liable, if he suffered it to pass out of his hands; upon the established maxim, in Equity, that what ought to have been done is considered as done; and he will be considered as

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having received it for his *wards. But the fact is, that the witness Black proved that Caldwell told him he had received funds of his wards, which he intended to apply to their education. And so he did apply it, in part, in paying Bowen for the board and education of two of the children. The whole of Caldwell's acts then shewed that he received it in his character of guardian, and those acts would have rendered him liable as such; and the same facts must render his sureties liable. The principal and the surety are both liable as for a bond debt. Can it be said, that if the guardian received money before he gave bond, that he was not liable for such sum? And if he be liable as guardian, his surety must be.

If an executor owe money to the estate, it is assets in his hands for the payment of debts, 13 Ves. 264. The principle of the doctrine applies to guardians; and as he owed what he received, and it became assets during the time of his bond; his surety became liable for such assets. He ought to have charged himself immediately for the same, 4 Burns's Ecc. Law, 109. 8 Ves. 466. Walker v. Bynum, 4 Desaus. Rep. 557.

As to the board allowed by the Commis-

sioner, the allowance was improper and illegal: for the Misses M'Dowell were invited to Caldwell's, from their own house, where they paid nothing. This was proved by major Black. They lived at his house and had lived at some other houses on the same terms. They were young ladies, living as friends invited to his house. The invitation was proved by a letter from Mrs. Caldwell, directed in the hand-writing of Caldwell. Besides, it was proved, that the services of the young ladies to his family were more than sufficient to counterbalance their board.

The interest was the proper fund for maintenance. Boycot v. Cotton, 1 Atk. 556. 3 Atk. 438. Cudworth v. Thompson, 3 Desaus. Rep. 62. The interest, or the rents and profits, are applicable to maintenance, where

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*the parent is unable to pay, the children having a separate estate. Maintenance is to be regulated by the income. Chaplin v. Chaplin, 3 P. Wms, 368. And the capital is not to be broken into by a trustee for maintenance, 1 Mad. Cha. 276. Walker v. Weatherall, 6 Ves. 474. 1 Ves. Jun. 247. 4 Ves. Jun. 268. 269.

Interest is never allowed on the arrears of maintenance. 1 Madd. 272. Melish v. Melish, 14 Ves. 516, 517. If any receipts are not to rank as bond debts, they should be applied to the expenditures.

Dunlap, in reply. The sureties are not liable for funds received by the principal, before the sureties gave bond. 9 Cranch, 212.

As to the board, it is but justice. The invitation was only for a temporary visit. Besides Caldwell himself was then boarding at a tavern: and the invitation, at all events, was only intended for Charlotte.

It is admitted that interest is the proper fund for maintenance, if sufficient: but if the interest be not sufficient, will not the Court break in upon the capital rather than suffer the ward to starve? The cases cited by Mr. O'Neall, were all cases between parents and children having separate estates. In such cases, if the parent be able to maintain the child, he is bound to do it without touching the principal or interest of the child's separate estate.

J. Caldwell, same side. The receipt from Blocker, &c. was previous to Caldwell's giving his guardianship bond: and at that time he was not acting as guardian, but as agent to the executors of Patrick M'Dowell; and if the payment was made in that character, can it, at any time afterwards, be changed in its nature to a receipt of funds in a fiduciary situation, and thus involve the surety on his bond given long after? Who

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credited *him? Who trusted him? The executor of Patrick M'Dowell. And after all this, the Court are asked to make an innocent person liable for acts done before signing the surety bond, which must be considered prospective in its obligation. He cited 9 Cranch, 212.

O'Neall, in reply. The case in Cranch is not applicable, because the default was before the bond was given, which the Court held was entirely prospective in its terms. There was no conversion in this case before he gave his bond, which was not the fact in the case in Cranch. The money was received in this case before the bond, though the conversion was afterwards. But the bond in the case from Cranch was entirely prospective,—"for all moneys which may come into his hands." Baker v. Preston, Gilmer's Rep. 235. He at least is prima facie liable; for Caldwell in this case, in his first return, charged himself with this money. This affords conclusive evidence that he received the money for the estate.

Curia, per JOHNSON, J. The matters of law arising out of this case will be considered with reference to the following points, without regard to the order in which they are set down in the brief. They are:

First. Whether a surety to a guardianship bond is liable for funds in the hands of the guardian at the time the bond was executed?

Second. Assuming that the estate of William Caldwell, the deceased guardian, is insufficient to pay all his debts, whether, in marshalling the assets, any balance that may be found due on the settlement of his accounts as guardian is to rank as a bond or simple contract debt?

Third. Whether, under the circumstances, the defendants are entitled to a credit on account of the subsistence of Charlotte and Elizabeth M'Dowell?

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*Fourth. Whether the defendants are entitled to be credited on account of board and expenditures for clothing and tuition of James and Alexander M'Dowell, ascertained by a conjectural estimate, without proof of actual expenditure, and to an amount exceeding their annual income?

As to the first point, it was satisfactorily proved, that William Caldwell the guardian, in the interval between the order for his appointment and his entering into bond, received a sum of money from Harris & Bowen, in part payment of a bond, and the decree allows it as a charge upon his estate, but not against the surety, because it came into his hands before the surety was bound: and these circumstances give rise to the first of the foregoing propositions.

The guardianship was general. It committed to William Caldwell the management of the whole estate of his wards, and his bond was intended as a security for the discharge of his duty with respect to the whole. Of this the funds in his hands constituted a part. His appointment was consummated by his entering into bond; for until then he had no

powers. In virtue of it he had a right to detain the funds in his hands, and on every principle of justice and reason the bond must stand as a security for the manner in which he disposed of it. The sums received on this account must be charged to the surety, whether they were received before or after the execution of the bond.

Connected with this matter a contest has arisen, whether in point of fact the complainants were entitled to certain sums received by their guardian from John Collins and James Blocker, and on account of land sold to Drummond. The first of these only is allowed, and that only as a charge upon the estate of William Caldwell, and not against the surety. Whether William Caldwell received these sums as agent for the executors of

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*Patrick and Alexander M'Dowell, or on account of his wards, is left in some degree doubtful by the evidence; nor have I been able to distinguish between the character of the evidence in relation to these items, nor to comprehend fully the reasons which led to the allowance of one and the exclusion of the others; and under these circumstances it has been thought most advisable to send them to the Commissioner for further evidence, with directions to charge them to the account of the guardianship bond, if they should be found to have been received on account of the plaintiffs; and it is ordered accordingly.

As to the second ground, by the common law, if the condition of a bond was broken, whether it was for the payment of money or for the performance of covenants, the penalty was forfeited and became a debt by specialty; and although Equity has always relieved against it, and although by statutes Courts of Law are authorized to do so, yet I apprehend that the legal character of the debt has not been changed. The penalty still remains a debt by specialty, and stands as a security for whatever may be found due on the condition, and is entitled to rank as such in marshalling the estate of William Caldwell.

As to the third ground, the proof is very conclusive that there was no intention on the part of William Caldwell to charge his wards, Charlotte and Elizabeth M'Dowell, with board; and that it was so understood at the time they took up their residence with him. The relation of brother-in-law in which he stood to them, the well known liberality of his feelings, the kind attentions which he bestowed on them, added to the positive evidence of Mrs. Caldwell, establish it beyond controversy. Indeed the reasoning both of the Chancellor and the Commissioner indirectly admits it, and a forced construction has evidently been resorted to for the pur-

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pose of *charging them with it as a relief to the surety, John Caldwell. But when we reason that it is unjust that a principal should be liberal at the expense of his surety, we see but one side of the picture of this case. These young ladies had been invited by major Black and Mrs. Watts, their relations, whose respectability and ample means promised all that could be expected, to take up their residence with them, free of any expense on account of subsistence. They were seduced from this offer by the entreaties of a sister, and the assurances of her husband that he would accord them the same terms. To charge them with board under these circumstances, would not only be a violation of the rule, that what was intended as a gratuity shall not be converted into a demand, but it would amount to a positive fraud. It has been further urged, that the invitation could not have contemplated a residence so protracted as this proved to be; and that for that reason it should be limited to one year. The undertaking was voluntary, and imposed no obligation on William Caldwell further than that it was executed; and if he found it onerous, he might at any time have put an end to it; but until he did so, the original conditions remained. This view of the subject is not however intended to exclude any demands for money expended for clothing, or other necessaries suited to their condition and circumstances in life; for these they are clearly accountable.

With respect to the fourth proposition, the facts appear to be these: the complainant, Alexander M'Dowell, and his deceased brother, James M'Dowell, had been put out apprentices to trades; but on funds coming into the hands of their guardian, he removed them from their occupations, and put them to school. They resided with the guardian a part of the time, and at other times were boarded abroad, but no account has been furnished of the actual expenditures, or of the

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length of time they *were boarded abroad; and the basis of the charge against them is by probable conjecture as to what would be the expenses of board, tuition, clothing, &c. for the whole length of time. It is a well settled rule, that the guardian is not entitled to break in upon the capital of his ward for his subsistence, except under peculiar circumstances, which do not enter into this case; and generally it is limited within the income. Of course, there could not be a balance against the ward at the end of the year on which interest could be calculated; and for this reason, as a general rule, interest is not allowable on a balance due for subsistence. The liberality of the complainants, in consenting that a reasonable allowance should be made for the board of those young men, without regard to their income, has relieved the Court from the necessity of applying these principles to the case further than is applicable to interest on the annual expenditures. This, for the reasons before mentioned, cannot be admitted; and the account for their board and subsistence will be re-

tained, expunging the interest which has been calculated on it.

With respect to the matters contained in the seventh ground of the complainants' motion, it may be remarked that they present a proposition too clear to admit of any doubt. If the expenses of the suit of Black and others and wife v. M. Junkin were incurred in prosecuting the rights of the complainants, and have been paid by their guardian, he is entitled to be credited with them; and so with regard to the expenses on account of the lands sold to Drummond. If the proceeds of this sale belonged to complainants, of course they are chargeable with the expenses, but if otherwise they clearly are not. Whether they are, or are not entitled to this fund, is one of the facts referred back to the Commissioner; and their liability must depend on the determination of that question.

This disposes of all the points made on the

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part of *the complainants; and it will only be necessary to notice very briefly those made by the defendant. The first ground stated in his brief is disposed of in considering the second general proposition arising out of the complainants' motion, and without abandoning the question of law arising out of his second ground. Mr. John Caldwell, who is the party and the counsel, has consented to waive it, and that the amount charged to have been received from Mr. Cheves shall be retained. His third ground involves a question of fact only, and for that reason this Court would reluctantly interfere with it: but connected with it is the circumstance that no accounts have been kept or exhibited as to the actual expenditures; and if a person who stands in a fiduciary relation will suffer his transactions to be involved in obscurity, when, by a proper attention to his duty and the interest of his cestui que trust, he might have removed it, if he is entitled to any remuneration, it furnishes a good reason for putting it on the lowest estimate. The Court are perfectly satisfied with the deduction made by the Chancellor on account of the board of the young men.

It is therefore ordered that this case be referred back to the Commissioner, to examine into the matters left open by this decree, and to state an account between the parties conformably to the principles laid down.

Decree modified.

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2 McCord, Eq. *60

*SARAH BUTLER et al. v. MATTHEW ARDIS et al.

(Columbia. Jan. and May Terms, 1827.)

[*Equity* ⇐17.]

Equity will not entertain jurisdiction of a case involving titles to land, where a discovery of titles is not sought, or some other ground of equity relied on.

[Ed. Note.—Cited in Albergottie v. Chaplin, 10 Rich. Eq. 430.

For other cases, see Equity, Cent. Dig. § 39; Dec. Dig. ⇐17.]

[*Account* ⇐12.]

An heir cannot go into Equity to demand an account of rents and profits, unless some impediment exists to his recovery at Law.

[Ed. Note.—Cited in Albergottie v. Chaplin, 10 Rich. Eq. 430.

For other cases, see Account, Cent. Dig. § 65; Dec. Dig. ⇐12.]

[*Appeal and Error* ⇐1009.]

On questions of fact, the decree of the Chancellor is supported as a verdict at Law, and will not be set aside, unless manifestly contrary to the weight of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3974; Dec. Dig. ⇐1009.]

The bill stated that the complainants were Sarah Butler, and her children by her last husband John Butler. That in 1781 John Schinholster, first husband of complainant, departed this life intestate, seised and possessed of a valuable tract of land in Beach Island, called the Mount tract, granted to Ulric Schinholster the 13th of October 1758, containing 500 acres, occupied by Abraham Ardis in his life time, and since his death by his children the defendants. John Schinholster left at his death three children: Susannah, who married Abraham Ardis, his daughter by a former wife; a daughter named Mary, and a son named William, by complainant. That about eighteen months after John Schinholster's death, Sarah married Sherry, and had two children not long after the marriage. Shortly after Sherry's death, the complainant intermarried with John Butler, by whom she had four children, the present complainants. John Butler died in 1818 intestate. William Schinholster, son of complainant's first husband, was John Schinholster's eldest son, and by the law of primogeniture inherited the land of which his father died seised. The land was considered his until his death, which took place about 1793 or 1794. In 1799 Abraham Ardis, father of the defendant, was appointed guardian of William, and in that capacity held the land until his death, which occurred in 1816. That the land had been since that time and was now in the possession of the defendants. The bill further stated that the land was distributable among the complainants. That there might be no unfavourable impression against the claim of complainants, it was stated that the title to

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the land *was cast upon her during coverture with John Butler, and that in 1801 he sold, as he had a right to do, his interest in the land to Abraham Ardis, who was holding it as guardian or trustee. The deed of conveyance, marked A, was filed. It was stated that if the defendants claimed under this deed, as it was presumed they did, it was void from inadequacy of price and for other

reasons. The deed purported to convey the lands of Butler and wife. The bill further stated that Abraham Ardis possessed himself of all the title deeds to the land when he was appointed guardian, and that they were now in his representative's possession. The prayer of the bill was for a discovery and relief and account, that the deed alluded to might be set aside as fraudulent, and for partition if necessary. It required Ardis to account for his actings as trustee.

The answer of the defendants, Matthew Ardis, John Ardis, Casper Naily and wife, Miledge Galphin and wife, and Mary Simkins, stated that they had been informed that there was such a man as John Schinholster; but when he died, whether intestate or not, and possessed of what, if any property, they were quite ignorant. That he might have left the three children mentioned in the bill, viz. Susannah by the first wife, and Mary and William by his last wife; and that Susannah did intermarry with the said Abraham Ardis. That they heard that after the death of John Schinholster his widow did marry one Sherry, and after whose death, she did speedily marry John Butler, and that in 1818 said John died intestate, but they were ignorant whether William Schinholster was the only son of John, and whether he inherited all his estate previous to 1791, of which they required the strictest proof, so far as it might be intended to affect their interest. That they could not state when William Schinholster died, though they believed it to have been some time after 1794;

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and that so far from *knowing that the lands were inherited by the said William, they stated that he never was in possession of one acre of it during his life, and therefore not possessed of such an estate as could have descended from him to any one; and that many facts bring them to an unshaken belief, that Abraham never went into the possession of land, either as trustee or guardian of the said William, but so much as he did possess, he did so by purchase in his own right. They admit there was an order of the County Court, appointing Ardis guardian, probably for the said William, requiring a bond of £100 penalty; but whether the County Court could legally appoint a guardian at all, they were advised was doubtful; and, if it had the power, it could never extend further than to the personal estate, which they strongly inferred from the smallness of the penalty of the bond, &c.; a sum totally inadequate, from the complainants' statement, to secure so valuable a real estate. That besides they believed, from the intimate acquaintance of some of them, now thirty years old, if the land had been encumbered with any trust they must have heard of it. That he cultivated the land for a long series of years until his death as his own. Indeed one of the defendants heard his father say, he had paid for land twice; and never heard of any trust till he heard of this bill. That as this bill is now brought forward when all the evidences of right had perished, they felt bound to state, that Adam Hiles, the grandfather (uncle) of these defendants' mother, Susannah Ardis, was in possession of this land a long time before and until his death, and whilst John and William Schinholster were living. That Hiles died in possession, claiming, as they had a right to presume, under a good title. That Adam made his last will, by which all the remainder of his estate, after some bequests, was given to his grand-daughter (niece), Susannah.

That, as stated by complainants, John But-

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ler, on the *20th of August 1801, conveyed all his interest in the land to Abraham Ardis in the most solemn manner; which deed was drawn to be signed likewise by Sarah, the wife of the said John; but she executed another instrument of writing, conveying also all her interest and right. That Sherry likewise had a claim to the land, which they had heard their father Abraham also purchased; and this was not wonderful, considering the state of the country, the confusion of titles, and the ignorance generally of what was, and was not, a good legal title. That Abraham was scrupulously honest and notorious for holding his property clear by purchasing up all claims. That twenty or thirty years ago lands sold for one-tenth of what they would bring now; and surely Abraham Ardis was not to blame if he did not give a full price for the land every time he bought it. That the said Abraham had purchased Butler and his wife's claims, and had been in possession of the land thirty-four or thirty-five years, free of incumbrances, trusts, suits, and adverse claims of all the world. The defendants, after the lapse of such a time, when the evidences of title were lost, or greatly jeopardized, not only insisted on the statute of limitations, but earnestly craved the full benefit of all presumptions arising from so great a lapse of time, to shield and protect them.

An amendment to the bill was afterwards filed. The amended bill stated, that Abraham Ardis went into possession as guardian, and afterwards purchased or attempted to purchase the land from complainant, a weak and ignorant woman, for a grossly inadequate price. That as guardian he possessed himself of the muniments of title, which were now in the possession of his representatives. That he also possessed himself of considerable personal property which he never had accounted for. The bill prayed for an account and discovery of titles, &c.

To this there was an amended answer:

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The amen*ded answer stated, that the defendants did not pretend that the conveyance of John Butler, mentioned in the amendment

to the bill, conveyed to Abraham Ardis any thing more than the dower of Mrs. Butler, in the lands conveyed, as widow of John Schinholster deceased; and that although the defendants, in their principal answer, from a hasty and imperfect view of it, were disposed to regard it as conveying a larger interest, yet that the deed must speak for itself, and that its legal character could not be affected by their representations: defendants therefore denied all fraud inferred from the alleged inadequacy of the consideration given for the conveyance.

A subsequent amendment was made to the bill: The additional amendment stated, that at the time Abraham Ardis was appointed guardian of William Schinholster, Jun. and took possession of all his property in that capacity, he also possessed himself of the titles, evidences, and muniments of title of and to the land of the said William, and that they were now in the possession of the defendants, or some one of them. That the land in controversy was originally granted to Ulric Schinholster, the father of John, and grandfather of William the younger, in 1758; and as it was referred to in the deed from Butler to Ardis, it was evident that it was in existence and in the possession of Abraham Ardis. That the fire in Charleston, which consumed the Land Office, destroyed this and all other original grants of that date, which prevented their offering a copy. That at the time stated Abraham Ardis took into his possession a considerable personal estate, the property of said William, which he had never accounted for. Complainants prayed that defendants might make a full discovery of all matters contained in the bill; and more particularly to state, if they, or one of them, had not in their possession the grant to Ulric Schinholster, and what other evi-

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dences pertaining *to the land they had; and also that they might account for the personal property and the proceeds which went into the possession of Abraham Ardis, as guardian aforesaid.

There was a second answer to the thus amended bill. The defendant answering (whose answer was by agreement to be taken for the answer of all the defendants) said, that they knew nothing about the grant to Ulric Schinholster, or of any of the title papers to the land in question. They believed the possession of the ancestor was honest and under good title; and insisted that the complainants should be held to the strictest proof of their title. They knew nothing about the personal property and insisted upon the lapse of time.

There was also a plea to the jurisdiction. The plea of Casper Naily, Jun. one of the defendants stated, that the defendants' possession was adverse and in Abraham Ardis's own right, that the bill contained no ground for jurisdiction, but the implied trust which the defendants deny to have existed, and that the complainants had adequate remedy at law.

De Saussure, Chancellor. The bill in this case was filed in 1822, and sought relief with respect to a tract of land claimed by the complainants. The brief stated that the bill was for a discovery and relief, and for an account; that the deed alluded to, of the 20th of August 1801, from John Butler, on behalf of himself and his wife, one of the present complainants, Sarah Butler, to Abraham Ardis might be set aside, as fraudulent; and for partition if necessary; and it required Ardis to account for his actings as trustee. To this bill, a plea to the jurisdiction was filed, on the ground that the possession of Abraham Ardis was in his own right, and adverse to the complainants; and that there was nothing in the bill to give jurisdiction except the charge of an implied trust, which the defendants deny to have existed, and con-

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tend that *complainants have a plain and adequate remedy at law. The answers filed are full, and put the points in controversy, and particularly the title to the land, in issue.

We must first decide on the plea to the jurisdiction. I have stated in another case, that of Bussy and others v. M'Kie and others (ante, p. 23 [16 Am. Dec. 628]), the resolution I have taken, and the reasons for it; that in those cases where the jurisdiction is objected to on such reasonable grounds as to excite a doubt, I shall sustain the objection, in order to obtain the judgment and guidance of the Court of Appeals, as to what is really within the jurisdiction of this Court, and what is not so, to which I shall scrupulously conform. In the case now before me, the grounds taken to support the jurisdiction of the Court are chiefly the same as those taken in the case of Bussy v. M'Kie, to wit, partition, an account for rents and profits, discovery, the delivery of the deed of 1801 to be cancelled being obtained by fraud.

The three first are subject to the objections taken to the case of Bussy v. M'Kie.

With respect to delivering up the deed, on account of fraud in obtaining it, I do not perceive any ground for that charge. Mrs. Butler had the right of dower in the land, and the deed recites that right, and professes to convey her rights, and the consideration of $500 is not shewn to have been inadequate, and there is no pretence of improper means to obtain the deed.

There is another ground in this case, not found in the case of Bussy v. M'Kie,—that of an alleged trust. There is no direct trust in the deed; it can, therefore, only be an implied trust, if there be any trust at all. To support the alleged trust, it is stated that Abraham Ardis was appointed guardian of the personal estate of William Schinholster in the spring of 1790, and that his possession

of the land took place about that time; whence it is inferred, he was a trustee. The

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boy Wil*liam Schinholster was at that time, 1790, ten or twelve years of age, and died about two years after: nor does it appear that this implied trust, if it existed, was kept alive, or could apply to these defendants, who claim adversely; for no steps were taken for many years, and all the presumptions from lapse of time apply. These answers to the alleged ground of an implied trust, and to the consequent jurisdiction of the Court, are not entirely satisfactory; but at least they raise considerable doubt; and doubt will induce me to sustain the plea to the jurisdiction, in order to have the judgment and guidance of the Court of Appeals, especially in a case which involves the title to land claimed by an adverse possession. It is therefore ordered that the plea be sustained, and the bill dismissed.

The complainants appealed from the above decree, and submitted the following grounds to shew jurisdiction in the Court of Equity.

First. "Abraham Ardis, the ancestor of the defendants, having taken possession of the land of William Schinholster deceased under whom the complainants claim, and having possessed himself of the title deeds of the same as guardian of the said William, the complainants are entitled to a full discovery, and to have their title deeds delivered up."

Second. "The defendants are amenable to this Court for the actings and doings of Abraham Ardis as a trustee, both in regard to the real and personal property mentioned in the bill."

"The bill charges fraud in Abraham Ardis in holding the land, and prays that certain deeds, by which the defendants pretend to hold the land, may be set aside as fraudulent."

"The complainants are entitled to an ac-

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count for *rents and profits of the real estate, and an account for the personal estate and the proceeds thereof."

"The bill is filed for a partition, and an adjustment of their rights and for relief generally."

Thompson, for the appellants. William Schinholster died after the act of 1791. That fact is material to the right of inheritance, and in regard to the statute of limitations. If he died in 1793 or 1794, his mother would take the whole jointly with her children and Butler. The grant of the land was made in 1758. In 1801 a deed from Mr. and Mrs. Butler to Ardis recites the grant; and the right to dower in Mrs. Butler is recited to have accrued through John Schinholster. Was not defendant estopped to say there was no grant? William Schinholster died in 1793 or 1794. Besides the recital in the deed it was proved that possession had been held of the land until John Schinholster died. His representative lived on it afterwards, and rented it out for some years. Admitting the title in Ulric, from him it descended to his son. John Schinholster died in 1781: and if it had been Hiles's land he would have lived on it; but Schinholster's widow lived on it some years, and his administrator rented it to several persons, and among others to Hiles himself; from him it descended to his son William, who died as complainants allege after 1791; and if so, complainants are entitled to recover; if before, neither were entitled. The only pretence that can be set up of a title by the defendants is under Hiles. Hiles at that period then could not have pretended a title or claim. Susannah Schinholster could not have inherited of John, for she had a brother alive who would take under the laws of primogeniture; and she can set up no title unless Hiles had a title. Hiles died in 1785 or 1786. Ardis went into possession as guardian of William, and cannot dispute the

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title. *The defendants contend that there was no title in Ulric. If there was no written title, the length of possession, &c. authorizes the presumption of one. Besides the answer says that William Schinholster died about 1793 or 1794. He was a child about 13 years old. The amended answer claims differently from the original answer. But William died before 1791, and they were tenants in common. Butler and wife instituted proceedings in dower against Ardis in 1809.

Ford and Wardlaw, contra, were stopped by the Court.

Harper, also for the appellants. Every person taking possession of an infant's property is regarded as trustee. 1 Madd. Cha. 90. Guardianship is in the nature of trust. 1 Madd. Cha. 338. 1 P. Wms, 704, 721. 2 P. Wms, 104. 1 Madd. Cha. 123. 1 Atk. 544.

Is the guardian liable to the representatives of his ward? 3 Atk. 381, 2.

The objection that the Court has not jurisdiction is, that the complainants might maintain an ejectment; but in that action she must recover on the strength of her own title, which the law will not subject her to. It may be objected, that the defendants would not be allowed to call in question the right of their cestui que trust. This is a rule of Equity which has been adopted by the Law Courts, and cannot oust their jurisdiction. 1 Selw. 556. 2 Sch. & Lef. 72, 84. 11 Ves. 344. 2 Ves. 696. 13 Ves. 133. 6 Ves. 182.

In all cases of fraud the Courts of Law and Equity have concurrent jurisdiction. 1 Sch. & Lef. 205. 13 Ves. 483. 3 Bro. Cha. Ca. 218. 7 Ves. 244.

It has been said that the heirs of Ardis came into possession as trespassers, and are not amenable to a Court of Equity. The representatives of a trustee are liable in the same manner as their trustee, 2 Madd. Cha.

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*131. 1 Sch. & Lef. 260. All persons coming into the possession of trust property, with notice of the trust, stand as trustees, 2 Madd. Cha. 127. The heir of an infant may come into the Court of Equity for the delivery of possession, if he allege any matter which shews a probability that he cannot recover at Law; and if a dispute about title arises, an issue at law will be directed. 1 Madd. 89. 6 Ves. 89. 3 Atk. 130. 387. 2 Atk. 384. In Wild v. Hobson, 2 Ves. & Beames, 112, the Chancellor asks, "shall he not come into Equity because he may recover at Law?" There is no instance in which an issue has been directed in a matter of trust. The rule applies only to heirs, 2 Madd. Cha. 477. As to the question of possession, he cited 3 Atk. 313. 459. Where persons enter under trustees, the statute of limitations will not run in their favour until they do some act, or give notice of adverse claim, 1 Bro. Cha. Ca. 550. 2 Ves. Sen. 472. If one with a fraudulent intention take possession of property, the statute will run only from the time of the discovery, Hovenden v. Lord Annesley, 2 Sch. & Lef. 336. In this case there is no evidence that Ardis ever claimed in his own right adversely. Twenty years is a bar to an equitable claim, 2 Bridgm. 253. 2 Sch. & Lef. 633. The statute of limitations does not run pending a suit in Equity, 2 Bridgm. 250. Bond v. Hopkins, 1 Sch. & Lef. 113.

Curia, per NOTT, J. This case comes before us on an appeal from a decree of the Chancellor, dismissing the bill for want of jurisdiction. But as it was necessary in order to decide that question that we should look into the whole case, we are now at liberty to decide it, either upon the question of jurisdiction, or upon its merits.

The grounds on which the complainants endeavor to sustain the jurisdiction, are.

1. A discovery of title deeds.

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*2. An account of rents and profits.

3. Fraud in obtaining a deed from the complainants.

4. For partition of the land.

With regard to the first question, it appears that the complainant claims as heiress to her son, who, it is alleged, inherited it from his father, to whom it descended from the original grantor. It therefore appears from her own shewing, that there was no chain of title to be discovered in order to enable her to sue at law. There is no allegation of the loss of any deed or of any paper which could give jurisdiction on that ground; and the defendants deny having any.

On the second ground it is contended, that an heir may always go into a Court of Equity for an account of rents and profits: but an heir, merely as such, is not entitled to such an extraordinary privilege without stating some legal impediment to his recovery at law. 1 Madd. Cha. 85. Duttney v. Duttney, 6 Ves. 89. No such impediment appears in this case.

It is also further contended, that as the defendant's ancestor went into possession of the land as guardian of complainant's infant son, under whom she claims, or at least took possession for him, it created a trust which gives jurisdiction to the Court. How far the circumstances of this case would enable the complainant to avail herself of that fiduciary character, if it existed, is perhaps a question of some difficulty, but it is not important to the discussion of this case; for, to give to the argument all the effect to which it is entitled, it resolves itself into the question, "Whether the possession was or was not thus acquired?" And that was a question of fact proper for the consideration of the Chancellor in the Court below, and in which this Court would not interfere, unless the decree were manifestly contrary to the weight of evidence. The decree of the Chancellor must in that respect be considered in the nature

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of a *verdict at Law. He hears the testimony viva voce, and is therefore better qualified to judge of it than this Court can be, who take it from the loose and imperfect notes of the Judge: and in this case the preponderance of evidence appears to me to be in favour of the decree. The guardianship was merely of the personal estate, and the guardianship bond in the penal sum of one hundred dollars only. There are two witnesses only who express an opinion (for it can only be an opinion) that the possession was taken in that character, and one of those the brother of the complainant. Opposed to these are four or five, who with equal confidence express their opinion that Ardis took possession in right of his wife, whose ancestor had long lived on, and died in possession of the land. Indeed the complainant herself, by her own deed made to him several years after the death of her son, disclaimed any other right than the right of dower; and a claim of so doubtful a character as that now set up, and which goes to disturb a possession of more than fifty years, ought not to be encouraged. The ground of fraud in obtaining the deed is not supported by any evidence.

As to the partition, it has turned out in the course of the investigation, that the complainant Sarah Butler is entitled to all the land if to any, and not to a part, so that she must fail on that ground.

From any view of the case therefore, I am of opinion that the decree of the Chancellor must be affirmed.

Decree affirmed.

2 McCord, Eq. *73

*JOHN WARDEN and Wife v. BURTS, Executor of Sims.

(Columbia. Jan. and May Terms, 1827.)

[*Appeal and Error* ⟸1009.]

This Court requires rather stronger grounds for reversing a decree on facts than for setting aside a verdict at law; but acts upon the same principle.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. ⟸1009.]

[*Executors and Administrators* ⟸111.]

An executor is entitled to be refunded costs and counsel fee, paid in defending a case against the estate.

[Ed. Note.—Cited in Bryson v. Nickols, 2 Hill, Eq. 121.

For other cases, see Executors and Administrators, Cent. Dig. § 449; Dec. Dig. ⟸111.]

[*Appeal and Error* ⟸840.]

[In the adjustment of an account, the questions whether particular items were originally due, or whether incompetent evidence has been admitted, or legal evidence rejected, may be examined on appeal, as being a question of law, but not the question of payment, that being a question of fact.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3314; Dec. Dig. ⟸840.]

This was a bill filed against the defendants to account as executors. Several questions were made as to the accounts, which were brought before the Chancellor by exceptions to the Commissioner's report. The defendant in his charges had an item for costs paid in a case against him as executor, and fifty dollars a fee paid to counsel. It was contended that an executor could not be allowed such charges. Chancellor De Saussure, who heard the cause, overruled the objection, and allowed the charge. Several other questions, involving ordinary matters of fact and accounts, were made, and decided by the Chancellor, from whose decree this appeal was taken.

Irby, for the appellants.

P. Fanow and O'Neall, contra, cited Bulow v. O'Neall, 4 Desaus. Rep. 394, as to the allowance of costs and counsel fees.

Curia, per JOHNSON, J. The Court concur in the decree pronounced by the Chancellor, and generally for the reasons given. It has been thought advisable however to use the occasion furnished by this case, to lay down, with as much precision as the subject will permit, a few rules applicable to the questions involved in it; and which have become the more necessary under the recent modification and present organization of this Court. And first, as regards the determination of mixed questions of fact by this Court, especially in relation to the adjustment of accounts.

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*The evidence in relation to these matters is almost invariably taken by the Commissioner, and, on exceptions taken to this report, is carefully revised by the Chancellor on the circuit, in the presence of the parties, and in the neighbourhood where the cause originated; and altogether under circumstances the most favourable to any explanations or corrections that may be required: and if, under such circumstances, a Chancellor is liable to err, how much the more is this Court, when, on an appeal, they are called on to review his judgment, without any other aids than are furnished by short notes, which from their nature must be imperfect, and such explanations as counsel are disposed to accord, by whom the most positive affirmations on the one side are too frequently met with as positive denials on the other. It is possible, but almost impracticable, to put down the very words of a witness; but it requires a master's hand to give expression and life: and it may be safely affirmed that the difficulty of ascertaining their true meaning increases in a progressive ratio at every stage through which they pass. Apart then from any consideration of convenience, and the utter impracticability of investigating all the minutiæ of a complex account and labouring through an ill-shapen and undigested volume of evidence, as a matter of expediency calculated to promote the ends of justice, this Court would not be disposed to intermeddle with them.

In theory, Courts, possessing appellate powers only, were not designed for the determination of cases, except as an incident, but for the purpose of defining and settling principles; and a departure from this course can only be justified by the concurring testimony of all the world. That our frailties, passions, and prejudices enter into and control the operations of the most perfect systems that human wisdom has ever been able to devise, is most clear; and without some

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check on their influence, *there would, in reference to all judicial systems, be no security for life, liberty or property: and hence the power which Appellate Courts, in the last resort, claim and exercise in matters of fact, as well as of law.

The exercise of this power without something like settled rules, and defined land marks, would be productive of greater evils than those it was intended to correct; because, as has been already remarked, an Appellate Court is more liable to err on account of the imperfection of the sources from whence its information is derived. And some attempts have been made to circumscribe it within proper metes and bounds, particularly in relation to the trial by jury. Thus it has been well said, that when there is evidence on both sides the Court will not weigh it; for that belongs to the jury; and their view of it is conclusive. And so, unless it is apparent that they have acted under a mistake, or have been so palpably influenced

by some improper motive that the erroneousness of their conclusion is such as to strike the understanding with conviction at once, the Court will not set aside a verdict.

Now all the reasoning, on which these rules are founded, applies, with equal indeed with greater force, to a case coming up under a report from the Commissioner, through the medium of the Chancellor; because we are removed one stage further from the original source: and the Court feel warranted in adopting these rules for its future government.

In the adjustment of an account; whether the party, charged with a particular item, was legally bound to pay,—or whether legal evidence, to prove it, has been rejected,—or incompetent evidence has been admitted, may, in general, be regarded as naked questions of the law, and come up in a shape that is tangible to the Court. But whether the party claiming it has or has not paid it, is a question of fact, susceptible of being proved by all the grades of evidence, and

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all the variety of circumstances, *which are found between the extremes of light presumption and demonstration: and any effort, on the part of this Court, to weigh them and adjust the balance, would subject it to insuperable difficulties and innumerable errors. Of this class are some of the items in this case, with which, for these reasons, the Court will not intermeddle.

The right of the defendant to be remunerated for costs and expenses incurred in defending suits brought against him, in the character of executor, out of the funds of the estate, constitutes another question embraced by this motion.

The rule that an executor shall not be bound to pay them out of his own funds, unless they have been the result of his own misconduct or mismanagement, has been correctly laid down by the Chancellor; and that, although the estate could not be benefited by it, as may be well illustrated by the facts connected with the complainants' first exception. Reuben Sims, one of the legatees, filed a bill against the defendant for an account; and on the investigation of the accounts, it appeared that he had not only received all, but more than he was entitled to. Now, it is true that the estate could not, in any possible view, be benefited by this suit; but it is equally clear, that the defendant was exposed to this situation by the circumstance of being executor for the estate: and he had committed no fault; and the result proved that he was wholly blameless. And it is but just that one who, in many instances, assumes a highly responsible and delicate trust, from mere motives of friendship, should be indemnified for loss incident to that situation; and against which it was impossible to guard. The fee paid to counsel for defending that case was therefore properly allowed.[1]

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*The other items for costs and expenses incurred in defending law suits, noticed in the defendants' third exception, and also in the complainants' third exception, are disposed of by the rules before laid down. Whether they were incurred by the misconduct or mismanagement of the defendant, must be judged of from all the circumstances; and they have passed in review before a tribunal possessing more ample means, and in every respect more competent to decide them, than this Court. And none of those circumstances have been made manifest which would authorise the interposition of this Court.

Motion refused.

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[1] See ante, M'Dowell v. Caldwell, p. 43 [16 Am. Dec. 635]; and Watts v. Watts, ante, p. 77.

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2 McCord, Eq. 77

JENETTA M. WATTS Executrix v. JAMES WATTS and JOHN BLACK Executors.

(Columbia. Jan. and May Terms, 1827.)

[*Executors and Administrators* ⟸266.]

Where a trustee, executor, or administrator has made bona fide advances for the trust estate, he is entitled to be refunded out of the trust estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1023; Dec. Dig. ⟸266.]

[*Wills* ⟸726.]

[Cited in Lay v. Lay, 10 S. C. 215, and in Pendergrass v. Pendergrass, 26 S. C. 30, 1 S. E. 45, to the point that where a testator by his will gave his wife the use of his whole estate during her widowhood, and directed her, whom he appointed executrix, and his executors, to sell such of the estate as they might deem superfluous for payment of the debts, and a sale was attempted, but, the property not bringing its value, the sale was stopped at the instance of the widow, who took possession and paid the debts, including a decree recovered against the estate after she took possession, she was entitled to repayment of her advances, without interest, out of the principal of the estate.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1740; Dec. Dig. ⟸726.]

The complainant Jenetta M. Watts was the widow of major Richard Watts, who, by his last will and testament, appointed her executrix, and major John Black and James Watts executors. His will gave, or rather in its own words loaned, to Mrs. Watts during her life or widowhood the whole of his real and personal estate; and in the event of her marriage, one half in fee: but if she remained unmarried during her life, the will gave to her one-third part of his estate to dispose of as she might think fit; and at her death or marriage, the other half or two-thirds of his estate, as the case might be, to his brothers and sisters. Another part of the will directed his executors to sell such

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part of his estate as they might *deem superfluous, for the payment of his debts. Some short time after his death, the executors sold some portion of his property; but the property not selling well, Mrs Watts believing, with what had been sold and the debts due the estate, she might be able to pay the greater part of the debts, directed the executors to stop the sale, saying, that she had rather undertake to pay the debts, than to permit the property to be sold at reduced prices. Subsequently, indeed some years after, major Black and wife, finding that they were entitled to a large sum of money from the estate of major Watts, and other persons, the representatives of colonel Conway, filed a bill in the Court of Equity for Laurens district against Mrs. Watts executrix, and James Watts executor of major Watts, and other defendants. Upon the hearing of that cause, the complainants recovered a decree against the estate of Richard Watts for $804 53 cents. The complainant Mrs. Watts paid this debt and the other debts of the estate, to a considerable amount beyond the funds of the estate received by her; and in consequence of this she filed her bill, to have a part of the estate of Richard Watts sold to reimburse her the amount which she had paid. His honour Chancellor Thompson, at June term 1825, referred the matters of account to the Commissioner, and directed him to report what sums the complainant had paid out of her private funds on account of Richard Watts the testator. The Commissioner reported at June term 1826, that the complainant had paid out, over and above the amount received by her as executrix, interest included, $1485 25 cents. The defendants excepted to the report on various grounds.

First, That the complainant having taken all the property into her possession, and used and enjoyed the same (when by the will she was required to sell so much as would pay all debts), she therefore took the estate

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*chargeable with the debts, and ought to pay them out of the profits of the estate.

Second. That by not selling property to pay off the debts, the estate of the complainant was increased in value to the amount of the debts.

Third. That the Commissioner ought to have charged complainant with all such property contained in the bill of appraisement as, from its nature, must have increased in value.

Fourth. That the estate should, in no event, have been charged with interest, inasmuch as complainant ought to have sold, on the death of the testator, a sufficiency of the property to have paid the debts.

De Saussure, Chancellor. It is very obvious from the testator's will, that he intended his wife should enjoy the whole estate during her life or widowhood; but that she should pay off his debts by the sale of such property as his executors should think the most superfluous. The directions to sell were imperative, though the selection of the least material or most useless property was left to the executors. Small as the sales were, they amounted, with some debts collected, to two-thirds of the debts; and the executrix, who seems to have had the chief sway, should have gone on with the sales and paid them off. But she preferred not to do so, for her own accommodation. And meanwhile, the superfluous or perishable property has, from 1814 to 1820, actually perished, or been worn out and consumed. This the widow seems to have done from choice; for she is stated, in the answer of James Watts, to have declined selling, saying, she would take the estate into her possession, and pay the debts. The veracity of this answer is supported by the facts, that she did take the estate into her possession, and did not make sufficient sales to pay the debts, as the will directed, but actu-

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ally paid the debts without such sale. *It does appear to me, that on this statement of facts, the widow ought to bear the burthen of all the debts. She would have been bound to keep down the interest at all events during her life, and to have paid a third, or a moiety of the debts, according to her proportion of the estate, as she married or did not. But under the will, she would have paid them all by the sales. What she did not sell, as she ought to have done, she has enjoyed; and therefore has had an exact equivalent for the debts she has paid. Taking this view of the case, I feel bound to support all the exceptions of the defendants to the report of the Commissioner. If I had not taken this view, still on the question of interest I could not have had any doubt; for the executrix ought to have sold out and prevented the accumulation of interest, and extinguished the whole debt, as directed by the will. It is therefore ordered and decreed, that the bill of complainant be dismissed.

From this decree the complainant appealed, and moved the Court of Appeals to reverse the Circuit decree: and for a decree for the complainant, on the following grounds:

First. That having advanced out of her own funds, in the payment of the debts of the estate, the sum of $1485 25½ cents, she became thereby a creditor of the estate for that sum, and was entitled to have so much of the estate sold as would pay that amount to her.

Second. That having paid debts beyond the amount received by her, she was at least entitled to be refunded the principal sum of the amount which she had paid beyond the amount received.

O'Neall, for the appellant. A trustee paying off the incumbrances on the trust estate,

has a right to look to that trust estate for

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payment. 6 Johns. Cha. Rep. 62. *A trustee is entitled to a prompt remedy for his payments, and has a lien on the trust property; and the cestui que trusts can never call that property out of his hands, without first tendering indemnity. 6 Johns. Cha. Rep. 67. If an executor pays out his own money to the full amount of the assets in hand, he may apply the same to his own use; and he has even the right to retain the property as his own. So when lands are directed to be sold, he may retain out of the sales all his previous advances. 3 Johns. Cha. Rep. 318. The complainant is entitled to interest. See 5 Johns. Cha. Rep. 517.

Bauskett, contra. She has come too late, after all the fund debts have been distributed. The case from 3 Johns. Cha. Rep. 318, is not applicable, nor the case in 5 Johns. Cha. Rep. 517.

Johnston, in reply. Heirs at law are not entitled to receive their shares until debts are paid. The executors, having paid off debts, are entitled to retain assets. In Evertson v. Tappen, 5 Johns. Cha. Rep. 497, it was decided, that the whole estate being devised to a widow during life after payment of debts, the widow as executrix, in accounting to the heirs at law for subsequently acquired property real and personal, had a right to apply the rents of undevised lands to the payment of debts, after the personalty was exhausted. The balance of the rents she should account for.

"A trustee, who has paid off incumbrances on the trust estate with his own money, may look to the estate in the first instance for reimbursement, and is not bound to resort to the covenants of the grantors in the trust deed; but may leave the cestui que trusts to their remedy against the grantor, by substitution." 6 Johns. Cha. Rep. 62.

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Curia, per NOTT, J. I think it is a very well settled rule in Equity, that where a trustee has, in good faith, made advances out of his own funds for the benefit of the trust estate, he is entitled to remuneration out of that estate. 6 Johns. Cha. Rep. 62, 67. The same rule applies to administrators and executors, and all other persons standing in the same relation. Plow. 186. In Dyer there is a case, where it was held that an executor, who had disposed of his own money in alms for the salvation of the testator's soul, might retain the assets of the estate to that amount. 2 Dyer, 187. 3 Johns. Cha. Rep. 318.

Now what reason can be given, why this complainant should not have the benefit of that rule? It is said, that the property might have been sold according to the provisions of the will, if she had not prevented it; and that as the rule was omitted at her request, and for her accommodation, she must be bound by her contract: that she has had the use of the property, which would have been applied to that purpose, until it is consumed, or has perished, and comes now to be remunerated out of the valuable part of the estate, which was intended to be reserved for the remainder man. If she had wasted the property, she certainly would come with a very bad grace into Court with the present demand. But no such evidence is offered to the Court; nor do the circumstances of the case warrant any such suspicion. It appears from the decree of the Chancellor, that the whole amount of the personal estate which came into the hands of the executrix, except the outstanding debts, was $3,824, including the value of the slaves, which amounted to $3,300; so that the whole amount of property, exclusive of the slaves, was in value only $524, out of the sales of which, it appears from the Commissioner's report, $373 were raised; leaving in her hands a balance of $151. The whole amount of funds which came into her hands was $1,617. The amount

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of debts, which appear to have *been due at that time, was $1,671, leaving for her to pay, in pursuance of her contract, fifty four dollars. The property which she reserved amounted in value only to $150. Now that was a very small sum to allow her for provisions, household furniture, and such articles as were immediately necessary for her convenience and support. Yet that small pittance must have been taken from her, or the more valuable property be broken in upon. It seems to be supposed that this little property reserved by the complainant should be considered as the fund set apart by the testator, under the name of "surplus property," for the purpose of paying his debts. But it cannot be believed that he meant, by his surplus property, those articles which were necessary for the subsistence of the first object of his bounty. It appears however, that even this must have been sold, or other property sacrificed, if she had not stopped the sale. And the convenience which she secured to herself thereby may perhaps be considered as a sufficient consideration for the payment of the small sum (say fifty four dollars) over and above the funds otherwise provided for the payment of the debts which then appeared to be owing by the estate. Now suppose her liable to pay that, she will then have left, exclusive of the slaves, property to the amount of $100 only; out of which, it is contended, she ought to have paid a debt of more than $800, and not to have a bed left to sleep on, in order that the negroes may be left for those in remainder: and even that $100 and more were raised by the sale of a horse, at an advanced price, which had been bid in, at the sale.

But the fact is, the debt, for the payment of which she now seeks remuneration, was not a subsisting debt at that time, and could

not have been in contemplation of any of the parties when this engagement was made. It was a decree obtained against the estate three years afterwards. I think therefore

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that the complainant is *entitled to an indemnity for that debt out of the estate: but I do not think she is entitled to interest. She had the use of the property, which ought to be considered equivalent to the interest. If it were not so, she might have stopped the interest by an earlier sale of the property. The decree is reversed.

It is therefore ordered and decreed, that so much of the estate of the said Richard Watts be sold as shall be sufficient to reimburse the complainant the sum of $804 53 cents, and the costs of this suit; to be sold in such manner and upon such terms as the Chancellor shall direct, and that the costs be paid out of the funds of the estate.

Decree reversed.

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2 McCord, Eq. 84

WILLIAM LEVERETT et al. v. JOHN LEVERETT et al.

(Columbia. Jan. and May Terms, 1827.)

[*Life Estates* ⇐4.]

The act which requires the slaves on the plantation of a tenant for life, who dies after the 1st of March of any year, to remain thereon to finish the crop, does not give hire to the remainder man, but confers their services for the remainder of the year to the estate of the deceased tenant.

[Ed. Note.—Cited in Freeman & Freeman v. Tompkins, 1 Strob. Eq. 57, 59; Clifford v. Read, 3 Rich. Eq. 221; Gillam v. Caldwell, 11 Rich. Eq. 81.

For other cases, see Life Estates, Cent. Dig. § 6; Dec. Dig. ⇐4.]

Temperance Leverett, by a deed from Ann Floyd, was entitled during her life to certain slaves; and after her death they were given over to the complainants. The tenant for life died on the 25th day of March 1824. Her executors, the defendants, kept these slaves on the plantation until they finished the crop of that year, under the authority given to them by the act of assembly of 1789 (Pub. Laws, 494), which is in the following words. "If any person shall die after the 1st day of March in any year, the slaves of which he or she was possessed, whether held for life or absolutely, and who were employed in making a crop, shall be continued on the lands, which were in the occupation of the

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deceased, *until the crop is finished; and then be delivered to those who have the right to them; and such crop shall be assets in the executors' or administrators' hands, subject to the debts, legacies and distribution; the taxes, overseer's wages, expenses of physic, food and clothing being first paid; and the emblements of the lands, which shall be severed before the last day of December following, shall in like manner be assets in the hands of the executors or administrators; but all such emblements growing on the lands on that day, or at the time of the testator or intestate's death if that happens after the said last day of December and before the 1st day of March, shall pass with the lands. And if any person shall rent or hire lands or slaves of a tenant for life, and such tenant for life dies; the person hiring such land or slaves shall not be dispossessed until the crop of that year is finished, he or she securing the payment of the rent or hire when due."

The complainants contended that the defendants, the executors of Temperance Leverett, should pay them for the hire of the negroes from the death of their testatrix, on the 25th of March 1824, till the 10th day of January 1825, when the crop was gathered. It was contended by the defendants, that the act of 1789 gave the services of the negroes employed in making the crop, if the tenant for life died after the 1st day of March, for the purpose of making the crop. It was to prevent great injury from the loss of a crop planted, and the difficulty of employing hands after that period. For the complainants, it was answered that that was true; but the legislature never intended that the tenant for life, or his representatives, should have the benefit of their labour without consideration. For reasons of policy, the property was to be kept together; but the interest of the parties was to remain the same; and the executors in this case should be compelled to come to a just account for the profits of the slaves.

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*The question came up upon the report of the Commissioner.

De Saussure, Chancellor. The first exception depends upon the construction of the statute of 1789, which enacts, that on the death of a tenant for life of any estate which may determinate at an uncertain time, such death occurring after the first of March, the slaves of the estate are to be continued on the estate to the end of the year, or as the exception expresses it, "the estate is continued to the end of the year." The complainants contend, and the Commissioner has decided, that though the property be so continued under the statute, it is subject to hire. The statute does not say so, and never to my knowledge has been so construed. I do not think it the sound construction; for I believe an essential benefit was intended, and not an illusory one. The exception must be sustained, and so much of the report overruled and corrected.

The complainants appealed.

O'Neall and Johnson, for the appellants. The legislature only intended to give the estate of the tenant for life the benefit of the labour of the negroes in finishing the crop;

and did not intend to extend the estate of the tenant for life to the end of the year.

The words of the act are, "who were employed in making a crop;" from which it is to be inferred that the legislature solely intended to secure to the estate the labour of the slaves in making a crop, and did not take away the right of the remainder men to hire.

In the latter part of the clause the following words are made use of, "and if any person shall rent or hire lands or slaves of a tenant for life, and such tenant for life dies, the person hiring such lands or slaves shall

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not *be dispossessed until the crop of that year is finished; he or she securing the payment of rent or hire when due." From which it is apparent that the legislature meant to secure the payment of hire, in that event, to the remainder man: and this part of the act explains the previous part, and plainly indicates that the intention of the Legislature was not to take from the remainder man the right to hire.

The doctrine of emblements has no analogy to this case, except so far as the crop growing on land may be regarded as precisely the same as the labour of the slaves; but it does not follow, from the fact of the emblements going to the tenant for life in the case of lands, that therefore, when the labour of slaves is secured to the estate of the tenant for life in completing the crops, the right of the remainder man to claim hire is taken away. They cited 1 Brev. 335. 3 Dane's Ab. 125. Tit. Emblements.

Bauskett and Dunlap, contra. The act expressly makes the crop assets, which plainly declares that the benefit of the labour of the slaves shall go to the executor. The case is precisely like the case of emblements. The latter clause of the act relates only to persons who hire slaves, and cannot control the force of the previous part of the clause, which specifically relates to tenants for life. It is proper where persons hire slaves that the owner shall not lose his hire; and the act expressly provides for it. If it was intended that the representatives of a tenant for life should pay, the act would have provided for that too. Expressio unius exclusio alterius.

Curia, per COLCOCK, J. This Court concur with the Chancellor in his construction of the act of 1789: and I can safely say, that I

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never heard a doubt expressed as *to the correctness of such construction. It is in furtherance of the common law doctrine of emblements, that he who has a right to sow shall be entitled to reap; which cannot be done in this country unless the negroes employed in making the crop are permitted to remain to the end of the year. It would often be of little advantage to the person taking, to remove the negroes after the crop is planted: whereas it might operate as a total destruction of the crop. The appropriation of the crop, as assets in the hands of the executors, certainly negatives the idea of allowing compensation by way of hire to the person entitled to the negroes.

Decree affirmed.

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2 McCord, Eq. 88

WILLIAM HALL, GEORGE COTCHETT, and Others, Executors of Ainsley Hall v. CLAIBORNE CLIFTON and JOHN M'LEMORE.

(Columbia. Jan. and May Terms, 1827.)

[*Abatement and Revival* ⟸67.]

Where a defendant died after the hearing, but before the decree has been delivered, the case does not abate, but the Chancellor may proceed to give his decree.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 336; Dec. Dig. ⟸ 67.]

[*Abatement and Revival* ⟸71.]

[Where one party dies after a hearing upon the merits, and the decree thereupon would be final, the decree may be pronounced without a revivor, notwithstanding the death of a party.]

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 365; Dec. Dig. ⟸ 71.]

This cause was fully heard upon the merits in the summer of 1826, and one of the defendants, C. Clifton, who had answered, died, in the autumn, before a decree was pronounced. Chancellor De Saussure, who heard the cause, decreed that the suit had abated as to C. Clifton, and that no further proceedings could be had in the cause until the suit was revived as to the defendant who died.

The complainants now moved to reverse this decree.

W. F. De Saussure, for appellants. A bill of revivor was unnecessary; and after a full

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hearing in the life time *of a defendant a decree may be pronounced without reviving the suit. He cited Pub. Laws, 79. 9 Ves. 461. 2 Madd. Cha. 398. 2 Fowler's Exch. Prac. 169. 4 Johns. Cha. Rep. 334. One of the parties dying after argument, the decree has relation back to the time of argument. 1 Salk. 8. 10 Mod. 137. 7 Term Rep. 31.

Chappell, contra, cited Coop. Plead. 64. 1 Harris. Cha. 296. 1 Cha. Ca. 7. 2 Madd. Cha. 526.

Curia, per JOHNSON, J. It is admitted on all sides, that this cause had been heard on its merits, and that the decree to have been pronounced by the Chancellor would have been final in its effects and operation. And the cases cited at the bar abundantly establish, that in such a case the decree may be pronounced, although one of the parties in interest die after the hearing, and before the judgment is given. Davies v. Davies, 9 Ves.

461. Campbell v. Mesier, 4 Johns. Cha. Rep. 342.

A suit abates by the death of one of the parties during its progress, because there is no one in Court who is interested, or bound to defend the interests which belonged to him; and they might be compromitted by an ex parte proceeding. But this reasoning cannot apply, when he has had an opportunity of indicating his rights through every stage in which his efforts could avail any thing: and this is the state of things after a final hearing. Besides, the judgment has relation back to the time of the hearing, and in legal contemplation is a judgment in the life time of the party.

This Court is therefore of opinion, that the Chancellor was at liberty to have proceeded to pronounce his decree, notwithstanding the death of the defendant Clifton, and without the consent of his representatives.

Motion granted.

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2 McCord, Eq. *90

*JOHN M'CAW and Wife v. THOMAS G. BLEWIT and Wife, and Others.

(Columbia. Jan. and May Terms, 1827.)

[*Appeal and Error* ⇐1009.]

Decree of the Chancellor on facts is generally conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3974; Dec. Dig. ⇐1009.]

[*Evidence* ⇐265.]

The answer of the defendant, who was called upon to state what advancements had been made to him, that a certain note had been given in settlement of all advances is conclusive, unless rebutted by two witnesses, or one witness and circumstances; or unless the circumstances of the case shewed that higher evidence might have been given of the facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029–1050; Dec. Dig. ⇐265.]

[*Descent and Distribution* ⇐96; *Equity* ⇐345.]

What are advancements to a child, often depends upon the circumstances of the gift.

[Ed. Note.—Cited in Rickenbacker v. Zimmerman, 10 S. C. 115, 121.

For other cases, see Descent and Distribution, Cent. Dig. § 394; Dec. Dig. ⇐96; Equity, Cent. Dig. § 722; Dec. Dig. ⇐345.]

[*Executors and Administrators* ⇐104.]

An executor (under the circumstances) charged with interest from the time of receiving the fund to the commencement of the suit, and for all sums since received with the interest thereon received.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 423–432; Dec. Dig. ⇐104.]

[*Executors and Administrators* ⇐495.]

That which was undertaken gratuitously shall not be converted into a demand.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2089–2106, 2108; Dec. Dig. ⇐495.]

[*Descent and Distribution* ⇐109.]

By hotchpot is meant, that each child is to draw at the death of the parent an equal proportion. But that part of the estate which has been advanced must be estimated at what it is worth at the death, relation being had to its situation at the time of the gift.

[Ed. Note.—Cited in Youngblood v. Norton, 1 Strob. Eq. 122, 127; Ison v. Ison, 5 Rich. Eq. 15, 19; Gillam v. Caldwell, 11 Rich. Eq. 81; Manning v. Manning, 12 Rich. Eq. 428; McLure v. Steele, 14 Rich. Eq. 116; Rickenbacker v. Zimmerman, 10 S. C. 119; Hughey v. Eichelberger, 11 S. C. 52; Ex parte Glenn, 20 S. C. 69.

For other cases, see Descent and Distribution, Cent. Dig. §§ 416, 419, 420; Dec. Dig. ⇐109.]

[*Descent and Distribution* ⇐109.]

The increased value, arising from improvement on lands, or issue of slaves, is excluded by the statute of South Carolina.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 416, 419, 420; Dec. Dig. ⇐109.]

[*Descent and Distribution* ⇐79.]

At the death of the ancestor the rights of the parties are fixed, and the improved value after that period goes in the proportion of the capital, or original fund.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 276–279; Dec. Dig. ⇐79.]

[*Discovery* ⇐27.]

[Cited in Clark v. Meek, 2 Bailey, 392, and in Ison v. Ison, 5 Rich. Eq. 15, 18, to the point that, where a bill called upon the defendant to state the amount of advancements made to him by a relative, a statement in the answer that a particular note given by the defendant included all such advancements was *held* to be responsive to the bill, and evidence for the defendant.]

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 39; Dec. Dig. ⇐27.]

[*Executors and Administrators* ⇐491.]

[Where an executor undertook the execution of a will under an express stipulation that he would not charge commissions, the court refused to allow him commissions.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2082; Dec. Dig. ⇐491.]

[This case is also cited in Cooner v. May, 3 Strob. Eq. 188, 189, 191, on the doctrine of advancements.]

Allen De Graffenreid died intestate on the 7th of January, 1821, leaving a widow and six children. His widow and son-in-law, the defendant Thomas G. Blewit, administered on his estate; and after settling part of the personal estate, with the remaining slaves and stock, raised a large and valuable crop, in 1821, on a part of the lands of the estate; and they leased out the rest of the lands for the year.

At Chester, February term 1822, a partition of the lands and remaining slaves (including nothing else) was made between the distributees, at the suit of Mrs. De Graffenreid and the other distributees against Blewit and wife; several of the distributees, among them Mrs. M'Caw, being yet minors, to whom Blewit in the mean time had been appointed guardian.

The case came before the Chancellor upon exceptions to the Commissioner's report. The appeal came up however only on the following exceptions, which were sustained by Chancellor Thompson.

"Second. That the Commissioner had charged Blewit and wife with the following sums of money as advancements: to wit, to William Foote $815, to S. Chisholme $700: although the defendant expressly denied in his answer that they were advancements. The rule of law being clear, that when a fact is alleged in a bill and denied in the answer, the answer must prevail, unless disproved by two witnesses, or by one witness with strong corroborating circumstances.

"Third. That the Commissioner charged the defendant with $1,375 for cotton made

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on Hurts's plantation in *1815, as an advancement to Blewit and wife, when he, Blewit, expressly denied in his answer having received any part thereof: besides its being proved that the cotton made there went into the possession of Hurts, and that A. De Graffenreid said it was to pay for the land; and that it was also in proof that there was but a small quantity raised there.

"Fifth. As to this exception, the Chancellor remarked, that the Commissioner had charged the defendant with $463 for a horse and gig, &c. The horse had been accounted for by Blewit; and as to the gig, the Court is of opinion, that it cannot be considered as an advancement; the meaning of which term is, such a part of a man's estate as he gives to a child on marriage, or on setting out in life, which may be necessary for its settling in the world. The term advancement does not extend to trifling presents, as a gold watch, or any other gratuity. This exception is therefore sustained.

"Eighth. That the Commissioner charged the defendant with an old book account of $419 with interest; whereas the defendant denied owing one cent, in his answer, which had not been disproved. On this the Chancellor remarked that, independent of the answer of the defendant, there is other evidence to convince the Court, that all amounts, reckonings and demands between the parties were included in the note from Blewit to De Graffenreid for $2,550.

"Ninth. That the Commissioner had charged the defendant with one sixth part of the crop of 1821 made on the intestate's plantation, with interest thereon, as improperly received in the partition and division of the estate. Upon this the Chancellor observed, this Court cannot see what could exclude the defendant from receiving his distributive share, rather than any other distributees.

"Tenth. That the Commissioner charges

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the defend*ant with one sixth part of eight negroes born after the death of the intestate and before the division, with interest thereon, as improprly received by the defendant in the partition of the estate; when, the defendant contends, by law he is entitled to his proportion thereof. This exception was sustained by the Chancellor.

"Eleventh. That at the division the defendant accounted for $2,550, being the same amount as charged against him in a note in which his name is torn off, and which therefore ought not to be charged a second time. The Chancellor remarked, 'that from the evidence it clearly appeared, that the last note was given as a substitute for the former. The certificate of A. De Graffenreid establishes this fact beyond a contradiction. This exception must therefore be sustained.'

"Twelfth. That the defendant ought not to be charged with interest on the amount due from the filing of this bill; as the defendant offered to settle and pay the complainants the money, and the funds have been kept for him." The Chancellor said that, under the circumstances of the case, the defendant should not be chargeable with interest. This exception was therefore sustained.

"Thirteenth. The administrator is chargeable with interest from the time the funds came into his hands; unless he can make it appear that he could not safely put it out to interest. He was afterwards only chargeable with the annual balance.

"Fourteenth. That the Commissioner has allowed the defendant no commissions." The Chancellor was of opinion, that the defendant having obtained the administration on the express condition that he would not charge commissions, he should not be allowed to turn round and demand them. This exception was overruled.

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*The following grounds of appeal were taken up from the Chancellor's decree.

First. That the Court permitted the testimony of Hobson and Mills, the sureties of Blewit as administrator and guardian, to be received; and decreed on it, although it was objected to both before the Commissioner and the Court.

Second. That the defendants' exceptions, though sustained, ought to have been overruled, particularly the ninth, which was not founded on the facts of the case; and the decree deprived the complainants of one seventh part of the crop of 1821, to which it was admitted they were entitled.

[For subsequent opinion, see Bailey, Eq. 98.]

Johnston, for the complainants M'Caw and wife, objected to the Circuit decree so far as it supported the second exception of the defendants. The rule in favour of the denials of facts alleged in the bill, in an answer, is not to be extended. The broad rule laid down by the Chancellor is, at least, questionable, not only on the score of policy but of authority. There are decisions to this effect, that one witness in proof of the bill, unsupported by circumstances, may be weighed against the answer of the defendant: that it is the right of the Court thus to decide on their credibility; and the only way in which the defendant can avoid such an

investigation is, by asking an issue at law, which must be granted. 9 Ves. 283, 284. It will be recollected, the Chancellor in this case was not investigating the evidence in the first instance, but was listening to objections made to the report of the Commissioner, who had heard the evidence and decided on it. According to the opinion of this Court, delivered during the present term, in the case of Warden v. Burts, the Commissioner's judgment on the evidence is to be preferred to the Chancellor's. The rule as

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to contradicting *an answer is, that one witness is sufficient, if more credible than the defendant: if not, two are necessary: or one, and circumstances are required where the witness and defendant are of equal credit; and the judgment of the officer who first hears and decides on the evidence, is to be preferred. But admitting the rule laid down by the Chancellor, the answer must contain a direct and explicit denial. 1 Phil. Evid. 110. Now the answer, as to the $815 paid Foote, contains no denial of the charge in the bill; but on the contrary admits it. Indeed, it admits and avoids it: yet the avoidance consists of a distinct fact: viz. that sum having been settled with the intestate afterwards. When an avoidance consists of a distinct fact, it must be proved. 2 Johns. Cha. Rep. 88, et seq. This is the rule of sound sense. Is not a defendant as much bound to prove his allegations as a plaintiff? Suppose, for instance, an executor admits the receipt of assets, but states that he has paid them out, and files an account of disbursements; is he not bound to prove them? In principle, where is the difference between the present case and that?

But as to the money paid Foote, the rule requiring two witnesses was complied with by the testimony of Mrs. De Graffenreid and Foote.

As to the $700 paid Chisholme. In addition to the right of the Commissioner to believe Chisholme in preference to Blewit, the answer does not distinctly meet the charge. It does not deny the charge that $700 were paid by the intestate to Chisholme; but denies that intestate paid for the slaves George and John. That may be so; and yet $700 might have been paid for other slaves or other property. Chisholme proves that was the fact.

There are other circumstances which tend to shake the general credit of Blewit's answer, and to support the Commissioner's report. 1. He denied the striking out the old accounts and the receipt of the cotton on

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the planta*tion called Hurts's. His answer in both these points was flatly contradicted by credible witnesses.

2. He objected to the decree on the defendants' third exception. Blewit and wife's answers were contradicted by the testimony of Mrs. De Graffenreid, Allen De Graffenreid and Mr. Mosley; yet they were fully supported by Williams. The Commissioner weighed the testimony, and his report ought not to be set aside. Chancellor Thompson did not weigh the testimony, but felt himself constrained by the rule as to two witnesses; a rule which most clearly did not apply.

3. As to the decree on the defendants' fifth exception. The Chancellor's definition of an adancement, and his application of that definition, are questionable. There is difficulty in settling a rule. If a definition may be ventured, "an advancement is the gift of a parent to a child, beyond what by law he is bound to provide, from which a substantial benefit is to be derived by the child." It must be beyond what the parent is bound to provide; for clearly, necessaries or expenses of education are not advancements; and it must be substantially beneficial; otherwise toys and trinkets would constitute it. A horse and gig are not only beneficial, but by custom necessary to settling in the world; nearly as much so as a house, servants, or other things usually considered indispensable.

4. He objected to the decree on the defendants' twelfth exception. The Chancellor assumed the fact stated in the exception as true, although there was nothing in the evidence to support it. The evidence was, that Blewit retracted his offer to settle, and that although the plaintiffs delayed for six months, he made no payments. Who proved that the funds were kept for the plaintiffs? There was no such evidence. On the contrary, Blewit's amended answer stated that the greater part of the estate consisted of

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bonds and notes, which, *instead of being collected and kept, were outstanding at interest.

The Chancellor decreed "under the particular circumstances." Disclaiming any intention to censure the Chancellor, it were to be wished that decrees "under the circumstances" were out of fashion. They are a cloak to the exercise of arbitrary discretion, and by the omission to state the facts, or define the circumstances, the party against whom the decree is pronounced is often deprived of the means of setting it aside, even when erroneous.

Upon what circumstances could the Chancellor have relied? Was Blewit willing to settle? The evidence said not. Was the money kept to await the decree? The evidence, and Blewit's own answer said it was not. Was he receiving interest on the funds? His answer admits that he was. Was the Court prepared to lay down the doctrine, that interest stops on filing a bill? This decree said so; and gave the defendants seven per cent. per annum for postponing cases. The decree gave Blewit twenty-five per cent. on bonds drawing interest; being the amount

of interest since July 1823. If this be the law, it ought to be known. No executor or administrator will hereafter settle, until he is sued. It is said Blewit was obliged to stand suit; that advancements were charged against him, for which he was not bound to account. Admit this, still did he not know how much he was willing to pay? Why not tender it, either in money or the securities of the estate? In principle, is not a defendant in Equity as much bound to tender either the one or the other, as he is bound to tender money at Law?

On the other hand, is it not true, that the plaintiffs were obliged to sue? The decree admitted, they had a right to recover. Now, if they were desirous to sue, and had a right to recover, why not give them interest on what they were entitled to? The con-

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stant practice is *to give interest in such cases, unless the defendant had shewn, that he could not make interest. In cases where, at the trial, the funds consisted of paper, the plaintiff is usually given the alternative of taking his share, or the defendant is allowed a reasonable time to collect; which would not have been objected to by the plaintiffs in this case.

5. He took up the decree on the eleventh exception of the defendant. The question is presented, whether the record in the partition case can be explained by letting in Blewit's declarations, made at the time, to shew that the entry in the record of partition, "cash at sundry times, $2,550," referred to the note of $2,550. Even if such testimony were competent, the complainants are entitled to their share of the interest on the note up to the partition.

6. He proceeded to the decree on the defendants' sixth, ninth, and tenth exceptions. He would consider the ninth exception only, as the others clearly depended upon the same principles.

The Chancellor here again, without proof, assumed the facts stated in the exception: and considered the crop of 1821 as having already been partitioned.

Williams. It is admitted that the crop of 1821 was not partitioned. The statement to the contrary, in the ninth exception, proceeded from mistake. The plaintiffs were entitled to either one-sixth or one-seventh of the crop.

Johnston, in continuation. The decree however deprived the plaintiffs of any part of it. The doctrine about to be contended for would present totally new points of construction of the act of 1791. It was felt to be a duty to contend for a construction of that act

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wholly *repugnant to what on the Circuit was deemed its clear meaning.

The intestate died in January 1821. If Blewit had then applied for partition, his previous advancements would have amounted to his full share of the estate, as it then stood. He would therefore have been entitled to no share of the estate on hand; but that would have been divisible among the unportioned distributees. By postponing the partition, he could not become entitled to a share of either the increase or profits of an estate in which he had no interest at the intestate's death.

Partitions must be made, let them take place when they may, in reference to the state of things existing at the death of the intestate. If a child has been advanced his full share of the estate as it then stood, that child can take no part of after increase or profits. If his or her advancements fall short of the share, his or her share of after increase and profits must be in proportion to the deficiency. This is the true intent and, it may be added, the clear meaning of the act. When the convention imposed an obligation on the legislature to pass this act, they were actuated not only by the spirit of natural justice, but by considerations of profound policy and wisdom. Equality is the very basis of a popular government. An equal distribution of wealth is attended with an equal distribution of the means of obtaining intelligence; the life and soul of a government of the people. To secure these was the object of the convention. That construction most favourable to equality is in accordance with the act. The act, standing in the place of the parent at his death, observes to one child, "some years ago I gave you twenty slaves; their increase and the profits of their labour, being the result, shall also be the reward of your care and diligence. I now give twenty slaves to each of my other children; let their care and diligence be rewarded in

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like manner by their *increase and labour." Thus the act gives each child an equal share. Were partitions to be governed by the rule laid down by the Chancellor, what inequality and injustice would result therefrom! A parent, having forty slaves and one child, gives twenty of them to him. He lives until his son's slaves by procreation have increased to one hundred, and his own to an equal number. Just before his death he has another son born. He dies, leaving these two sons. Shall the advanced child, not satisfied with his own increase of eighty slaves, nor with half of the increase of his father's stock, be allowed to wait ten or twenty years longer until his ancestor's estate by compound increase upon increase has trebled itself, and then come in for an equal share of the whole, by merely accounting for his original twenty slaves?

Again, suppose a case like the present. A child who has been advanced gets himself appointed guardian over his brothers and sisters. Knowing that he has been fully ad-

vanced, he does not claim immediate partition. Having the reins in his own hands, he calmly waits out the whole period of his wards' minority. If the intestate's estate does not increase, he says nothing about partition: but if it should, he instantly makes hotchpot and claims it. There are many other circumstances pointing out the death of the intestate as the period of partition.

1. Advancements are required, by the act, to be estimated by their value at the death of the ancestor. The rule is, to inquire what the article given in the situation it was when given, would be worth at the donor's death.

2. The act declares the estate distributable at the intestate's death.

3. When a child in making hotchpot retains the property originally advanced, it changes the mode of taking from purchase to inheritance, 2 Murph. 133. This implies that the

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partition must relate to the period *of the ancestor's death: that being necessary to connect the ancestor and heir: so that the estate which passes out of the one shall instantly enter into the other.

4. If a child adheres to advancements, he or she is not liable for the ancestor's debts on the score of assets descended: otherwise, if he makes hotchpot. This implies the same relation back to the time of the ancestor's death, in order to clothe the child with the character of an heir.

5. By the act, the estate of one dying after March shall not be instantly distributed. This is an exception, and proves the rule.

Williams, contra.

1. As to the amount paid Foote, he cited Harper's Eq. Rep. 200.

2. As to the amount paid Chisholme, Harper's Eq. Rep. 142. 2 Sch. & Lef. 532.

3. As to the crop given with the plantation called Hurts's he said, considering the testimony was conflicting, the Chancellor's decision ought not to be set aside.

4. He submitted whether the horse and gig constituted an advancement?

5. As to interest, he cited 3 Desaus. Rep. 241. 4 Desaus. 556. After suit commenced, Blewit could not safely let out the funds, not knowing when he would be called on for them.

He consented that complainants should have interest on such parts of the funds as draw interest: but not as to money in hand.

6. As to commissions, he contended that the decree should be reversed. Blewit's contract was without consideration, and made under a mistake.

7. As to the decree on the sixth, ninth and tenth exceptions of defendants, he conceived the decree should be affirmed. The doctrine

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contended for by com*plainants w*s novel, and until now unheard of. Both the Chancellors were opposed to the complainants' construction of the act of 1791.

Johnston, in reply. As to commissions, Blewit's contract was proved. It was made with the Ordinary, for the benefit of the infants, and would inure to their benefit. It was not without consideration, for, inasmuch as Mrs. De Graffenreid would have administered without charge, it would be a fraud on the infants to allow Blewit to charge. His extra trouble could not entitle him to it; he must sue at Law for that. He could have been of no service in the surveys: besides, he must have attended on his own account as a distributee, and not as an administrator; and for this he charges at the rate of $8,000 per annum.

Curia, per COLCOCK, J. In this case I shall pursue the order which has been observed in the argument on the different exceptions. We concur with the Chancellor in the view which he has taken of the facts, and in so much affirm the decree. It is true that there is great room to doubt as to some of them; but it is impossible for this Court to weigh with scrupulous exactness the evidence which was given before the Commissioner. Should we attempt to do so, we have no guarantee that we should approach any nearer to the justice of the case than the Chancellor has done; for it must be obvious to every intelligent mind, that at every interval from the source of information the difficulty of ascertaining the truth is increased.

The two first objections may be considered together; for the reasoning on the facts, and the law on them, are equally applicable to both. As to the sum paid to Foote there can be no doubt; and though there may be some as to that paid to Chisholme, yet, the

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most that can be *made of the facts is, that there is oath against oath; and that certainly affords no ground to disturb the decision. But as to both, the defendant says the note of $2,500 contains all the advancements made by the intestate for him. And it appears that this note is of a date subsequent to the payment of all those sums, and made on a final settlement; and therefore affords strong evidence of the truth of the defendant's answer. Now it is said that this is matter in avoidance, and should have been proved by the defendant; but the law does not require that which is impossible. How could the defendant prove his assertion, except by his oath? If there had been regular books kept between them as to these matters, it would have been susceptible of proof; but from the nature of the transaction, and the relative situation of the parties, it was not to be expected that such clear and satisfactory evidence could be produced as might have been furnished in a matter of

dispute between two merchants keeping regular books. The observations which have been made apply with equal force to the cotton charged; for if the testimony of Allen De Graffenreid be put out of the case, there is the oath of the defendant and the overseer against that of Mosley: and if admitted there would still be a preponderance in favour of the defendant; for a man may not consider himself bound to deny every thing which he knows to be untrue, that is stated in his presence. If he does so when called on his oath, and that oath is not disproved, the bare circumstance of his not having denied it before is not sufficient to discredit him.

On the fifth exception, which relates to the horse and gig, I would remark, that it is not always clear what shall be considered as an advancement. Much depends on circumstances. I cannot but think that the same article of property, given under different circumstances, might be differently viewed in this respect. Thus a *horse given by a farmer of limited property to one of his sons, for the purposes of agriculture, may be considered as an article of use and necessity, and therefore regarded as an advancement; while another horse given by a wealthy man to his daughter, to be driven in a carriage, would be considered as an article of mere luxury, like a gold watch or ring, and not to be charged as an advancement. Is it reasonable to suppose that the intestate in this case would have so considered the gig and horse? I think not.

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On the subject of the note for $2,500, I can perceive no difficulty. It is brought into the account by the executor with apparent fairness; and if there was any other note due by him to the testator, it is certain that no evidence has been offered to prove it. I think the vague and slight suspicions which seem to have been indulged on the subject are sufficiently removed by the production of the certificate of the intestate. That the interest should have been charged on the note, is admitted by the defendant's solicitor, and must be taken into the account. On the subject of interest generally, it is the opinion of my brethren, that the executor must be charged with it from the time of receiving the different sums of money to the commencement of this suit; and for all sums since received, with the interest thereon received.

On the question of commissions, the Court are unanimously of opinion that the executor is not entitled to them. He voluntarily undertook the duty under the express stipulation that he would not charge them; and he cannot now be permitted to violate that contract. That which was expressly declared to have been intended as a gratuity shall not now be converted into a demand.

The last question raised in this case is by no means free from difficulty. How the property which is brought *into hotchpot is to be estimated does not seem to be determined. The great object of our statute was to produce equality among the children of a deceased person: and it has been contended, that the equality is to have relation to the time of the death; because then the estate is to be divided, and then the property valued. But this is an incorrect view of the subject, and one which could not be carried into operation. There might arise many objections to its practical operation, such as the loss of the property before the death of the ancestor, or the disposition of it by the child advanced. The true intention of the law is, that the estate of the ancestor is to be considered as a common fund, out of which each child is to draw at the death an equal proportion. That part of the estate which has been given is to be estimated at what it is worth at the death, relation being had to its situation at the time of the gift. Thus a father gives to one of his sons a healthy negro boy of twelve years of age, and ten years after the gift the father dies. If this boy be brought into hotchpot, his value will be estimated as that of a boy twelve years old; and whatever such a boy would then bring, the child is to be charged with as an advancement. The increased value of the property given which arises from improvement is expressly excluded by our act, which constitutes an important difference between it and the statute of Charles. The clause of our act is, "In case any child, or the issue of any child who shall have been so advanced, shall not have received a portion equal to the share which shall be due to the other children (the value of which portion being estimated at the death of the ancestor, but so as that neither the improvement of the real estate by such child or children nor the increase of the personal property shall be taken into the computation), then so much of the estate of the intestate shall be distributed to such *child or issue, as shall make the estate of all the children equal."

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As to the claim of the defendant to any portion of the improved value of the estate since the death, that of course must depend on his claim to any part of the capital of the estate. The rights of the parties are fixed at the death of the ancestor. If, therefore, on taking the final account, it shall appear, that the defendant's advancements do not place him on a footing of equality with the other children, he will of course be entitled to receive from the capital of the estate such a sum as will produce that equality, and consequently a proportionate share of the increase or profit which has arisen since the death. The decree of the Chancellor is, therefore, so modified as to meet this view of

the case, and an account to be accordingly taken. The crop of 1821 has not been divided, and of course is to be taken into the account.

Decree modified.

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2 McCord, Eq. 105

JAMES K. DOUGLAS v. ROBERT FRASER, Executor of J. B. Fraser.

(Columbia. Jan. and May Terms, 1827.)

[*Executors and Administrators* ⟸275, 438.]

Where a bill was filed against an executor for a debt due the complainant by the estate, for which the executor had given his own note, it was held, the bill was well brought, and that it was unnecessary to make the legatees parties, no distribution having taken place, or being alleged; and an order of reference to inquire into the amounts received by the legatees set aside, not being within the allegations of the bill, and the legatees not being parties.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1083, 1775; Dec. Dig. ⟸275, 438.]

The bill stated that J. B. Fraser, the defendant's testator, in his life time became indebted to Hugh M'Call & Co., merchants in Camden, the sum of $462 70 cents, for goods, wares, and merchandise; that the defendant, after his death, as his executor, took up other goods, wares, and merchandise, to the amount of $422 99 cents, for the use and benefit of the estate. That the de-

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fendant *afterwards liquidated the demand by giving his note for both accounts, amounting in the whole to 885 69 cents. That the copartnership of Hugh M'Call & Co., of which the complainant was one, was afterwards dissolved, and upon a division of the effects, this note was transferred to the complainant. That a suit had been brought, and a judgment and execution obtained upon the said note, and that the Sheriff had returned nulla bona upon the execution, by which it appeared that the defendant was insolvent.

The object of the bill was, to subject the estate of J. B. Fraser, in the hands of his executor, to the payment of this debt. The defendant put in no answer, but suffered the bill, January 1825, to be taken pro confesso, against him.

At February term 1825, Chancellor De Saussure made the following order.

Ordered, That this case be referred to the Commissioner, to ascertain and report whether the account is properly charged against the estate of J. B. Fraser; also, whether the executor has delivered over the estate to the several persons interested, under the will of the testator; and whether any of them, and which of them have settled with the executor for his particular claim against the estate; and whether there are any, and what facts in the case, which discharge such of them as have settled with the executor from the payment of their proportion of the said claim.

Upon the reference, the Commissioner Mr. Miller, on the 1st of November 1825, made the following report.

"In obedience to the order of reference in this case, I have been attended by the parties, and find that the account against John B. Fraser deceased, for articles furnished to him in his life time, by the complainant and those under whom he claims, amounts to $462 70 cents. I further find that after the death

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of the said J. B. Fra*ser, his children Robert Fraser, Jane Fraser now wife of Thomas Boone, Mary Fraser now wife of G. S. C. Deschamps, Ladson Fraser, and Elias L. Fraser lived together for some time, during which time the balance of the account exhibited by complainant, amounting to $422 99 cents, was contracted by the executor of the said J. B. Fraser for the benefit of his estate, and for his children, and is properly charged against the estate. I further find that the executor has not delivered over to the several persons interested, under the will of the testator, the whole of the property to which they are entitled. I further report, that the wife of Mr. Deschamps has a receipt from the executor, dated the 2d of December 1823, for her proportionable part of the judgment obtained by A. M'Donald, indorsee of Hugh M'Call & Co. against Robert Fraser, the executor of the estate of J. B. Fraser, on the note given by him for the account against the estate. But as the receipt recognises the judgment as an existing demand against the estate; and as no discharge of the estate by Hugh M'Call & Co., or the complainant, has been offered in evidence, I deem this receipt given by the executor insufficient to discharge the estate, or that portion of it to which Mrs. Deschamps is entitled. I further find that Thomas Boone has a receipt from the executor, dated the 3d of January 1825, nearly five months after the filing of the bill in this case, for his wife's proportion of the debts of the estate of J. B. Fraser. None of the other heirs of the estate have exhibited any testimony before me. Upon a review of the evidence, I am of opinion, that the estate of the testator, in the hands of the executor, or of those to whom he has delivered any part of it, is still liable to complainant for $885 69 cents, the amount of his account. I am further of opinion that, under the circumstances of the case, the complainant is entitled to interest on his account from the 1st day of January 1821, when the account was stated by the executor."

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*On the 20th of February 1826, the Commissioner made a further report, as follows.

"In addition to my first report, I beg leave further to report, that since that report was

made out, the Sheriff of Orangeburg has returned, on the execution of A. M'Donald indorsee of J. K. Douglas v. Robert Fraser, that by the sale of the defendant's property, he has made upon the said execution $695.-83½, which he has paid over to the plaintiff, J. K. Douglas.

The principal of the debt in the said case, was	$1051	07
Interest on $885 69 from the 10th of October 1823 to the 7th of November 1825, two years and one month	129	14
	$1180	21
Costs of said suit	37	48
	$1217	69
Then collected by sale	695	83½
	$ 521	86½

"I beg leave to report that the balance due to the said complainant is $521.86½, with interest thereon from the 7th of November 1825."

To these reports the defendant's solicitor filed the following exceptions.

"The defendant excepts to so much of the report as charges G. S. C. Deschamps and Boone. And on the ground that interest was allowed on the open account. And likewise, that there was no evidence before the Commissioner, as to the priority of M'Call and Douglas's debt."

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*On the 21st of February 1826, Chancellor Thompson made the following decree.

"The Commissioner submitted two reports in this case, to which exceptions were made and argued. It is ordered and decreed, that the complainant James K. Douglas do receive from the said Robert Fraser, as executor of the last will and testament of John B. Fraser, $521.86½ and interest thereon from the 7th of November 1825, being the balance reported by the Commissioner as due to the complainant by the estate of the said John B. Fraser."

From that decree, the following grounds of appeal were taken by Miller for the defendant.

First. That the legatees ought to have been made parties.

Second. That some of the legatees showed that they had accounted with the executor for their proportion of this debt, and others of the legatees had no notice.

Third. That complainant had elected to take this debt as a personal one on the executor, and had discharged the estate, and enabled the executor to charge the legatees for this debt; and therefore the executor must account and show that the estate is indebted to him, before any decree ought to pass against the property of the legatees.

J. G. Holmes, contra, urged that,

1. The executor alone is defendant, and properly so, as the sole representative of the estate.

2. The demand is not disputed by the executor, and is regularly against the estate.

3. The heirs of the estate are not, and ought not to be parties.

4. The executor does not, and the heirs cannot appeal.

5. The order of Chancellor De Saussure was improper, but being interlocutory could not be appealed from.

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*6. The first report of the Commissioner, and the only important one, was made out six months before the meeting of the Court, and no exceptions had been filed to it: although the counsel for the heirs had full and explicit notice of it.

7. The last report was a mere credit, founded on the return of the Sheriff on an execution, which was in Court, and exhibited to the counsel. But strike out that report, and the only question that can then occur is upon the first report.

The facts stated in that report and admitted by the exceptions show,

That the debt was due by the estate.

That the executor gave a note signed by him as executor for the amount of the account.

That no discharge was given of the debt or account.

That the executor being sued on his note in his individual capacity was insolvent.

That the account is still a subsisting one against the estate.

That the account of Deschamps and wife, heirs of the estate, is a receipt from the executor for money to be applied to the payment of the judgment to him on the note, and therefore recognizes the debt after the note was given as a subsisting debt against the estate.

That the receipt of Fraser, another of the heirs, is five months subsequent to the filing of the bill.

Curia, per NOTT, J. The only difficulty which has presented itself to the Court in this case, has arisen from certain irregularities which occurred in the progress of the cause. The only object of the bill was to subject the estate of the testator to the payment of a certain debt, which it is alleged was contracted for the benefit of the estate; and for which the defendant, as executor, has made himself personally liable. The legatees,

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or *next of kin to the testator, are not made parties. They are not called upon to contribute. It is not alleged that there is not property enough in the hands of the executor unadministered to pay the debt. It is not alleged that the executor has paid over the estate, or indeed any part of the estate to the persons interested in the distribution. The simple question therefore for the consideration of the Chancellor was, whether the estate was properly chargeable with this debt. The order of reference of February 1825, di-

recting the Commissioner to make inquiry and report the evidence in relation to that question, was unquestionably correct and proper. But the other part of the order related to matters not embraced in the bill; and went to involve the interests of persons not parties to the proceedings. That part of the order therefore, and all the proceedings upon it, must be reversed. The persons ultimately interested in the distribution of the estate have an interest in the payment of this debt, as it goes to diminish the dividends which they will receive. But they have the same interest in every debt which the executor is called upon to pay. If the executor is wasting the estate, or if he is entering into collusion with the complainant to impair their rights, they have their remedy. But it does not belong to the Court to volunteer its aid unasked upon the presumption that they are entitled to such relief.

This view of the subject disposes of the two first grounds of the appeal. Indeed it disposes of the whole case. For as it regards the executor, he admits all the allegations in the bill, and is satisfied with the decree. And the Court cannot entertain an appeal at the instance of persons not parties to the proceedings. The decree cannot affect them except in the manner abovementioned, and in which they cannot have relief without being made parties, which they have not asked. But I apprehend that the mere circumstance

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of the executor having *liquidated the demand, cannot exempt the estate from the payment of a debt otherwise chargeable upon it. The executor as trustee is entitled to all disbursements made in behalf of the trust estate. Cater v. Eveleigh, 4 Desaus. Rep. 19, [6 Am. Dec. 596;] James v. Mayrant, 4 Desaus. Rep. 591, [6 Am. Dec. 630;] Montgomery v. Eveleigh, 1 M'Cord's Eq. Rep. 267.

The counsel appear to consider this as a decree against the legatees; and taken with reference to the proceedings as they originally stood in connexion with the reports of the Commissioner, it might have admitted of that construction. But modified as the proceedings now are, it can only affect the estate of the testator in the hands of the executor to be administered; and as such must be affirmed.

It is therefore ordered and decreed that the decree of the Chancellor be affirmed, so far as it went to charge the estate of the deceased in the hands of the defendant as executor.

Decree modified.

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2 McCord, Eq. 112

HOWELL WESTBROOK v. PATRICK HARBESON, and Others.

(Columbia, Jan. and May Terms, 1827.)

[*Evidence* ⟸433.]

Parol evidence sometimes admitted, on the part of a defendant, to shew a mistake in a deed to prevent the specific execution of it, but never on the part of the complainant to set up a different deed from that which has been executed.

[Ed. Note.—Cited in Ryan v. Goodwyn, McMul. Eq. 453, 456.

For other cases, see Evidence, Cent. Dig. §§ 1999–2004; Dec. Dig. ⟸433.]

[*Evidence* ⟸266.]

The declaration of a magistrate who was dead, that a mistake in a deed was made by him, is inadmissible, being hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1059; Dec. Dig. ⟸266.]

[*Evidence* ⟸433.]

The Court will not admit parol evidence to show that a renunciation of dower before a magistrate was intended as a release of inheritance.

[Ed. Note.—Cited in Ryan v. Goodwyn, McMul. Eq. 456.

For other cases, see Evidence, Cent. Dig. §§ 1725, 1999–2004; Dec. Dig. ⟸433.]

[*Reformation of Instruments* ⟸32.]

The Court will not readily correct mistakes after a lapse of time.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119–121; Dec. Dig. ⟸32.]

[*Equity* ⟸346.]

[Where a party, with knowledge of the facts, has suffered several years (in this case 12) to elapse without taking any steps to reform a deed on the ground of mistake, a bill to correct the mistake must be supported by the most satisfactory evidence.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 726; Dec. Dig. ⟸346.]

[This case is also cited in Westbrook v. McMillan, 1 Bailey, 259, as to facts.]

The bill stated that Patrick Harbeson and Jane his wife conveyed to their son James one hundred and sixty-five acres of land, being part of a tract of three hundred and sixty-five acres in the district of Chester, which they claimed by descent from Dougal Ballentine, the father of Jane; and that James, the son of the said Patrick and Jane

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Harbeson, paid them a valuable con*sideration for the piece of land aforesaid. That James had since sold and conveyed to complainant a moiety of the land, which complainant had afterwards sold to one John M'Millan, who was now in possession of the same. That Jane Harbeson lately departed this life; and that her heirs at law were setting up a claim against the land, on the ground that Jane had only renounced her dower instead of her inheritance. And that John M'Millan, the purchaser, had refused to pay complainant for the land in consequence of such claims on the same. The bill further stated that the said Jane Harbeson intended to convey to her son James an absolute estate in fee simple in the lands; but owing to the ignorance or error of the justice of the quorum before whom she was examined, she relinquished her dower instead of her inheritance. The bill prayed that her heirs, who were the defendants, might be compelled to release their right to the land.

It was proved that a valuable consideration was paid by James for the land; and as much as had been offered for it by others. Jane Harbeson, who obtained the land by descent from her father, signed the deed of conveyance with her husband. And the magistrate certifying her renunciation of inheritance on the back of the deed, stated that she had of her own free will and accord, &c. voluntarily released and relinquished to James Harbeson, his heirs and assigns, all her interest and estate, and also all her right and claim of dower to all and singular the premises mentioned in the said deed.

Chancellor Thompson admitted parol evidence to prove that this was intended as her relinquishment of inheritance, and not merely a renunciation of dower; and that it was occasioned by the ignorance of the magistrate before whom she relinquished the in-

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heritance, *and he being dead, his declarations to that effect were admitted. The Chancellor then decreed that the heirs of Jane Harbeson should make titles to John M'Millan the purchaser, to whom James Harbeson had conveyed.

The defendants appealed from this decree.

Williams, for the appellants, contended that the declarations of the deceased magistrate were not admissible, and that his honour erred in ordering the heirs at law of Jane Harbeson to make titles. Inheritance does not pass by renunciation of dower. 2 Const. Rep. 121. 3 Desaus. Rep. 84.

A. W. Thomson, contra. It will not be denied, that a Court of Equity will correct a mistake made by a scrivener on a misconception of the intention of the parties. 1 Fonbl. 122. The Court will order a new deed of bargain and sale, when the operation of the first has been defeated by not recording it. The Court will not supply the non-execution of a power, but will aid a defective execution of it. 1 Madd. Cha. 51. The Court will supply the omission of the word "heirs" in an award. 1 Madd. Cha. 67, 79. A defective conveyance will be made good against the heirs as well as the ancestor. 1 Madd. Cha. 50. The defect was concealed in the life time of Mrs. Harbeson, which was a fraud on the purchaser, as she might have voluntarily perfected the deed. The Court has compelled the execution of a power, although two witnesses were necessary. 1 Madd. Cha. 53. The Court will compel the husband to procure the wife to carry into effect a contract for the sale of her estate. 1 Madd. 393, 400. Instruments void at Law may be sustained in Equity. 18 Ves. 423. The Court will correct a mistake arising from ignorance of law. An omission by mistake stands on the same ground as that of a

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mis*take by fraud. 1 Ves. & Beames, 363. If the mistake arises from intention, accident or fraud, Equity will rectify it. 2 Sch. & Lef. 562. 1 Bro. Cha. Ca. 363.

Clendinen, in reply. The case turns on the construction of our own act, which requires that the inheritance shall be renounced in the form prescribed, and unless it is so done and recorded, it is declared absolutely void. Every one is presumed to know the law, and the law will not presume that there can be any mistake with respect to the law. You cannot therefore come at the proof, and the Court cannot relieve against it.

Curia, per NOTT, J. There are two questions for our consideration in this case.

First. Whether any parol evidence ought to have been admitted to contradict the deed, by shewing a mistake either in law or fact?

Second. Whether the evidence was sufficient to establish the fact that there was a mistake?

It will be here remarked, that this is a bill to correct a mistake in a deed, so as to give it a more extended operation than it purports on its face; or rather to establish another in its place, carrying a different and larger estate than the original purports to convey. Its object, therefore, is to violate one of the first and best settled rules of evidence, to wit, "that parol evidence shall never be admitted to contradict, explain or vary a written instrument." I admit that there are many exceptions to that rule: and that there is great difficulty in reconciling the various cases upon the subject. But among all those conflicting decisions, I am of opinion, that it will be difficult to find one which will authorize the admission of the testimony which has been received in this case. There are many cases where parol evidence has been admitted on the part of a defendant, to shew

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a *mistake in a deed in order to prevent the specific execution of it; but I am not aware of any, where it has been admitted on the part of the complainant to set up a different deed from the one which has been executed. Phillips, in his treatise on Evidence, says, "It does not appear, from any reported case, that the complainant has ever been allowed to give parol evidence, varying a written agreement, on the ground of mistake or surprize." Phil. 353, 354. In the case of Walker v. Walker, 2 Atk. 100, Lord Hardwicke throws out an intimation, that such evidence might be admitted.

In the case of Joynes v. Statham, 3 Atk. 388, the Lord Chancellor permitted the defendant, by parol evidence, to disclose a fact, which did not appear on the face of the deed; and in that case also observed, that if the defendant had been the complainant, and had brought his bill for a specific performance, he did not see but he might be allowed the benefit of the same testimony. But in the case of Climan v. Cook, 1 Sch. & Lef. 22, Lord Redesdale referring to those

cases remarks, "there seems to have been somewhat of a floating idea in the mind of his Lordship, that by possibility, a case might be made, in which even a plaintiff might be permitted to shew an omission in a written agreement either by mistake or fraud. However, I can find no decision except the contrary way." Lord Eldon, in the case of the Marquis of Townsend v. Stangroom, 6 Ves. 328, says, "that those producing evidence of mistake or surprize, either to ratify an agreement, or calling upon the Court to refuse a specific performance, undertake a great difficulty; but it does not follow that such evidence is therefore incompetent." In the case of Woollam v. Hearn, 7 Ves. 218, the Master of the Rolls lays down the rule that parol evidence is never to be admitted to correct a mistake in favour of a plaintiff seeking the specific performance of an agree-

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ment. It is not my in*tention however to express any opinion on that question at present. And I have referred to those cases, merely for the purpose of shewing how cautious eminent Judges have been in admitting an invasion of that necessary and most salutary rule of evidence. But whatever the general rule may be, evidence, which is incompetent for any other purpose, ought not to be received, to contradict or vary a deed.

The declaration of the magistrate, that the mistake happened through his ignorance, was only hearsay, and ought to have been rejected.

The only remaining evidence of mistake is the testimony of James Harbeson, who bought the land: he says his mother acknowledged that she had sold all her right. But that was nothing more than what she had already acknowledged under her hand and seal. And there she appears to have considered her right to be nothing but a right of dower. That right she was willing to renounce, and did renounce, and nothing more. But a solitary, and at most an equivocal expression of that sort, ought not to have the effect of destroying the legal operation of a solemn deed; and particularly one which the law, through an abundance of caution, has required to be executed with more than ordinary solemnities. It is said that the purchaser paid the full value of the land. But that was a matter in which the wife had nothing to do, and of which she probably had no knowledge. It is also contended, that she joined her husband in the conveyance which went to pass her inheritance. But under what circumstances, whether voluntarily or by compulsion or persuasion, we know not. It is only from the official certificate of the magistrate, that we are to ascertain that fact. And from that it appears, that she was willing to renounce her dower only. And although it furnishes some reason to suppose that she had no very distinct notion of what her right

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was, it does not au*thorize the conclusion, that if she had been better informed, she would have been willing to have renounced more. But another view not more favourable to the complainant is, that notwithstanding he had a full knowledge of the fact, he suffered it to remain for twelve years, until the magistrate, the most important witness to prove the fact, if it existed, and the old lady, who alone could correct it, are both dead. And he ought not to be permitted, after such a lapse of time, and after the means of ascertaining the truth has been lost by his own neglect, to deprive these defendants of their inheritance upon such feeble and unsatisfactory evidence. The complainant does not even allege in his bill, that he has lately discovered the mistake, but on the contrary he goes back, for evidence to prove it, to a period of time which shews manifestly that he did know it; or, what we have a right now to conclude, that he knew the contrary, and would not venture to commence his suit until those witnesses were gone. I am of opinion that the defendant has failed to support his case; and that the decree must be reversed, and the bill dismissed with costs.

Decree reversed.[1]

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[1] Vide post. 137, the case of Mayo v. Feaster; and the case of Gibson v. Watts, Vol. I, McCord, Eq. 490.

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2 McCord, Eq. 118

CHARLES and ALEXANDER RABB v. DAVID AIKEN.

(Columbia. Jan. and May Terms, 1827.)

Jurisdiction of Equity in the partition of lands.

[*Descent and Distribution* ⟸74.]

The law of intestates vests only an inchoate right in the heir to land, before partition.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 227, 228, 237–242, 260–262; Dec. Dig. ⟸74.]

[*Partition* ⟸39.]

Under the act of 1791 a distributee of lands may go either into Equity or Law for partition. If an adverse title is set up, an issue at Law may be directed.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 93; Dec. Dig. ⟸39.]

[*Partition* ⟸39.]

Quære, Whether tenants in common and joint tenants should be allowed to go into Equity for partition, there being no obstacles to their proceeding at Law for want of title deeds, &c.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 93–96; Dec. Dig. ⟸39.]

[*Execution* ⟸44.]

The act of 1791, of distributions, vests no immediate right. It is inchoate until the lands are partitioned or the goods distributed: and an execution against one of the distributees has

no lien on his undivided share until assigned to him in partition.

[Ed. Note.—Cited in Black v. Steel, 1 Bailey, 307; Burris v. Gooch, 5 Rich. 6; Riley v. Gaines, 14 S. C. 457; Pendergrass v. Pendergrass, 26 S. C. 29, 1 S. E. 45.

For other cases, see Execution, Cent. Dig. § 143; Dec. Dig. ⟸44.]

[*Judgment* ⟸747.]

Proceedings in partition are conclusive upon the parties and their privies.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1053, 1284–1296; Dec. Dig. ⟸ 747(2).]

[*Execution* ⟸264.]

[Cited in Johnson v. Payne, 1 Hill, 113, Starke v. Harrison, 5 Rich. 9; and Garvin v. Garvin, 1 S. C. 62, to the point that, if the share of a distributee of an intestate under the act of 1791 is subject to execution against him before partition, the purchaser at the sale on execution takes subject to a partition, and cannot disturb such partition, though a compensation in money be allotted to the execution creditor.]

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 747; Dec. Dig. ⟸264.]

[*Partition* ⟸34.]

[The proper proceeding for partition in equity is by petition.]

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 88; Dec. Dig. ⟸34.]

This bill was filed for partition of part of a tract of land of which William Rabb,

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the father of the defend*ants, died seised. William Rabb died intestate, leaving a widow and nine children; against one of whom, Robert Rabb, there had been a judgment and execution in favour of one Andrew Wicker. This judgment had been renewed by scire facias; and on the 24th of September 1822, the execution was levied by the Sheriff of Fairfield district on Robert Rabb's right and interest in the tract of land; and on the 2d of December 1822, the same was purchased at Sheriff's sale by the complainant for $65. On this purchase the complainant filed his bill for partition against the defendants Charles and Alexander Rabb. The defendants on the trial produced the record of the proceedings in partition between the widow and heirs at law of William Rabb in the Court of Common Pleas, Fairfield district; by which it appeared, that the whole of the land, by the judgment of the Court of Common Pleas, Spring term 1818, had been divided, and one part thereof vested in Elizabeth Rabb the widow, one other part thereof in the defendant Charles Rabb, and the remainder in the defendant Alexander Rabb; and that a sum of money was assessed, by the Commissioner appointed by that Court, to be paid to Robert Rabb and the other brothers and sisters of the defendants, in lieu of a distributive share of the land. That sum of money had been paid by the defendants to Robert Rabb previously to the levy and sale by the Sheriff, and without notice of any such claim against the land. The defendants insisted by their answer, that the judgment of the Court of Common Pleas, on their proceedings in partition, was a bar to the complainant's claim. That they held the land by a title adverse and paramount to any claim set out by the complainant in his bill, and prayed the opinion of the Court, whether the complainant's bill ought to be sustained, inasmuch as it involved the title to lands. The answer stated that the execution of An-

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drew Wicker against Robert Rabb *had been paid off as long ago as the year 1814; or if any balance remained due, other property had been sold by the Sheriff, before the levy and sale of the land, sufficient to satisfy the balance: and further, that the levy and sale of the land were made at the instance of the complainant (Andrew Wicker having removed long before that time to the western country) and with a full knowledge of the proceedings in partition in the Court of Common Pleas.

Chancellor Thompson granted an order for a writ of partition, without permitting the defendants to go into their defence on the merits of the case; although the defendants' counsel stated that he was ready to prove that the execution, under which the complainant purchased, was paid off previously to the sale; and that complainant purchased when he was well acquainted with the claim of the defendants.

From this order the defendants appealed, and moved to reverse the same, on the following grounds.

First. That the judgment of the Court of Common Pleas, in the proceedings in partition, was a complete bar to the complainant's claim.

Second. That the bill ought not to be sustained, inasmuch as it involved the title to lands: the defendants claiming under a title wholly adverse to that of the complainant, and paramount thereto: and by no means as tenants in common.

Third. That the defendants ought to have been permitted to show, that the execution under which the lands had been sold was paid off antecedent to the levy and sale thereof by the Sheriff: and also, that it was improperly renewed by scire facias, after it had been paid off.

Fourth. That the complainant, being a purchaser with full knowledge of the claims of the defendants and of all the facts of the

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case, could not acquire a better title *than Robert Rabb himself had at the time of the sale, who was divested of all right therein by the judgment in partition.

Fifth. That the defendants ought to have been permitted to have made their defence in an ample manner, before the granting of the order for issuing a writ of partition.

M'Call, for the appellant. A right to lands under the statute of distribution, before par-

tition, is not liable to execution by fi. fa. It stands as a chose in action which cannot be levied on, otherwise it would be converting the law of executions into that of attachments. For under the act it is required, that the land may be divided by the Commissioner, or sold for division. Then the question of advancements may be made, and a person buying such claims buys them subject to all the contingencies with which they were held in the first instance by the person entitled to distribution. In what situation was this land before partition? It was without an owner: for no one can be said to have a right to any particular part or share of it, until partition takes place. It was in the nature of a chose in action; because it requires the assistance of the Court to reduce it to possession; or it requires some act of one party with the consent of others to get possession. Without general consent and agreement to the division, there could be no division. But a person cannot truly be said to be possessed of property, when some act of a Court or of individuals is necessary to consummate his rights, as well as to put him in possession. The act says, the person paying for the land shall be vested with the estate as fully and completely as the ancestor; which shews the necessity of such an act to vest the right in any one, and also to preclude every idea of liability for the debts of any other person than the

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ancestor. Besides, the proceedings *in partition were such lis pendens as constituted sufficient notice to all persons having claims; and whoever intended to come in, should then interfere and prevent the sale, or have the division so made as to protect his claim. Harvey v. Murrell, Harp. Eq. Rep. 256. But the person buying under sale for partition, by the act, takes the estate as the ancestor held it: and therefore the land by this act, cannot be subject to a lien for the debts of the distributees before partition, but only for the debts of the ancestor. The lien of a judgment creditor is only that which would be good against the act of the judgment debtor. Paine v. Drue, 4 East, 525. This judgment cannot be considered as notice to the purchaser. It must be a suit pending. 2 Fonb. 152, and not a case decided. It is what is passing in a Court of Justice which is clothed with the high authority of notice to the world. The records in the offices are not supposed to give that publicity to facts. A purchaser for a valuable consideration without notice is always protected by the Courts of Equity. 2 Ves. Jun. 457. As to the jurisdiction, he cited Martin v. Smith, Harp. Eq. Rep. 106; and to show that the Court of Equity cannot interfere where titles are in dispute, Washington v. Washington, Id. 89.

Clarke, contra, had never heard of the first ground taken by the opposite counsel. His brief should have stated it, and notice thereby have been given. Unless he had given notice there was no right to take it. As to the argument that this claim is a chose in action, and therefore could not be levied on, there is no weight in it: for it is done every day as to claims against copartners. And besides, choses in action cannot generally be seized, because they cannot be found: but the argument or reason of the rule did not apply to lands, which the Sheriff can always find out. The act for partition was only a method prescribed for division: but the legislature never thought

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*of this question, nor of any liens which might arise against a distributee.

NOTT, J. If the land had been levied on before partition, would that have prevented partition and sale?

Clarke. It would not: but still that does not alter the position, as the execution might bind the undivided shares, as in cases of copartnership, subject to the right of accounting. The case of Paine v. Drue is not applicable to the argument of the opposite side; and the distinction is, that in the present case the execution creditor claims under one of the distributees, and not between two executions as in the case of Paine v. Drue. In Martin v. Smith the execution was against the ancestor, and not against the distributees; it is therefore inapplicable. It is laid down in Bacon's Abr. Tit. Execution, that judgment, execution, levy, and sale, are considered as one legal act, therefore no intervening alienation by the debtor can affect the right of his judgment creditor. This can only be considered as an alienation of the distributee, which cannot annul existing liens prior to such alienation against any such distributee. In Barkley v. Barkley, Harper's Rep. 441, the sale by the Court is considered the act of the parties seeking the partition.

This is a case clearly within the jurisdiction of the Court of Equity: for whenever the law was doubtful, the old Court of Equity, in their wisdom, had settled the rule, that the Court will entertain jurisdiction. If we had gone to Law, it would have been said that a tenant in common could not bring trespass against his tenant; and now in Equity, we are told that we should have gone to Law, because lands are concerned.

M'Call, in reply, said the statement of facts in the bill was sufficient notice of the

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first ground he had taken: *as defendant, he might take any ground arising out of complainant's bill.

Curia, per NOTT, J. The first question submitted to our consideration in this case, is, Whether the Court of Equity had any jurisdiction of the matter. Under the former organization of the Judiciary, it was

thought that the access to the Court of Equity was quite too easy. The complaint was, that that Court was extending its jurisdiction to every description of cases. But I think it is obvious, that the current is now setting the other way. And it is equally necessary that both should be resisted. It is of great importance that the jurisdiction of the two Courts should be well defined and preserved. Whether in ordinary cases, where there is no legal impediment to proceeding at Law, joint tenants and tenants in common ought to be allowed to go into the Court of Equity for partition, is at least questionable. The act of 1749, P. L. 218, expressly directs that they shall apply to the Court of Common Pleas. If there should be any obstacle to proceeding at Law, such as a want of title deeds, or any other impediment, the Court of Equity will lend its aid upon such difficulty being suggested. If an adverse title should be interposed, an issue at Law may be directed, and the bill retained until that question shall be tried. In the present case, if the complainant has any right, it is under the act of 1791, which authorizes the party to apply either to the Court of Equity or Common Pleas: so that I think the Court had jurisdiction of the matter. But I do not see the necessity of proceeding by bill. The act authorizes the application to be made by petition, which is a more simple and a cheaper method.

But the complainant has a more formidable objection to encounter than the jurisdiction of the Court. The object of the act

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of 1791 is to declare the manner in *which lands of persons dying intestate shall descend and be distributed. But it does not vest any immediate right. The right must necessarily be only inchoate and contingent. If the ancestor be in debt at the time of his death beyond the amount of the personal estate, the lands are assets for the payment of the debts. If it cannot be divided without manifest injury to the parties, or some of them, it may be sold, and the proceeds of the sale divided. Or it may be assigned to one or more who are required to pay the distributive share of the others in money. So that no one can be said to have a distinct and vested right in the land itself until distribution is made. And he then may not be entitled to any part of the land, but to a distributive share of the proceeds of the sale. But let us suppose the interest to be such as to be subject to an execution. The execution creditor could only come in under the distributee whose interest he claimed. He could not disturb the order of distribution. He could not prevent the sale or assignment of the land, according to the provisions of the act. All that he could claim would be a distributive share of the money. And he cannot now be in a better situation than a distributee, whose rights have been already adjudged and determined. This is a case in which the maxim that "lis pendens is a notice to all the world," applies with all its force. The land now in question was the subject matter of the suit for partition, and those proceedings must be conclusive upon all who were either parties or privies to it. They may not affect a person holding under a distinct, unconnected paramount title, but must conclude all persons claiming in the same right. Public expediency, the quiet and peace of families, the final settlement and adjustment of estates, require that it should be so. How are the scattered members of a numerous family to ascertain, whether there are not some dormant claims against some one or

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more of their co-dis*tributees? And must they wait an indefinite period of time to see if some slumbering creditor may not wake up to disturb their repose? Such a principle cannot be maintained. The land never vested in Robert Rabb, under whom the complainant holds. It remained in the nature of a chose in action until distribution made, and then it passed by operation of law to the defendants.

Whether the complainants by a timely application could have arrested the money in the hands of the defendants before it was paid over, may perhaps be a question worthy of consideration. But he has no claim upon the land. The order for partition must therefore be reversed, and the bill dismissed with costs.

Bill dismissed.

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2 McCord, Eq. 126

FRANCIS COLEMAN v. SAMUEL SHELTON.

(Columbia. Jan. and May Terms, 1827.)

[*Pledges* ⟸26.]

Where personal property left in pledge, or subject to an equitable lien, has been taken from the pawnee by the debtor, the creditor may go into Equity to enforce his lien.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 64; Dec. Dig. ⟸26.]

[*Pledges* ⟸26.]

At Law the lien incident to a pledge or pawn depends on the possession, and detinue or other action at Law cannot afford an adequate remedy where the pawn has been taken from the possession of the creditor.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 64–66; Dec. Dig. ⟸26.]

The bill stated that Samuel Shelton, being indebted to Robert Chandler in the sum of $200, pledged to him a negro fellow named Hall, who was to work for him until the debt should be paid. Chandler fell in debt to Robert Mobley, and, with the assent of Shelton, transferred his right in Hall to Mobley. Whilst the negro was in possession of Mobley, Shelton insisted on complainant advancing $200 to Mobley, and taking the negro on

the same terms as he had been held by Chandler and Mobley. Complainant advanced the money accordingly, took the negro and had him in possession a few weeks, when Shelton enticed him away, acknowledging that he was insolvent, and threaten-

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ing at the same time to remove off *with the negro. The bill prayed that the negro might be sold for the money (with interest) advanced by complainant, and Shelton restrained from moving off with him. There was no demurrer to the bill. The plaintiff made full proof of the facts stated. The defendant evaded answering the charges directly, but did not deny them.

Chancellor Thompson dismissed the bill for want of jurisdiction.

The complainant appealed.

Pearson, for the appellant. The only question is, Whether the Court has jurisdiction? Shelton is insolvent, and Coleman, if he sued him at Law, could get nothing but a return of nulla bona. If he sued him in trover, he would likewise fail. 7 Term Rep. 387. 2 Selw. N. P. 1271. He has no remedy at all at Law, or at best a doubtful one. In Equity he stood in the light of a mortgagee, and could obtain the benefit of such equitable interest. 1 Madd. Cha. 425.

By our act prescribing the Equity jurisdiction, the remedy at Law must be plain and adequate; and the act required nothing more than the enforcement of the same principle established in the English Courts. 3 Ves. 133. The filing of a bill in Equity besides would have been notice to the world not to buy, and Shelton was then threatening to run off with the negro.

Curia, per JOHNSON, J. The leading object of this bill is for relief; so that in considering the question of jurisdiction, the case made by the bill will be exclusively regarded without reference to the matters which arise out of the answer.

In theory the law provides a remedy for any wrong which one man can inflict upon

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another, and a branch of *Equity jurisdiction founded on this theory has grown up, on account of the inaptitude of the proceedings of a Court of Law to supply a remedy suited to the precise injury, in a variety of instances: and hence the rule that Equity has jurisdiction in all cases where the party injured has not a complete and adequate remedy at Law.

There can be no doubt that, by the terms of the contract set out in the bill, the complainant had a right to the possession, and a lien on the negro for the amount advanced; but it is contended, in opposition to this motion, that the complainant has a complete and adequate remedy by an action of assumpsit, or trover, or detinue, and that therefore this Court cannot entertain jurisdiction of the cause.

It is amongst the peculiar incidents attached to a pledge or pawn, that the lien created by it depends on the possession of the thing pawned or pledged: and remains so long as the possession continues, and no longer. 1 East, 4. 7 East, 5. 3 Term Rep. 119. 4 Johns. Rep. 112. Now it is very clear, that neither the action of assumpsit nor trover will restore the complainant to the lien to which he is entitled by the terms of the contract, and of which he has been deprived by the act of the defendant. A recovery would place him on the footing of a general creditor: but his lien is gone; and in the event of insolvency, he would lose his remedy. The same reasons apply to the remedy by action of detinue, if that action can be maintained: the judgment there is in the alternative, either for the thing in specie or damages; and whether this would or would not prove adequate, would depend on contingencies, about which the Court ought not to drive the complainant to speculate, as he must do so at the hazard of an entire loss in the event of insolvency, which is positively alleged in the bill. The wrong complained of in this case is, that the complainant has been, by the act of the defendant, deprived of a security

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*which he held, under a contract with him for the payment of a debt. And it is apparent that none of the remedies before alluded to are calculated to restore him fully to his rights: nor am I aware that the Courts of Law furnish any that will. To the Court of Equity he must therefore resort.

I have not been able to find any case, nor has any been cited at the bar, which can be regarded as directly in point. The books do however furnish cases which bear, I think, a strong analogy. The case of Kruger v. Wilcox, Amb. 252, is of this class. There Lord Chancellor Hardwicke remarks, that he had been unable to find any case at Law, where a factor who had parted with the possession of goods, on which he had a lien, was allowed to retain it, where the goods had been turned into money; but he adds, "I have no doubt, it would be so in this Court, if the goods remained in specie: nor do I doubt its being so, when they are turned into money." In the case, Ex parte Emery, 2 Ves. Sen. 674, a factor was held to retain a specific lien on goods, although he had parted with the possession. Now although the question of jurisdiction did not arise in these cases, they ascertain rights for which the Courts of Law furnish no adequate remedy. A Court of Law could not restore his possession and lien on the goods, nor follow their proceeds, when converted into money, and consequently Equity must, according to principle, retain it.

The case is therefore ordered back to the Chancellor, to be tried on its merits.

COLCOCK, J., dissented, without assigning reasons.

Decree reversed.

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2 McCord, Eq. *130

*THOMAS M'DONALD v. ELIJAH F. CROCKETT, NATHANIEL WADE and Wife and THOMAS LEE.

(Columbia, Jan. and May Terms, 1827.)

[*Parent and Child* ⇐9.]

Permitting personal property to go into possession of a daughter on her marriage, and to remain there a considerable time, raises the presumption of a gift. If any condition is attached to the gift, it must be expressed at the time the possession is changed.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 133; Dec. Dig. ⇐9.]

[*Husband and Wife* ⇐116.]

Where a deed gives a life estate in a negro to a wife, without saying for her sole and separate use, or using words from which it could be inferred, the husband is entitled to the life estate.

[Ed. Note.—Cited in Graham v. Graham's Ex'rs, 3 Hill, 147.

For other cases, see Husband and Wife, Cent. Dig. § 414; Dec. Dig. ⇐116.]

[*Appeal and Error* ⇐184; *Equity* ⇐42.]

An objection to the jurisdiction of the Court may be made at any stage of the case, where the want of jurisdiction goes to the subject matter in dispute; but with regard to all other cases, if the party submits to the jurisdiction and goes to trial, he cannot object after the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1179; Dec. Dig. ⇐184; Equity, Cent. Dig. § 120; Dec. Dig. ⇐42.]

[*Gifts* ⇐41.]

[Cited in White v. Palmer, McMul. Eq. 118, to the point that the absolute character of a gift cannot be restrained by subsequent deed.]

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 20; Dec. Dig. ⇐41.]

This cause came on upon the report of the Commissioner, and exceptions thereto. The bill was filed by the complainant to recover a sum of money, about two hundred dollars, which he had been obliged to pay as surety for the defendant Wade, on his purchase of a horse. Wade was insolvent, and the question made for consideration was, "whether the complainant was entitled to be reimbursed by the sale of a slave named Daniel, who was put in possession of Wade by Mr. Simpson after his marriage with the daughter of Simpson, or out of the hire of said slave, the proceeds of which were in the hands of the defendants, Crockett and Lee." It appeared that Wade married the daughter of Simpson in the year 1811, without his consent, as alleged; but after the marriage he received them home, and they resided with him some time. They then went to housekeeping separately from the father; and Wade worked a farm for his livelihood. Mr. Simpson sent them the slave Daniel, who continued in their service. No writing was sent at the time Daniel was delivered to Wade and his wife. It was stated that Wade became idle and extravagant after some years; and on the 8th of July 1814 Simpson executed an instrument by which he conveyed to Robert Crockett and Thomas Lee the slave Daniel, in trust for the use and benefit of his daughter, Laura Wade, during the time of her natural life: and at her death for the use of her children, previously or subsequently born.

The case was referred to the Commissioner. The Commissioner reported, that in his

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judgment, founded on *testimony, the slave Daniel was in the possession of Wade and his wife several years: during which the slave Daniel, as well as the horse purchased by Wade (for which the complainant, M'Donald, became security, and had been made to pay $200), were employed by Wade in farming, for the benefit of his family. And there was more money than sufficient to pay the debt to complainant out of the hire of slave Daniel, since he was taken possession of by the trustees.

The principal exceptions to the report were, that Wade had no interest in the slave Daniel, that he was loaned by Simpson in 1811; and no deed of him till that of 1814: and that that was a deed of trust for the use of Mrs. Wade alone, and not for the benefit of the family, as the Commissioner supposed.

De Saussure, Chancellor. There are several questions for my consideration.

Was the horse, on account of whose purchase the debt to complainant was contracted, purchased and used for the benefit of the family of Wade? There is no evidence that the horse was purchased expressly for that purpose; but there is evidence that the horse was employed for the subsistence of the family.

But the more important questions are the following: Was the delivery of the slave Daniel to Wade and his wife a loan or an absolute gift? There was no written document given at the time of the delivery, and no evidence of what was said at that time. It stands then on the naked ground of the actual delivery of a personal chattel by a father to a married daughter. It has been decided long ago, "that permitting personal property to go into the possession of a daughter on her marriage, and to remain there a considerable length of time, is regarded as sufficient evidence of a gift." See [Teague v. Griffin] 2 Nott & M'Cord, 93, 95; [Johnston v. Dilliard] 1 Bay, 232, and other cases. I

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con*cur in, and feel bound by these decided cases. There is no evidence in this case sufficient to take away the legal conclusion, that possession delivered of a personal chattel, to a person standing in the relation of a married daughter, must be considered an ab-

solute gift, unless restrained at the time by some condition. But it is said that the father, Mr. Simpson, by executing a deed in 1814, conveying the same slave to trustees for the use of his daughter for life, and then for the benefit of her children, expressed his intention, and explained the original delivery of the slave. Doubtless, a father would be disposed to secure the property to his daughter and her children, when he found the husband becoming extravagant and careless; but if the delivery of possession, without limitation at the time, made it an absolute gift, it is not in the power of the donor afterwards to qualify and restrain the gift, or attach conditions to it. Besides the deed itself gives a life estate to the daughter, without saying that it was for her sole and separate use, or using any words from which it could be inferred. The husband then, at all events, was entitled to enjoy that life estate; and the hire during that time furnishes a fund to pay this security debt. Besides, the deed from the father, to be operative as a settlement to the sole and separate use of the daughter, should (if it comes within the statute for recording marriage settlements, which I doubt) have been recorded in the office of the Secretary of State, and not in the Register's office of the district. A good deal of reliance was placed on a decision of the Court of Appeals in Equity, in 1814. See Johnson v. Thompson, 4 Desaus. Rep. 458, 9. The Court decided that a deed of gift of personal property, by a father to a daughter, then a married woman, should be considered as an instrument to give the wife a separate estate, though the deed was not explicit. I was favoured a considerable

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time ago, by Mr. Justice John*son, of the present High Court of Appeals, with a minute of the terms of the deed. He stated to me in a writing, which I have attached to the case, that a father made a written deed of gift to his daughter of personal property, "to do with and dispose of as she pleases during her life." Judge Johnson added, that perhaps the words "without the control of the husband" were added, but he did not recollect.

The decree of the Court of Appeals also states, "that it could be fairly inferred from the words of the deed, that the intention of the father, the donor, was to give her a separate estate, which her husband had no right to dispose of in any manner." Thus we see that this case is very different from the one we are considering. The testimony in the case, generally, speaks rather to opinions than to facts,—the construction of the act of the delivery of the slave, and of the subsequent deed; and therefore does not assist us materially in forming a judgment in the case.

Upon the whole, I am satisfied that the complainant is entitled to be paid, at all events, out of the funds in the hands of the defendants, derived from the hire and labour of the slave. Should that fund be insufficient, then to be paid out of the value of the slave. And it is so ordered and decreed, with costs out of the funds.

From this decree the defendants appealed, on the ground that the Court of Equity had no jurisdiction of this case, the complainant having full and ample remedy at Law.

That the trust deed from Simpson to Crockett and Lee secured a separate support and maintenance to Mrs. Wade, which was not liable to Wade's debt.

Williams, for the appellants. The bill should be dismissed for the want of juris-

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diction. The property was *delivered to Wade in 1811, and the deed not executed until 1814. The remedy should have been by trover at Law. Simpson's power over the property was gone so soon as he delivered it to Wade. The Court has decreed the debt to be paid out of the slave; and that would seem to decide the fact of the property being in Wade. Johnson v. Thompson, 4 Desaus. Rep. 458. But there exists another difficulty. The complainant must either claim under the parol gift, or under the trust deed. If under the parol gift, the suit should have been at Law; and it could not be under the trust deed, as the property was bought before the date of the deed. The property under the trust deed never went into Wade's possession; it remained in the possession of the trustees to the deed.

Miller, contra.

Curia, per NOTT, J. With regard to the merits of this case the Court concur with the Chancellor, and have nothing to add to the views which he has taken in his decree. The only question on which it is thought necessary to make any observations, is that respecting the jurisdiction of the Court. No question of jurisdiction was made in the Court below, either by plea or answer. The defendants submitted to the jurisdiction until all the matters in issue had been investigated, and had undergone five years' litigation; and when a decree has been pronounced against them, they then, for the first time, allege that the Court had no jurisdiction. It is difficult perhaps, to set out the limits of the Equity jurisdiction by visible metes and bonds, so that the lines and corners may be distinctly seen. There are certain cases of which that Court alone will take cognizance; such as cases of trust, matters of account, specific performance of contracts and the like. There are other cases, the

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*subject matter of which cannot be brought within the pale of that Court; such for instance, as slander, assault and battery, cases involving dry legal titles to land, &c.—

But there are other cases, such as cases of fraud, and a great variety of anomalous cases, of which the two Courts have concurrent jurisdiction; or, if not such as precisely come up to our notions of concurrent jurisdiction, may assume such a shape as to give jurisdiction to either the one Court or the other. Thus, for instance, on a covenant to make titles to a tract of land, the party may at his option bring his action at Law for a breach of the covenant, or he may go into a Court of Equity for a specific performance of the contract. There are also other cases: where the remedy at Law is doubtful or difficult, or where a multiplicity or circuity of actions may be avoided, a Court of Equity will entertain jurisdiction, although the party might have sued at Law. Now I take the rule to be, that in those cases which cannot, from the subject matter of the cases themselves, be brought within the pale of the Equity jurisdiction, the objection may be made at any time. But with regard to all other cases, if the party submit to the jurisdiction, even though he had a remedy at Law, he must abide by the decision. If it appear upon the face of the bill that the complainant has a remedy at Law, the defendant may demur. If it should not appear upon the bill and the defendant in his answer shall deny all the equity, he may then object to the jurisdiction, and the complainant must proceed at his peril. But the objection will come too late after the decree is pronounced. Such is the rule laid down by Judges Kent and Thompson, in the case of Ludlow v. Simond, 2 Caines' Cas. 1; and the quotation in that case from Baron Gilbert's History of the Chancery Practice is strong and conclusive on that point.

In the case of Underhill v. Van Cortland, 2 Johns. Cha. Rep. 369, Chancellor Kent

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again lays down the *same rule, and says, "It would be an abuse of justice if the defendants were to be permitted to protract a litigation to the last extent, and with the expense attending the suit, and then at the final hearing interpose this preliminary objection."

Chief Baron Gilbert, in his History of the Chancery Practice, says, "Where the Common Law would give the same relief as a Court of Equity;" then if the defendant would deny the deed and demur to the relief, the demurrer would be allowed; but if the defendant doth not demur to the relief, the Court will decree for the plaintiff on the hearing, because the defendant admitted the jurisdiction by answering and putting it in issue. "The Court of Chancery," says Lord Redesdale, "being a superior Court of general jurisdiction, nothing shall be intended to be out of its jurisdiction which is not shewn to be so." Red. Treat. (3d Lond. edit.) 183. And it is said in Sir John Warden's case, before Lord Talbot, there was an objection for want of jurisdiction, and that the matter was properly triable at Law; but it being disclosed that he had filed a cross bill, the Court did not enter into that objection, but said the defendants had given jurisdiction. 2 Madd. Cha. 283. But the case now under consideration is still stronger, because the objection was not made until the cause was brought to this Court, after a final decree had been pronounced. I do not however wish to be understood that I am of opinion that this was not a proper case for the Court of Equity. I am inclined to think the jurisdiction might be maintained upon principle. The motion must therefore be refused, and the decree affirmed.

COLCOCK, J. I am constrained to dissent from my brethren in this case, on the ground that there is plain and adequate remedy at Law.

Decree affirmed.

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2 McCord, Eq. *137

*THOMPSON MAYO v. JACOB and ANDREW FEASTER.

(Columbia. Jan. and May Terms, 1827.)

[*Dower* ⇐49.]

The Court will not construe words renouncing dower according to the act, to mean inheritance. The formalities to release inheritance by a feme covert must be complied with.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 154–174; Dec. Dig. ⇐49.]

[*Deeds* ⇐120.]

The Court cannot give to a deed a more extended operation than the natural and legal import of the words authorize.

[Ed. Note.—Cited in Fisher v. Fisher, 89 S. C. 177, 71 S. E. 863.

For other cases, see Deeds, Cent. Dig. § 401; Dec. Dig. ⇐120.]

[*Reformation of Instruments* ⇐30.]

A mistake in a deed cannot be corrected in a collateral way. There must be a bill filed between the parties to the deed to correct a mistake.

[Ed. Note.—Cited in Dennis v. Dennis, 4 Rich. Eq. 313.

For other cases, see Reformation of Instruments, Cent. Dig. §§ 117, 118; Dec. Dig. ⇐30.]

[*Waste* ⇐12.]

A remainder man for life only cannot sue for waste. It can only be supported by one entitled to the inheritance. A contingent interest is not sufficient.

[Ed. Note.—For other cases, see Waste, Cent. Dig. § 22; Dec. Dig. ⇐12.]

[*Waste* ⇐12.]

But a remainder man for life may have an injunction for immediate injuries to his estate.

[Ed. Note.—For other cases, see Waste, Cent. Dig. §§ 12, 21–23; Dec. Dig. ⇐12.]

[*Husband and Wife* ⇐15.]

[A feme covert joined with her husband in a conveyance of her inheritance, but the words used in the deed were those prescribed by statute for a renunciation of dower. *Held*, that

only the life interest of the husband passed by the conveyance.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 96; Dec. Dig. ⟸15.]

[*Waste* ⟸20.]

[Cited in Bradley v. Drayton, 48 S. C. 234, 245, 26 S. E. 613, to the point that, in a suit to stay waste merely, the plaintiff will not be permitted to show a mistake in the form of the conveyance to him, by which a feme covert renounced dower in the land, instead of conveying her inheritance.]

[Ed. Note.—For other cases, see Waste, Cent. Dig. § 33; Dec. Dig. ⟸20.]

John Mayo, by his last will and testament dated the 10th of April 1816, loaned to his wife Elizabeth during her widowhood the whole of his estate, both real and personal; and after her widowhood directed the same to be equally divided between his six children, to wit, Mourning Floyd the wife of ——— Floyd, Sarah Mayo, Richardson Mayo, Thompson Mayo, John Mayo, and Nancy Mayo. John Mayo, the eldest, died on the 17th of November 1817. Part of the property loaned to Elizabeth Mayo was a tract of land, containing about two hundred and seventy-two acres. Thompson Mayo, the defendant, resided with his father and mother at the time of the death of his father, and for several years previously; as they were both too old to attend to their own concerns without the assistance of defendant, who also during that time worked his own slaves upon the lands loaned to his mother. On the 27th of May 1818 defendant and his mother entered into a written agreement respecting the estate loaned to her by her husband; by virtue of which, and in consideration that defendant would, from time to time, afford her a comfortable support until her death, she authorized and permitted him to use, occupy, and enjoy the profits of all the property loaned to her during her life by her husband, as aforesaid. Under this agreement the defendant cultivated part of the old lands, and newly cleared about thirty acres on other parts of the tract. Sarah Mayo, one of the distributees in remainder, afterwards married Albert Beam; and Nancy Mayo, another of the distributees, married James Mayo, a cousin of hers. Albert Beam and wife conveyed their interest in the land to the com-

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*plainant Andrew Feaster; and James Mayo and wife conveyed their interest in the land to the complainant Jacob Feaster. The conveyances were signed by both wives, respectively; but they only renounced their right of dower in the land, instead of inheritance. The bill was filed by the complainants to restrain the defendant from committing waste. The injunction was granted.

At the next succeeding Court, after the service of the injunction on defendant, complainants' counsel moved for an attachment against the defendant for a contempt of the injunction, in continuing the waste, cutting trees, &c. On this motion, the defendant's counsel moved that the case should be referred to the Commissioner to ascertain the waste committed by the defendant, both before and after the injunction.

The Commissioner reported, and to his report the defendant filed several exceptions, among which were the following, to wit:

That the Commissioner had not allowed defendant any compensation for the improvements made by him on the land.

That the complainants were not entitled to an account for waste, in the capacity in which they stood; nor was the defendant answerable for waste in the capacity in which he acted.

De Saussure, Chancellor. Two objections were raised on the argument, which it is necessary to consider and decide.

1. Whether the complainants are entitled to relief? Upon this I have no doubt. The complainants have a title derived from two of the heirs, for their shares of the estate. But it is objected that these two heirs being females and married, though they joined in the conveyance, did not renounce their inheritance to these complainants, who conse-

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quently could not sue. This *seems to have been a mere mistake. But at any rate, the purchasers have a life estate, even under the erroneous deed; and they being remainder men, have a right to the protection of the Court against the present occupants for life, if waste has been committed.

2. It is said that the defendant was not liable to be enjoined and restrained from committing waste; nor was he answerable for the same, as he held under the tenant for life, the widow of the testator. The law on this subject is very plain. The tenant for life is entitled to cultivate all the cleared lands, at the death of her husband; and to the use of so much of the timber as may be necessary for fencing, firewood and repairs of the buildings. And it must be admitted that if the present occupant or tenant for life had no right to cut down timber and clear land in his lawful possession for cultivation, he cannot transmit to others a right to do so, which he had not himself. The defendant claims under the widow, who has a life estate; and his clearing land is waste in him, as it would have been in her; and he can and must be restrained. Indeed the Commissioner reported that the defendant had cultivated less than the cleared land left by the testator; so that there was no necessity for clearing more land, except to obtain new lands for planting, which he had no right to do.

It was argued that joint tenants, or tenants in common, could not sue each other for waste; but this is not the case of a tenancy in common. It is the case of a tenant for life: and remainder men or persons who

have purchased from the remainder men, it was never doubted, could restrain the tenant for life from committing waste. The defendant is not entitled to improvements made on the land for his own benefit; though those benefits may survive his life estate. As to the details, I am satisfied that the intelligent Commissioner, who made the report, is better informed than I am, and of course

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better able *to form a correct judgment. I am therefore of opinion that the report ought to be confirmed and the exceptions overruled: and it is ordered and decreed accordingly; and that the injunction be continued for restraining the defendant from committing waste.

From this decree the defendant appealed on the grounds taken against the Commissioner's report; and that the injunction should not have been made perpetual.

Clarke, for the appellant.

1. The deed to complainants being informal conveys no more than the life estate of the husband. 2 Const. Rep. 12. An intermediate remainder man for life cannot have an account for waste; that only belongs to the remainder man in fee. Eden on Injunction, 118. The reason may be that the remainder man in fee may have the account, and both cannot; and that is the law although the fee has vested, if it can be defeated by a subsequent contingency. 3 P. Wms, 268. Eden on Injunction, 117. In this case if the husband died before the life estate was determined, the complainant's interest never would have vested. 3 Black. Comm. 225. Before the statute of Marlbridge, the tenant for life could not be restrained when he came in under an act in pais, and only when he came in by operation of law, as tenants in dower by curtesy, &c. and under that statute, from which our act has been copied, tenants for life or years only are affected. Under the contract between defendant and his mother, he was only tenant at will; the mother therefore, and not defendant, was liable; and she ought to have been made a party.

2. Again, complainants, admitting their claim to the fullest extent, are only entitled to two sixths, and their claim for waste ought to be apportioned accordingly; and the report and decree give the whole.

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*Pearson, contra. The deeds to complainants are signed by the wives, and they renounce all their estate as well as dower: the first includes inheritance. It is true that the certificate does not state according to the act of 1795, that it was made seven days after the execution of the deed. But the intention is apparent and must prevail. 1 Fonbl. 37. 13 Ves. 114. This would be a good conveyance at Common Law. The act does not take away the common law mode of conveyance, but substitutes another; so that the common law conveyance is good. Bac. Abr. Baron and Feme. 1 Madd. Cha. 479. Equity will enjoin waste by the tenant of the freehold. 1 Madd. Cha. 114. 122. 2 Brev. Dig. 331. Smith v. Poyas, 2 Desaus. Rep. 65.

Curia, per NOTT, J. The first question to be determined in this case is the nature of the estate which the complainants have in the land in question. They purchased of the husbands of two of the female devisees. The husbands had only a life estate in the inheritance of their wives; and therefore could convey no more to the complainants. The act of 1795 has prescribed a method, by which married women may renounce their dower, as also their right of inheritance. In this case, the form prescribed for the renunciation of dower has been pursued. It is now contended, that the words used in the conveyance are broad enough to transfer the inheritance. Admitting that they will bear that construction, yet, as they are the very words which the act has directed to be employed in a renunciation of dower, we cannot by construction extend their meaning beyond the object required by the tenor of the act. And such construction seems necessarily to follow, from the subsequent clause of the act which gives the words necessary for the renunciation of the inheritance. There are also other provisions superadded in the

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act, in order to *give effect to such a conveyance. These provisions are intended as a protection to the rights of married women. The legislature has placed these guards around them, in order to prevent their rights from being invaded. And this Court would fall very far short of fulfilling the intentions of the legislature, were they to break down those barriers which have thus been erected for their defence. It is not necessary however to dwell upon this part of the case, as the question has already been fully considered and decided in the case of Brown and Spann, 2 Mill, Const. Rep. 12. It is said that the form of renunciation adopted in this case was used by mistake, and that it was intended to convey the inheritance. I do not know how that fact may be, nor is it important to the discussion of the case. We cannot give to the deed a more extended operation than the natural and legal import of the words will authorize. It may be, that the mistake was in supposing that they had only a right of dower in the land. They may have been willing to have renounced such a right, and not the right of inheritance. If there has been any mistake, it may perhaps be corrected; but it cannot be done in this collateral way. It must be by a direct application to the Court for that purpose, in which the parties to the mistake may be parties to the suit also. The complainants therefore have nothing more than the qualified interest which the husbands had in the estate of their

wives: and that is a mere contingent interest; for the husbands may die before the life estate is terminated, in which case it will never vest.

The next question then is, whether the complainants have such an interest as will entitle them to a suit for waste? And on that subject I think the law is very clear: Judge Blackstone says, "he who has the remainder for life only is not entitled to sue for waste; since his interest may never

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come into possession, and *then he has suffered no injury." 3 Black. Comm. 225. See also Co. Lit. 218. 6. And the reason is very obvious. The injury done by waste is an injury to him who is entitled to the inheritance, and to no one else. And although an intermediate tenant for life may have an injunction, it can only be to prevent those acts which are immediately injurious to his estate: yet he cannot recover for the waste, because that inures only to him who is entitled to the inheritance. Berwick v. Whitfield, 3 P. Wms, 267.

The complainants may possibly become intermediate tenants for life upon the death of the first tenant: still it is but a contingent interest which they possess, because it may be determined before the termination of the first life estate. They have not therefore such an estate as will enable them to sustain this bill. The decree must be reversed, and the bill dismissed with costs.

Bill dismissed.

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2 McCord, Eq. 143

WILLIAM SMITH and Others v. RICHARD DANIEL.

(Columbia. Jan. and May Terms, 1827.)

[*Life Estates* ⇐6.]

A tenant for life of real or personal property is a trustee for the remainder man, and the Court may take all necessary steps to prevent or restrain an abuse of his trust; as giving security to produce the property at the end of the life estate, &c.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 18, 23; Dec. Dig. ⇐6.]

[*Vendor and Purchaser* ⇐228.]

Where a person buys property, with a knowledge that it is subject to a trust, he takes it subject to the trust.

[Ed. Note.—Cited in Sullivan v. Latimer, 35 S. C. 430, 14 S. E. 933.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495–501; Dec. Dig. ⇐228.]

[*Life Estates* ⇐23.]

But where a person bought without a knowledge, and parted with the property before suit he will not be compelled to give security, but he would if he still held the specific property.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 42–45; Dec. Dig. ⇐23.]

[*Life Estates* ⇐6.]

A remainder man cannot obtain security from the tenant for life where there is no danger from the insolvency of the defendant, or where there is no reason to apprehend that he is about to remove away or to dispose of his property.

[Ed. Note.—Cited in Joyce v. Gunnels, 2 Rich. Eq. 269.

For other cases, see Life Estates, Cent. Dig. § 18; Dec. Dig. ⇐6.]

[*Life Estates* ⇐6.]

The bill not favoured if filed by a purchaser on speculation for shares in the recovery.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 18, 23; Dec. Dig. ⇐6.]

The bill stated that William Smith, Samuel Hicks and Lucy his wife, Owen Hall and Judith his wife, were the complainants. That Samuel Smith of the state of North Carolina, about the 1st of March 1797, made his last will and testament, wherein was the following provision; "I lend unto my daughter Nancy James a negro girl named Nancy, during her natural life; and after her death my desire is, that her surviving children may have and enjoy the said negro girl Nancy, and her increase for ever." That

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soon after the death of the *said testator the girl went into the possession of Nancy James and her husband George James. Some time after George James sold the negro as his own property to the defendant, and that the complainants had been informed, and believed that one of the executors called on defendant some time after and gave him notice not to remove the girl out of the state; but which he had since done, having removed into South Carolina. George James (the bill stated) departed this life long since, and his widow was then old and infirm, and had no other children besides Lucy Hicks and Judith Hall, who would be entitled at the old lady's death to the remainder in the girl and her increase. That Lucy Hicks and her husband, and Judith Hall were very poor, lived at a great distance, and were unable to prosecute their claims; under these circumstances they had made a contract with William Smith, by which they were to give him one-half the negroes when recovered to prosecute their claim; but that he was not able to file an exhibit of the contract, it having been left with the Clerk of the Court of Wilkes county, North Carolina, to be recorded. That Nancy had children, Sylvia, Spencer, Gabriel, Rundy and Henry; and it was supposed she had had more, whose names they did not know; and also presumed that Nancy's daughter had had children. The bill stated that complainants were fearful of being put to much trouble and expense in getting possession of the negroes at Nancy James's death. That they were informed and believed that the defendant had carried off a part of the negroes, if not all, out of the state, expressly for the purpose of putting them out of the reach of complainants; or if he had not done so himself, that he had procured it to be done. So that if complainants were not aided by this Court, they were in danger of

losing the negroes, inasmuch as they could prove that defendant had said he knew he could not hold the negroes longer than Nancy

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*James's life time, and that at the death he would give them up; but that some time ago it was reported that she was dead, and immediately the defendant, as complainants heard, was sending off some of his negroes privately to parts unknown to complainants. That the complainants had applied to defendant by their agents, and offered the purchase money for the girl, and $100 extra if he would give her up and her increase; or if he would not do this, that he would give bond and security to give up the negroes at Nancy James's death, which very reasonable request the defendant refused to comply with. The bill prayed specially that Richard Daniel should set forth, "whether he did not purchase the negro Nancy from George James, the husband of Nancy James? The price he gave for her? Where she now was? And whether he had not sent her out of the state to keep her out of the way of complainants?" To discover the name and value of each of her children? And as there was danger of complainants losing the testimony by which they expected to establish their claim, they prayed that such testimony be perpetuated by the aid of the Court. They prayed also that the defendant might be compelled to enter into a bond and security for the negroes to be forthcoming when Nancy James should die; and that he would not part with the negroes, or any part of them out of his possession.

The defendant, in his answer, said that he knew nothing of Samuel Smith deceased, nor whether he left a will or not. He admitted that in 1798 he purchased a negro girl, Nanny, from one George James. He did not know if it were the same negro mentioned in Smith's will or not: he gave seventy-five pounds Virginia currency for the girl to James, who was an entire stranger to him. That sum was as high as the girl could have been sold for any where. The defendant positively averred, that he had not the slightest notice of any claim to the girl at the

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*time he purchased her, and that he gave a full, fair and adequate price for her. He set out the price given for negroes in different years, to show that he had given a reasonable price for Nanny. He admitted that some time after the purchase of the girl, one Smith, calling himself the executor of Samuel Smith, informed him that the negro was entertailed: he thereupon offered the girl back to James, from whom he had purchased her, but he refused to pay him his money, and was in fact insolvent. The defendant, in two or three years afterwards, moved to the district of Spartanburg, and resided there ever since, and had no intention of removing. Defendant did not know if Lucy Hicks and Judith Hall were the children of George James or not, though he believed that George James and his wife were still living. Nanny had children, Spencer, Gabriel, Rundy and Henry, who might be still living, but whether or not defendant did not know, as well as Sylvia, Isaac, ———, and a girl, who were dead; none of the children of Nanny had had issue. Defendant having heard that an attempt would be made to get Nanny and her children into the possession of the agents of Hall and Hicks, and being satisfied that the report was true, he, anxious to get rid of a law suit in his old age, by the advice of his friends, some time in April 1824, sold all the said negroes for $800; giving the purchaser notice of the pretended claim of Hall and Hicks. And he sold only such estate in them as he had, whatever that estate might be, having claimed no right to the property since 1824. He submitted whether the complainants could be entitled to the security from him they required. He objected, as he was instructed he had a right to do, being an innocent purchaser, without notice, to answer any thing more to the premises, and likewise to the perpetuation of the testimony; and denied all unlawful combination of fraud on his part, and prayed that the complainants

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might be enjoined from harrassing *him any further in Law or Equity, and that he might be dismissed with his costs, &c. He further said that George James pretended to have a good title to the negro, and he bought her without suspicion or cause of suspicion. He had never said he would give up the negro at the old woman's death, but spoke of the claim of complainants as leaving his right doubtful, and that he might have to give them up. That Smith did ask him to give security for the forthcoming of the negroes, but not till after the bill was filed; that he refused, and still refused unless ordered by the Court to do so. Defendant estimated the true value of the negroes at $950: he sold them to J. Harrison of Greenville district, at the time stated.

No witnesses were sworn in the case, and his Honour decided upon the bill and answer.

Thompson, Chancellor. The bill states that Samuel Smith, of North Carolina, loaned to his daughter Nancy James, during her natural life, a negro girl named Nancy, and at her death he gave Nancy and her increase by his will to her surviving children: the wife of William S. Hicks, and the wife of Owen Hall, two of the complainants, are her children. That George James, the husband of Nancy James, sold the negro girl to the defendant, Richard Daniel. That Richard Daniel has carried off or sold the negroes for the purpose of preventing a recovery of them by the complainants. The application to this Court now is, that the defendant, Richard Daniel, do give security for the production and delivery of the negro Nancy, together

with her increase, to the persons in remainder, upon the determination of the life estate.

This power is clearly vested in this Court; otherwise great inconvenience and trouble would accrue to remainder men. It is every

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day's practice to grant such *orders. As the defendant has already evinced a determination to place them in a situation where it would almost amount to an impossibility for the complainants to find them, it is therefore ordered and decreed, that the Commissioner do ascertain the value of the said negroes, and that defendant do enter into bond and security in double their value, to have them forthcoming when the life estate shall determine, or that he pay their value on that event and the costs of suit.

The defendant now moved the Court of Appeals to reverse the Circuit decree on the following grounds:

First. Because there was no evidence of the identity of the negroes, or of the complainants being the persons entitled to them.

Second. The defendant was an innocent purchaser, without notice from the person rightfully in possession, and was not bound to give the security required.

Third. That the negroes being out of defendant's possession long before the bill was filed, he was not answerable for them either in Law or Equity.

Fourth. That the complainants were bound to sue for the specific negroes, no matter in whose hands they were, without charging an intermediate purchaser.

Fifth. That the decree decided upon the right of property, when the bill was only filed to procure security until the right could be tried.

Henry and Earle, for the appellants.

A. W. Thomson, contra.

Curia, per NOTT, J. I have no doubt of the power of the Court of Equity to restrain a tenant for life from committing waste, or to require him to give security to have personal property forth coming at the termina-

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tion *of the life estate. A tenant for life is considered in the nature of a trustee for those in remainder, and the Court may therefore take all the necessary steps to prevent or restrain an abuse of his trust. And when a person purchases, with a knowledge of the situation of the property, he takes it coupled with the trust, and will be considered as standing in the same relation to the party. But it is not even alleged in this case that the defendant, at the time he made the purchase, knew that the vendor had only a life estate: and he positively denies in his answer that he had any such knowledge. But nevertheless if he had the specific property now in his possession, and there was reason to apprehend that he was about to remove it out of the limits of the state, I have no doubt that, even in that case, the Court would subject the defendant to such terms as would render the complainants secure: but the defendant, in his answer, swears that he had parted with the property long before the bill was filed; he cannot therefore be required to give security to produce the property itself, and that is all the complainant requires. The decree therefore goes beyond the prayer of the bill, in giving to the complainant what he does not ask. But it does not appear to me, that if they had specifically prayed for the relief which has now been granted, that it ought to have been allowed. A person who has purchased a life estate may sell it again, unless restrained, while the property is in his actual possession; and he cannot be made answerable for the act of another over whom he has no control. And it does not appear to me, that he can be made liable for property which thus passes through his hands. But even admitting that he may be ultimately liable, still I do not think that the complainants have made out a case which entitles them to the relief that is sought for. They do not pretend that they are in danger of suffering by the insolvency of the defend-

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ant, or otherwise. On *the contrary, they state that he is wealthy. There is no reason to apprehend, that he is about to remove away or dispose of his property. If he is responsible at all, he will continue to be so when their right accrues. Besides I do not see any thing in this case to entitle the complainants to any particular favour. Their ancestor, in the first place, fraudulently imposed upon this defendant in the sale of the property. Thirty years have elapsed, and no steps have been taken to compel him to perform his trust: and now an attempt is made to make this defendant liable for his fraud. And it is further to be remarked that the bill is now filed by one who admits that he has purchased upon speculation, and has undertaken to maintain the suit for one half of what he can recover. I do not think therefore that he comes with very strong claims upon the discretion of this Court, to afford him this extraordinary remedy, which should be allowed in any case with extreme caution. I am of opinion therefore that the decree ought to be reversed.

I observe that the bill also claims a discovery, and prays for the perpetuation of testimony. And it is stated that there is an amended answer which is not before us. Whether those matters furnish any grounds for retaining the bill I do not know. Of that the Chancellor must judge. If they do, let the bill be retained until those questions shall be disposed of; if not, let it be dismissed with costs.

Decree reversed.

2 McCord, Eq. *151

*JOSEY GORDON and Wife, and Others v. JOHN SAUNDERS Executor, NATHAN SIMS, and Others.

(Columbia. Jan. and May Terms, 1827.)

[*Equity* ⇐340.]
On a rule to show cause against a purchaser why he should not comply with his bid, his answer by way of affidavit is admissible evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 699; Dec. Dig. ⇐340.]

[*Equity* ⇐410.]
The Chancellor hears other evidence than that only offered before the Commissioner.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 905–919; Dec. Dig. ⇐410.]

[*Judicial Sales* ⇐28.]
Where the purchaser in his answer to a rule to show cause why he does not comply with his bid, alleges that he bid under parol understanding between himself and the other parties interested in the sale that the purchase should be for the benefit of them all, he must sustain such allegation by other proof than his own affidavit.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 55; Dec. Dig. ⇐28.]

[*Judicial Sales* ⇐28.]
But such an agreement between only a part of several interested will be no ground to avoid compliance with a bid.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 55; Dec. Dig. ⇐28.]

[*Equity* ⇐340.]
An answer to new facts as to which the defendant was not interrogated must be sustained by evidence aliunde. The answer alone is no evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 699; Dec. Dig. ⇐340.]

[*Witnesses* ⇐98.]
Where the entry of the sale has been lost, the existence and loss may be proved by the Commissioner who made the sale.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 363; Dec. Dig. ⇐98.]

[*Judicial Sales* ⇐15.]
The entry of sale need not be made in a book.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 31; Dec. Dig. ⇐15.]

[*Judicial Sales* ⇐39.]
Biddings not opened because the price is too high or too low.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 77; Dec. Dig. ⇐39.]

[*Judicial Sales* ⇐35.]
If the sale has been regularly conducted and fairly made, it is obligatory.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 72, 73; Dec. Dig. ⇐35.]

[*Judicial Sales* ⇐45.]
Sales have been set aside by the Court of Chancery in this state.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 83; Dec. Dig. ⇐45.]

[*Judicial Sales* ⇐29.]
The Court prefers a bill to compel a purchaser to comply where it has any doubts.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 56; Dec. Dig. ⇐29.]

[*Frauds, Statute of* ⇐116.]
An auctioneer is the agent of both parties, whose entry and signature will take the case out of the statute.

[Ed. Note.—Cited in Wolfe's Adm'r & Adm'x v. Sharp, 10 Rich. 63; Anderson v. Chick, Bailey, Eq. 119.

For other cases, see Frauds, Statute of, Cent. Dig. §§ 251–260; Dec. Dig. ⇐116.]

Whether the sale of the Commissioner is within the statute (Quære).

[*Frauds, Statute of* ⇐103.]
An entry of sale by the Commissioner should be entered regularly in a book, but it is nevertheless valid if only entered on a loose piece of paper.

[Ed. Note.—Cited in Secrist v. Twitty, 1 McMul. 256.

For other cases, see Frauds, Statute of, Cent. Dig. § 203; Dec. Dig. ⇐103.]

[*Frauds, Statute of* ⇐116.]
There is no difference between a sale of lands and goods at auction. The auctioneer is the agent of both parties in either case.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 251–260; Dec. Dig. ⇐116.]

[*Judicial Sales* ⇐28.]
A purchaser under the decree of the Court will be compelled to execute the contract on rule to show cause without a bill, more especially where the purchaser was a party to the decree under which the sale was ordered.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 55; Dec. Dig. ⇐28.]

[*Judicial Sales* ⇐28.]
There may be cases where it would be more proper to proceed by bill, but it will always be within the discretion of the Court.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 55; Dec. Dig. ⇐28.]

[*Appeal and Error* ⇐966.]
That the party was surprised by the trial affords no ground for the interference of this Court. If they were not ready, it was for the Court below to give time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. ⇐966.]

[*Appeal and Error* ⇐1056.]
Where evidence was allowed all the effect which it could have had if it had been admitted by the Chancellor, it will afford no ground to affect the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. ⇐1056.]

[*Appeal and Error* ⇐172.]
The purchaser may have a reference before the Master to ascertain if a good title can be made, but that motion ordinarily can only be made before the Chancellor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1070–1078; Dec. Dig. ⇐172.]

[*Appeal and Error* ⇐173.]
[A purchaser of land, upon a proceeding to compel performance by him, will not ordinarily be permitted to object to the title, for the first time, in the appellate court.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1110; Dec. Dig. ⇐173.]

[*Judicial Sales* ⇐28.]
[A purchaser under a decree submits himself to the jurisdiction of the court as to all matters connected with the purchase, so that he may be proceeded against by motion in the

cause, without the institution of original proceedings.]

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 55; Dec. Dig. ⟸28.]

[This case is also cited in Rehkopf v. Kuhland, 30 S. C. 237, 9 S. E. 99, and Ex parte Qualls, 71 S. C. 92, 50 S. E. 646, without specific application, and in Hamilton v. Hamilton, 2 Rich. Eq. 360, 46 Am. Dec. 58, regarding the English practice of opening biddings.]

In this case a tract of land was ordered to be sold by a decretal order of the Court of Equity. The sale took place by the Commissioner, and it was knocked off to Nathan Sims, one of the defendants entitled to a share of the estate, as the highest bidder, at the price of $3,000. Not having complied with the terms of the sale, a rule was taken out on Nathan Sims, to shew cause why he had not complied with the terms of the sale of the land in question, of which he had become the purchaser. It being stated on behalf of Sims, that he did not consider himself bound by the bid of $3,000 which he had made for the land, an order of reference was made to the present Commissioner (there having been a late change of that officer), to ascertain and report whether the sale of the land in question to Nathan Sims should be set aside or not. The Commissioner upon the last mentioned reference afterwards made the following report, "that it appeared from the former Commissioner's report and affidavit, and also from his testimony on the reference before the present Commissioner, that he had advertised the land for sale in pursuance of the order of the Court, and proceeded to sell the same at public auction, at which sale Nathan Sims became the purchaser of the land at the price of $3000. That the Commissioner made an entry of the sale, which had since been lost or mislaid. That it also appeared in evidence, that it would be very much to the disadvantage of the estate to resell the land. The Commissioner therefore reported that the sale of the land to Nathan Sims should not be set aside and ought to be confirmed."

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*To this report the counsel for Nathan Sims filed the following exceptions, viz.

First. That the Commissioner, at the hearing of the case before him, refused to hear the affidavit of the defendant Nathan Sims, which had been drawn up under the order of the Court ordering the case to be referred to the Commissioner.

Second. That the Commissioner received the affidavit of the former Commissioner on the subject of the sale, though the defendant required the production of the entry made by the Commissioner at the time of the sale.

Third. That the sale was void under the statute of frauds.

Fourth. That the defendant Nathan Sims could not be compelled to a specific execution of the contract said to have been made at the Commissioner's sale, in this summary way; but if he could be compelled to comply with the terms of sale at all, it could be done only by bill regularly filed for that purpose.

De Saussure, Chancellor. As to the first exception, I regret that the Commissioner refused to receive and consider the affidavit. It was the return to the rule to shew cause, and should have been received and read. That, and all other evidence which went to show that Sims ought not to be bound by his purchase, formed proper matter for consideration. It is this opportunity to be fully heard on the motion and rule to show cause which renders it unnecessary to proceed by bill and answer. If therefore Sims could be injured by the rejection of his affidavit by the Commissioner, I should send the case back to the Commissioner with instructions to receive and consider it, however reluctant I might be to occasion further delay. That however cannot occur; for it is habitual with the Court to receive new evidence not offered to the Commissioner, or evidence offered and

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*rejected by him. If this were not done, the business of the Court would be greatly delayed to the prejudice of the parties. In the case we are considering, the affidavit of Sims, as an answer and return to the rule, is now before me, and he shall have the full benefit of it. It states "that he denies that he ever considered himself as a purchaser of the land; but that he admits that he bid off the land for the benefit of the estate, under the following circumstances; that is, on the day of the sale, he the deponent with two others of the principal devisees of the land did attend the sale, and before the biddings were commenced had a consultation as to what was the lowest bid that the land should go off at; and it was mutually agreed that if it did not go off for more than $3,000, it should be bid in for the benefit of the estate, as they all (the three above mentioned) agreed that it was worth much more than that sum; and he still thinks it would be a great sacrifice, and if he wanted land, he would give more for it. That deponent is informed that no one is opposed to a resale but Matthew Sims. That said Matthew Sims, as deponent is informed, was willing to take the land at $3,000, which the deponent was willing he should do. That a considerable time after the sale, at a reference in this case before the Commissioner, all the facts were stated, and all the parties except Matthew Sims, agreed that it was but justice that the land should be resold. That deponent has been informed and believes that Matthew Sims, when first informed of the lands having been bid off at $3000, was very much dissatisfied; but as soon as he was informed that it was bid in for the estate, he seemed well satisfied. That deponent would not have availed himself of the purchase, if the land had been knocked off to him at $100. The

deponent further says, that the devisees (except Matthew Sims), who had made these arrangements to bid in the land, also agreed that no advantage should be taken by any of

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the *parties of the said arrangements not being fully reduced to writing."

In considering this affidavit or answer to the rule to show cause, it must of course be subject to all the rules applicable to an answer, and the general rules of evidence, and the rules of this Court. With these preliminaries in our minds, we will proceed to analyze the affidavit made in answer to the rule of Court to show cause why he should not proceed to complete his purchase. The affidavit or answer of Nathan Sims admits that he bid off the land at $3000, but denies that he considered himself a purchaser. The mere denial that he considered himself a purchaser concludes nothing. That is a point on which the Court is to form its judgment from the facts of the case. Now the facts of the case are very clear. The land was by public authority ordered to be sold. It was properly advertised and duly sold by the public officer. It was bid off by Nathan Sims as the highest bidder after a real competition of bidders. The officer of the Court made an entry in writing of the purchase and of the price. Nathan Sims knew of all this, and of the entry of him as purchaser. He knew the land well, was satisfied that it was worth more money, and at that time he made no objection. From these facts it is clear that he was a purchaser in the common sense of the word. But he endeavours to avoid that conclusion by stating that he did not consider himself a purchaser. Surely it would be most unsafe to allow a man to evade an obligation which he had thus contracted by such a declaration; and no sales could stand if such a declaration should be allowed to prevail against the plain facts which constitute him a purchaser. To avoid the force of this reasoning, reliance is placed on the facts stated in the affidavit, to show the agreement of the heirs and the purchase made for the benefit of the estate; whence it is concluded that Nathan Sims was not a purchaser, and

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*is not bound to complete the purchase. But giving Mr. Sims the full benefit of his affidavit, as if it were an answer on oath to a bill for a specific performance, this statement of facts by him cannot be received as evidence, because it is not an answer to any allegation against him. It is a new allegation on his part which ought to be supported by proofs. To supply this proof, was produced a letter of Mr. Benjamin Maybin, dated the 17th of January, 1823, addressed to the Commissioner, which does corroborate with the statement of Mr. Sims in its essential parts, and particularly as to the value of the land, even to the amount of $3,500. On the other hand, Reuben Sims, one of the heirs of the estate, and one of those referred to in the affidavit of Nathan Sims, distinctly states in an affidavit that he the deponent and Nathan Sims and Benjamin Maybin "met at Union Court House and agreed with each other that the land in question was worth $3,000, and if it sold for less than that sum it should be purchased in for the estate, and that neither would take advantage of the other. But neither of the three parties present undertook that the absent persons interested would accede or come into the agreement above stated. Nor was the agreement intended to be binding on them. That said deponent Reuben Sims, is willing there should be a resale; but he does not conceive that Nathan Sims can be relieved from his purchase without the consent of the other heirs. That Col. Maybin purchased another tract of land of the estate on the same terms, and has complied with the terms of sale. That on the day after the sale, the said Nathan Sims offered the tract of land he purchased to Matthew Sims upon the same terms upon which he had bid it off, and Matthew seemed to signify that he was willing to take the land on the terms stated, but that he required time to consider of it. That after con-

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sidering upon the matter *for about a week, Matthew agreed to take the land provided he had three years to pay for it in; but before the papers were executed, the said Matthew refused to take the land or have any thing to do with it; though it was by the consent and perfect approbation of the said Matthew Sims, that the said papers were prepared."

On these two papers it is to be remarked that the letter of Col. Maybin, which corroborates Nathan Sims's statement, is not on oath, and therefore not legal evidence: and that the statement of Reuben Sims is on oath. Admit them however both to have been correctly received, they neutralize each other where they disagree; especially as to the operation of the agreement of part of the heirs to bid in the land on the other heirs: and the affidavit or answer of Nathan Sims stands alone alleging new facts to which he was not interrogated, and therefore not legal evidence. But Reuben Sims in his answer puts the question on the true ground. Matthew Sims was no party to this private agreement; was not intended to be bound by it; was a real and earnest bidder at the sale (through an agent); and if he had purchased the land at $3,000, or even at a higher price, he could not have been relieved as of right from the purchase; consequently neither he nor the other heirs in his situation are bound by the private agreement of three of the heirs, and Nathan Sims must comply with the terms of the sale as far as they have all interest. This may be done by paying to those heirs their proportions of the price. It would be very mischievous, if a part of the

heirs of an estate could make private agreements as to the sale, and control of the same, without the concurrence of the other heirs. Nor will the decision injure Nathan Sims; for it is agreed by him and every party before the Court that the land is worth more money than $3,000. The rest of the affidavit of Reuben Sims applies to an alleged negotia-

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tion between Nathan Sims *and Matthew Sims, as to the sale by the former to the latter of the land, which he (Nathan) had purchased at the Commissioner's sale, at the same price he had given for it. It was altogether a distinct and subordinate transaction, and fell through on Matthew Sims's declining to make the purchase from Nathan. It has no relation to the question before us, nor any bearing on it, except so far that Nathan Sims's undertaking to make a bargain for the sale to Matthew furnishes evidence of the light in which he then considered himself; that is, as a real purchaser, and entitled to make a sale of the land to any third person, though he afterwards contended that he considered himself merely as having bid in the land for the estate.

Upon the best consideration then which I could give to this exception, and I have examined it carefully, I think that the first exception ought to be overruled; and it is so accordingly.

With regard to the second exception, I think the Commissioner did right in receiving the evidence of the former Commissioner respecting the sale. The reference to him was to get at the facts. The former Commissioner was a competent witness. He had no interest. He also best knew the facts, having conducted the sale. He testifies to the regularity of the sale, and to the purchase by Nathan Sims. In Jenkins v. Hogg, [2 Tread. Const. 821.] the Commissioner was the principal witness.

It is true that Nathan Sims was entitled to the production of the written entry if it existed. But the Commissioner who swears to the written entry of the sale having been made, swears also that the entry has been lost or mislaid. And it is clear, that not only an entry of sale, but the most solemn instruments, deeds and even judgments, which are proved to have once existed, may be supplied, on proof of the existence and

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loss and of *the contents. All this has been done in this case. The counsel for Nathan Sims insisted that the entry of sale was imperfect because it was not made in a sale book kept for that purpose. That certainly would be the safest course to be pursued by the officer of the Court, as it would prevent those losses of loose entries which breed these disputes. But no law prescribes that course. The entry may be made in any way which the Commissioner may think proper. He swears that he did make an entry, in this case, of the sale of the land, conformably to the advertisement, the price and the purchaser; and that this entry has been lost. His testimony on plenary examination and cross examination supplies the defect. This exception is therefore overruled.

The third exception ought to have stated more distinctly in what respect the sale was void under the statute of frauds. If it be on the ground that there was no written entry of the sale, that has not been established. It was argued for the defendant Nathan Sims, though not distinctly under this exception, nor indeed under any of the exceptions filed, that the purchaser ought not to be held liable under his purchase, because the price was too high, and it is the course to open biddings, and order another sale. It might be remarked that even in the English practice, it is not the course of the Court to open biddings on the ground of the purchaser having given too much, unless in cases of misrepresentation, or some other clear and forcible objection. But it is enough to say, it is not the course of the Court in this country, to open biddings either on the ground of too high or too low a price. The Court looks to the sale, and, if it be regularly conducted and fairly made, considers it obligatory on both parties. Undoubtedly several sales, made under the authority of the Court, have been set aside. In the case of Mr. Lowndes, the sale was

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*set aside at the instance of the purchaser under the particular circumstances of the case, a serious mistake in the representation of the quality of the land. In Roper's case [1] the sale was set aside against the will of the purchaser, on the ground that the land was knocked off to him prematurely, though another bid was made in due time, and not noticed by the auctioneer. These objections would have applied in any sale, and did not go on the general ground of opening biddings. So in Hall v. Frazier the sale was set aside on the special facts of the case, and the conduct of one of the parties injuring the sale.[2] Perhaps these remarks are unneces-

[1] These cases of Mr. Lowndes and Roper have never been reported. They were referred to by the Chancellor upon his recollection of the cases, when they occurred some years since in Charleston.

[2] The case of Frazier v. Hall, or rather Center v. Frazier, was decided a few years since in Columbia, but the Reporter, who was concerned for the purchaser, has reasons to believe that the Court were afterwards dissatisfied with their decree. Upon a resale, the premises brought but one third of the first sale, and a second attempt to set aside the sale was made before Chancellor De Saussure, who expressed great indignation at the imposition which had been put upon the Court, on the former motion, by the defendant in the cause (Frazier). It became evident to the Court upon the second motion to open the biddings, that there had

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*sary, as it has been settled, after much controversy and some discordant decisions, that the regulations of the statute of frauds do

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not apply to sales made under the *authority of the Court. Upon the whole, it seems to me that this exception must be overruled.

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been a fraudulent combination to defeat the sale between the defendant in the cause and the person who pretended to make a higher bid. The Chancellor confirmed the second sale. This case therefore can form no authority for the future guidance of the Court.

We do not think that many of the English cases as to opening the biddings can apply in this state. The method of selling under decrees of the Courts is entirely different in the two countries. In England, after the order for sale is entered, the solicitor for the party prosecuting the decree or order for sale, in such cases as the Master thinks fit, is permitted to make out "particulars of sale," and to print and disperse as many as are deemed necessary under the direction of the Master who is to make the sale. Beames's Orders in Chancery, 483. 2 Ves. & Beam. 417. If the sale is to be made on the land, the Master may appoint a deputy. An advertisement is published by the Master of the time and place of sale. Sales before the Master are generally conducted in his chamber. A particular of sale is prepared with a proper place left for bidders to sign their names. Every person who bids signs his name, with the bid

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he makes. The highest bid*der must obtain a report from the Master of his being the highest bidder, which is filed, and upon which a motion is made and an order to confirm it granted unless cause is shewn in a week after notice. Upon the confirmation of the report, an order is taken out for the purchaser to pay the purchase money into Court. Upon his doing so he receives a certificate. "He then calls for an abstract of the title, a copy of which is furnished by the solicitor concerned for the sale, who leaves the original with the Master, and takes out a warrant for the Master to approve the title if the parties differ. If the Master approves it, a title is accordingly prepared by the solicitor for the purchaser at his expense, in which all proper parties will be ordered to join and execute." "If the title should not be good the purchaser will be repaid his money." So far the contract is in fieri, and the purchaser may recede upon the discovery of any defect. If another person is disposed to open the biddings, he must make an offer to the Court bearing a considerable proportion in price above the last bidding, and must deposit double the sum, or sometimes ten per cent. with the Master. If a purchaser refuses to comply with his bid, the Court enforces a compliance by a reference to the Master to see if a good title can be made, and if he reports that it can be, the purchaser is ruled to shew cause, by a day fixed, why he does not accept the title and pay the purchase money. The whole proceeding in the case of sir William Yea is reported in 2 Fowler's Exchcq. Prac. 318-325. To the same work the Reporter begs leave to refer for the whole practice as to sales by the Master, p. 306. For further information on this subject, see Blake's Cha. Prac. 312, in note. 1 Howard's Cha. 260. 2 Howard's Cha. 116.

We have thus given an account of the manner in which sales are effected in England and Ireland.

In South Carolina, by the act of 1791, 1 Desaus. Rep. 77, the Commissioners are required to make all sales under the decrees of Court. The practice under this act has been for the Commissioner to advertise the premises with a description thereof, and the sale is effected before the Court Houses of each district, at public auction, by the Commissioner, in the same manner as Sheriff's sales, and generally on the same day, the first Monday of every month. All titles are executed by the Commissioner, and not by the persons concerned in the suit. Until the case of Center v. Frazier, it had been the habit of the Commissioners, so far as the experience of the Reporter extended, to give titles as soon as the purchaser paid the purchase money, or if sold on credit as soon as bonds and mortgages were signed. In that case Chancellor De Saussure reprehended the practice, and ordered the Commissioner never again to make titles before the report of sale was confirmed. Previously to that time the Commissioner of

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Columbia *was in the practice of reporting the sales, the compliance with the sale, and the fact that titles had been made, and, upon the report coming in, it was confirmed, no cause being shown.

By the English practice it is clear that the sale is still in fieri until the report of sale is confirmed and the conveyances executed by the parties. Up to that time neither party is absolutely bound. But is it so in our Court? Is it the fixed practice that the Commissioner shall not make titles before confirmation of the report? In the mean time what is to be done with the purchase money, if the sale is for cash; or the bonds and mortgages, if upon credit? Bonds, &c. cannot be taken before titles are made. The Court of Chancery sits but once a year, and by the practice of the Court the credit is usually six months. Suppose a sale is made soon after the adjournment of Court, is it to remain open until the succeeding session twelve months off, or are these sales to be confirmed at chambers? By the case of Gordon v. Sims the purchaser is bound by the entry of the bid. It is precisely as a Sheriff's sale in that respect. If so, why should not the Commissioner complete the sale, by receiving the purchase money and giving titles, and report the whole to the Court? According to this view of the matter the Court has the right and power both to compel the purchaser to comply with his bid, more especially when he is a party to the suit. But how are biddings to be opened? The Reporter suggests with diffidence, whether the Court has the power in this country to open them on any other ground than on some equitable principle of relief, which would give jurisdiction to the Court of Equity in any other case of contract of sale. There must be some fraud, mistake, accident or other ground of purely equitable cognizance. That another person offers a higher bid since the sale is no more a ground for relief, than if a higher offer had been made to a party after a private sale. The sale of the Master in England is in fact a private sale, not conclusive until the sale is confirmed and the titles made. We see no objection to the Court's either confirming or opening a sale where there has been fraud, accident, mistake or other ground of equitable cognizance, on motion before the suit is finally ended, as well as to hear the matter by bill and answer; but unless some such ground is made we do not think the Court of Equity in this state has the power to open the biddings. See Williamson v. Dale, 3 Johns. Cha. Rep. 290. Blake's Cha. 312. In England sales are opened on the ground of its being "in aid of creditors," "and of those interested in the surplus, that the fund arising from them should be increased. The Court therefore permits biddings to be opened, subject to certain terms to be imposed upon the new bidder." 2 Fowler's Exchcq. Prac. 318, citing the case of Hodges v. Jones, 31 May 1781.

With regard to the fourth exception, it is
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to be remark*ed anew, that this was a fair sale. That there was a competition of bidders, and one of them was displeased that Nathan Sims had become the purchaser at so moderate a price. That Nathan Sims was a party to the suit; and as the former Commissioner proved, saw or knew of the entry of the sale to him, and made no objections at that time; and that Nathan Sims as a party is more immediately under the control of the Court. In the exercise of that control the Court sometimes directs a bill for a specific performance; but it often decides the question on motion, and a rule to show cause. It prefers a bill where it has some doubts; but, in cases which appear to be clear, it acts upon motion to show cause. And surely this is the proper course in most cases: for generally sales are made to settle estates, to pay creditors, to divide estates among heirs, and such purposes as require speed. This mode of proceeding prevents great delays, and saves great expense. The purchaser too has the benefit of any testimony he can produce to show that he ought not to be bound. There is not an objection which he may not urge as well on his return to the rule, as in the mode of proceeding by bill and answer. I think therefore it is proper to overrule this exception.

It is therefore ordered and decreed, that the rule on Nathan Sims to show cause "why he has not complied with the terms of sale of a tract of land sold in this case, and purchased by the said Nathan," be made absolute; and that he be decreed to do and perform all that may be considered necessary by the Commissioner to complete his said purchase, and give the proper sécurities.

Nathan Sims appealed from this decree on the grounds taken before the Chancellor, with the additional grounds styled in the decree of this Court Nos. 5, 6, 7, 8, viz.

Fifth. "That the case ought to have been
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sent back *to the Commissioner, as defendant Nathan Sims was taken by surprize, in not being allowed the benefit of all legal testimony before the Commissioner, and conceiving that the Commissioner's decision would be overruled, did not produce before the Commissioner all the testimony that he could and would have done, but for the consideration that he would have another opportunity."

Sixth. "Because the decree does not allow the defendant the benent of Benjamin Maybin's letter, which was received as legal evidence on the hearing by consent, and especially as he is a party in interest, and his naked declarations are evidence against him or those he represents."

Seventh. "That there was no evidence of any plot of the land sold having been made, so that the Court cannot say what was sold by the Commissioner."

Eighth. "That the decree ought not in any view to make the defendant Nathan Sims liable to any of the heirs except Matthew Sims, as he appears to be the only one who is dissatisfied with the sale; and not even to him without giving him time to compel Benjamin Maybin attorney for Harris and wife, and Reuben Sims, his copurchasers, to contribute their portions of the purchase money."

A. W. Thompson, for the appellant.
O'Neall, contra.

Curia, per NOTT, J. I concur in opinion in this case with the Chancellor, on the first and second grounds, for the reasons given in the decree. I would only remark with regard to the second, that it was not the affidavit alone of the former Commissioner which was received, but he was called himself as a witness.

The third ground, however, appears to be
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the most *important point in the case. It has been long settled, that an auctioneer is the agent of both parties: and therefore the entry of a sale made and signed by him is a sufficient signing to satisfy the statute. Simon v. Motivos, 3 Burr. 1921. Hind v. Whitehouse, 7 East, 558. It appears that the decisions in England have gone further. It has been decided that a sale by the Master is a judicial sale, and that the confirmation of the report takes it out of the statute. Att. General v. Day, 1 Ves. 218. And the Chancellor, in this case, appears to have been of that opinion. It is not necessary, however, to decide that question; for the entry of the sale was made and signed by the Commissioner by whom the sale was effected. But there are two objections to this entry.

1. That it was made on a loose piece of paper, and not in a book kept by the Commissioner for that purpose.

2. That this was a sale of land, and therefore not embraced by the principles of the decisions above alluded to.

With respect to the first, it appears that the Commissioner was not in the habit of keeping a book at that time in which the entry of sales made by him were kept. His practice was to enter them on loose pieces of paper, which were afterwards filed in his office. It was certainly a very careless and reprehensible practice, but can not affect this question. This case must be decided on the ground of contract. And therefore if sufficiently reduced to writing, and signed by the party or his agent, it cannot be material whether the entry constituting the evidence of it was made in a book or on a sheet of paper.

The second question appears to be well settled by the modern decisions. For although it seemed at one time to be thought, that there was a distinction in that respect between a sale at auction of goods and lands, the distinction is without any foundation.

The words of the statute are, "no action
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shall be brought to charge any *person on any contract or sale of land, &c., unless the agreement, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

If therefore the auctioneer is the legally authorized agent of the party, signing by him is a fulfillment of the provisions of the statute. And that question being settled, the decisions apply as well to the sale of lands as goods. Emerson v. Heelis, 2 Taunt. 47. White v. Proctor, 4 Taunt. 208. Coles v. Trecothick, 9 Ves. 234. 1 Smith, 251. M'Comb v. Wright, 4 Johns. Ch. Rep. 665, and the cases there referred to.

I had at first some doubt on the fourth ground. But the Chancellor, who has had great experience in the Equity practice, and whose opinion therefore is entitled to great weight, does not appear to entertain any doubt on that question. And upon looking into the books I think he is well supported in the opinion which he has expressed. In the case of Cunningham v. Williams, 2 Anstr. Rep. 344, it is said, "A. B. was reported by the Master the highest bidder on a sale before him of property in a cause. Having neglected to complete his purchase, it was moved by Burton and Cooke, last term, to confirm the Master's report, in order to compel him to complete the purchase. The Court hesitating as to the practice, the matter stood over to this day, when Cooke stated two cases, Barker v. Holford, July 1793, and Egginton v. Flavel, November 1787, in Chancery, where biddings were compelled to be completed; and that the practice in Chancery is to confirm the report, and then, if the purchaser is supposed to be responsible, to get an order to inquire whether the party can make out a good title; and if he can, to obtain an order on the purchaser to complete the purchase. But if the purchaser is unable to complete the purchase, then on
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*the report being confirmed, it is moved to discharge him from the biddings. Ordered nisi, and no cause being shown, this was afterwards made absolute." I have transcribed the whole case; because Anstruther's Reports is a book with which the profession generally in this state is not very familiar; and because it is a leading case on the subject, and seems to have furnished a rule for the government of the Courts of Equity in England ever since. Child v. Lord Abingdon, 1 Ves. Jun. 94. 2 Ves. Jun. 335. In the case of Landsdown v. Elderton, 14 Ves. 512, Lord Eldon ordered the purchaser to pay the money in a fortnight, or to stand committed. And in New York, in a case not unlike the one now under consideration in its circumstances, Chancellor Kent ordered the purchaser to pay the money in six days, or that an attachment issue. Executors of Brasher v. Cortlandt, 2 Johns. Cha. Rep. 506. I also concur with the Chancellor, that this course derives support from the circumstance that the purchaser is one of the parties to the suit before the Court, and therefore more immediately under its authority. There may be cases where it would be more proper to proceed by bill than in this summary way; but that will always be within the discretion of the Court. But I do not see any thing in this case that made it the duty of the Chancellor to direct that course to be taken.

The fifth furnishes no cause for the interposition of this Court. It is the duty of the parties to be prepared for trial when required: and if, after using due diligence, their witnesses do not attend, they may obtain further time. But that is a question for the Court below, and not for this Court.

Whether Colonel Maybin's letter ought to have been received as evidence or not, is a question of no importance. For although the Chancellor rejected it as such, yet it was allowed all the effect which it could have had
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*if admitted. And the decision turned on other grounds which could not have been changed by the contents of that letter. For whatever agreement may have been made between some of the parties, it could not affect the rights of those who were not parties to that agreement.

The seventh ground does not appear to have been made in the Court below, and therefore can not be heard here. The party might have had the question referred to the Master, to ascertain whether a good title could be made, and may perhaps do it still. But that is a question for the Chancellor, and not for this Court. I do not mean to say that this Court will, in no case, order such an inquiry to be made, when it has not been moved before the Chancellor. Possibly such a case may occur; but it is not a motion of course; and I see nothing in the circumstances of this case which seem to require it.

The last ground was also a matter within the discretion of the Chancellor. The defendant is still at liberty to make what terms he pleases with the other parties interested. But without their consent the decree of the Court must be carried into effect.

The decree must therefore be affirmed.

Decree affirmed.

2 McCord, Eq. *168

*R. BRADFORD v. A. FELDER.

(Columbia. Jan. and May Terms, 1827.)

[*Executors and Administrators* ⟸3.]

The next of kin to a deceased person cannot maintain a suit in Equity for the recovery of property without administering, though he be exclusively entitled.

[Ed. Note.—Cited in Goodhue v. Barnwell, Rice, Eq. 239; Smith v. Carrere, 1 Rich. Eq. 129; Villard v. Robert, 1 Strob. Eq. 416; Kaminer v. Hope, 9 S. C. 258; Richardson v. Cooley, 20 S. C. 350; Strickland v. Bridges, 21 S. C. 25.

For other cases, see Executors and Administrators, Cent. Dig. § 3; Dec. Dig. ⟸3.]

[*Executors and Administrators* ⟸3.]

If he take possession and make dispositions, such acting will be disallowed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1, 3–14½, 1782; Dec. Dig. ⟸3.]

[*Equity* ⟸118.]

The decree suspended and leave given to the complainant to take out administration and to state it by way of amendment.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 554; Dec. Dig. ⟸118.]

Ann Clarke by her will gave several negroes to Ann Coulietle for life, and at her death, without issue living, then over to William Bradford an infant. Ann Coulietle married the defendant Felder, and died without having had children. William Bradford before he came of age also died, and this bill was filed by the complainant, his next of kin, against the defendant Bradford for the delivery of these negroes, and for an account of hire, &c. since the death of his wife, the tenant for life. The defendant demurred, on the ground that the complainant could not file his bill until he took out administration; and that was the only point made in the cause.

Chancellor De Saussure held that the bill might be well brought. It had been the practice of this state in similar cases.

The defendant appealed.

Chappell, for Felder, submitted the case on the part of the appellants.

M'Cord, for the appellee. Generally the law requires administration to be taken out in order to constitute one the legal representative of an intestate person. The statute of Charles, commonly called the Statute of Distributions, requires it. Nothing vests in the next of kin, under that statute, except through the administrator. But our statute of intestacy puts personal property on

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*the same footing with that of real estate, and vests the right thereto immediately in the next of kin. Administration under our act is only necessary in case of creditors to protect them, and to make equal distribution among several, should there be more than one of the next of kin. The only reason for the rule then was to have the funds properly applied to the payment of debts, or justly distributed among the next of kin. But here young Bradford died when but ten years of age, and left no other relation than Richard Felder of the same proximity of blood: there could therefore be no debts to be paid, nor any distribution to be made. It all belonged to the complainant: and why put him to the expense of administration? A distributee under the statute is in some cases regarded as the legatee of the law. Holt, C. J., in 4 Burn's Ecc. Law, 429, is made to say, "A person entitled to distribution under the act of 22 Ch. II. is in consequence entitled to sue for an account as a legatee was; for the next of kin is a legatee by the statute, and as a statute legatee he shall have the same remedy as the other legatee might before the statute." A legatee, under a bill to which there was no executor and no administration, might sue for a specific legacy against another holding the legacy in a fiduciary situation, as in this case of the tenant for life. 2 Kaimes's Eq. 71, 72, 73, 412, 415. However, if the bill was incorrectly brought in such cases, the Court will suspend the decree and give leave to the complainant to take out administration and to amend his bill. But it was believed that the complainant was actually the administrator.

Curia, per NOTT, J. The only question arising out of the decree in this case is, whether the next of kin to a deceased person can maintain an action in the Court of Equity for the recovery of property without

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adminis*tration. In the case of Farley v. Farley, 1 M'Cord's Eq. Rep. 506, this Court dismissed the bill on the ground, that no administration had been granted. In the case of Gregory v. Forrester, decided at the last December term, (ante, Vol. 1. McCord Eq. 318) the same opinion was expressed. In those cases the subject was well considered: and we felt bound to come to that conclusion. The next of kin is entitled to the administration; and may always administer before bringing his bill. Great difficulties may arise from allowing a contrary practice. It is said such proceedings have been allowed in our Courts; but I have looked over all our equity reports, and can find no such case. In the case of Elders v. Vauters, 4 Desaus. Rep. 155, decided in the year 1811, the Court would not permit the complainant to retain a slave which he bought from the next kin, though it was admitted that the debts were all paid, and although he held under a bill of sale purporting to be for a valuable consideration, and had been ten years in possession.

Chancellor De Saussure, in his index, states the purport of that decree, in the following words. "It is irregular for a person, though exclusively entitled to the estate of an intestate, to take possession and make dispositions without administering; and such

acting will be disallowed." 4 Desaus. Rep. Index, pl. 11, Tit. Executors and Administrators.

It appears to me, therefore, that the decisions of this Court have not only been conformable to the general principles of Law, but to the decisions which had previously prevailed in the Courts of Equity of this state. The decree therefore must be overruled. It is suggested however, that the complainant is, in fact, administrator. If so, he may have leave to amend his bill, so as to correspond with the fact. In the case of Humphries v. Humphries, 3 P. Wms, 347, where the next of kin had brought a bill

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without administering, the Lord Chancel*lor allowed the demurrer, and then gave the complainant leave to take out administration, and charge it by way of amendment to the bill. Let the complainant therefore have leave to amend his bill.

Leave given to amend.

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2 McCord, Eq. 171

SAMUEL F. DUNLAP v. JOHN CRAWFORD, THOMAS WILLIAMS and Wife, and J. H. WITHERSPOON, and Others.

(Columbia, Jan. and May Terms, 1827.)

[*Wills* ⇐598.]

Words of perpetuity in a devise of lands not necessary to convey a fee.

[Ed. Note.—Cited in Hall v. Goodwyn, 4 McCord, 443, 445; Peyton v. Smith, 4 McCord, 476, 17 Am. Dec. 758; Scanlan v. Porter, 1 Bailey, 428; Bedon v. Bedon, 2 Bailey, 251; Adams v. Chaplin, 1 Hill, Eq. 283; Robert v. Ellis, 59 S. C. 158, 37 S. E. 250.

For other cases, see Wills, Cent. Dig. § 1327; Dec. Dig. ⇐598.]

[*Wills* ⇐597.]

"I will and bequeath to my son R. one half of my plantation whereon I now live," *held* to convey a fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1319–1326; Dec. Dig. ⇐597.]

[*Wills* ⇐599.]

A charge on lands devised, without words of perpetuity, will give a fee.

[Ed. Note.—Cited in Hall v. Goodwyn, 4 McCord, 443, 445; Peyton v. Smith, 4 McCord, 476, 17 Am. Dec. 758; Scanlan v. Porter, 1 Bailey, 428; Robert v. Ellis, 59 S. C. 158, 37 S. E. 250.

For other cases, see Wills, Cent. Dig. § 1333; Dec. Dig. ⇐599.]

[*Statutes* ⇐263.]

The legislature having declared by an act, what the law in future should be on a point much controverted in the Courts, the Court adopted the rule laid down in the act, and decided the cause pending in the Court by that rule.

[Ed. Note.—Cited in Bowers v. Newman, 2 McMul. 488; Graham v. Moore, 13 S. C. 118.

For other cases, see Statutes, Cent. Dig. §§ 344, 349; Dec. Dig. ⇐263.]

There were several questions of some interest made in this case, but most of them were so involved with the peculiar circumstances of it that the Reporter has been induced to omit them. The main question was upon certain clauses in the will of Robert Crawford deceased. "I will to my wife her maintenance on the plantation during her life or widowhood. I likewise will my wife the use of the house and furniture." "I allow my son William a decent support in money and clothing for the sum of three years, to be raised off the plantation." "I will to my son Robert one half the plantation I now live on, adjoining Wren and Roper." "I will to my son John one half of the plantation I now live on, including the improvements." "I will to my daughters Martha and Elizabeth two hundred acres of land adjoining Hood." The question was, what estate Robert the son took under the will; for life only, or in fee? The charge on the plantation for the maintenance of the wife was upon the plantation in question, devised as above to Robert the son.

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*De Saussure, Chancellor. It is objected that the devise is without words of inheritance: and that Robert Crawford took only a life estate, which terminated at his death in 1819, after which the lands descended to the heirs of the devisor. Two answers were given to this objection by the complainants' counsel; first, that admitting for a moment the force of this objection, it is obviated by the application of another principle, that wherever a devise is made to any person subject to a charge, that of itself gives a fee, though there be no words of inheritance; and that the will of Mr. Crawford did subject the devisees of his lands to a charge for the support of the widow, and therefore the devisees took in fee.

The other answer which the complainants' counsel gave was that, in a devise of real estate, words of inheritance are not necessary to give a fee. This has been questio vexata before the late statute enacted or declared that words of inheritance should not be deemed necessary in a will to create a fee. Heretofore, for many years, the Court of Equity has decided that words of inheritance were not necessary in a will to create a fee; more especially whenever the slightest circumstance or appearance of intent could be discovered; and this was in conformity to the common sense and experience of mankind, that where a man devises land generally, and without restriction, he means to give a fee simple; and where he means to limit the estate, he does so by express words. By supporting the contrary, as the rule to guide in the construction of wills, the intention of the testator is defeated in a great number of cases. The cases decided are reported in [Whaley v. Jenkins] 3 Desaus. Rep. 80, [Clark v. Mikell] Id. 168, and [Waring v. Middleton] Id. 249; and in subsequent cases which have followed those. In the

Law Court the Judges, with a divided bench, were of a different opinion; as appears by the cases reported in [Crompton v. Ulmer] 2 Nott & M'Cord's Rep. 429.

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[Hall v. Goodwyn] Id. 383, and *[Spann v. Blocker] Id. 593, and [Witherspoon v. Dunlap] 1 M'Cord's Rep. 546. In the case of Hall et al. v. Goodwyn et al. 2 Nott & M'Cord's Rep. 383, there were six Judges present, three of whom dissented from their brethren, notwithstanding the very able opinion delivered by Judge Nott. In this state of things, I remain of the opinion I have always been. But the question ought to be submitted to the Court of Appeals; for though the statute of December 1824 has enacted that hereafter no words of inheritance shall be necessary in wills to give a fee simple in real estate, there must be many cases existing in which the Courts may and will be called upon to decide what the law was prior to the statute.

It is unnecessary to say, that whatever may be the rule laid down by the Court of Appeals, as to cases before the Statute, it will be the guide of my conduct.

The question came up again on appeal from the Chancellor's decree.

Miller, for the appellant. It is true, the clause devising the land to Robert contains no words of inheritance. But if the whole will be looked into, it makes a stronger case than that of Hall v. Goodwyn. The charges in the will on the plantation for the support of the wife during her life, and for the maintenance of William for three years, will give a fee. Hall v. Goodwyn recognized the rule. The cases are therefore not inconsistent. The two late Appellate Courts of Law and Equity were divided on this question. A new Court is established, and the legislature have contemporaneously adopted the rule of the Court of Equity in their act of 1824, declaring words of inheritance thereafter to be unnecessary to give a fee. The case therefore in this Court, notwithstanding Hall v. Goodwyn, is open for consideration. For the purpose of

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preserving uniformity the *Court should adopt the rule prescribed by the act. The same thing was done in Gibson v. Taylor, 3 M'Cord's Rep. 451. There the Court had long been divided as to the question, whether, the statute of limitations having once commenced running, any intervening disability could arrest its course. The legislature passed an act, that thereafter intervening disability, such as infancy, &c., should stop the statute. The Court in Gibson v. Taylor adopted the rule, and decided that case by the rule, although it was pending in the Court before the act was passed. It was great good sense in the Court to prevent such chequered features in the laws, which could only disgust the citizens of the country with a species of legal absurdity which they never could comprehend. Unless this rule was adopted, it would be thirty or forty years before bills under the new act would come before the Courts, and in the mean time a different rule will be in force. The legislature have the right to pass declaratory laws. In Calder v. Bull, 3 Dall. 386, it is said there is no inhibition in the constitution which prohibits the legislature from declaring a rule of law by act of assembly. It was not an ex post facto law—for criminal cases only are within that principle. It is not asked that the Court should go quite as far as the Connecticut Court went in the case last cited, nor is it necessary for our purposes that they should. The case of Mr. Fox's libel bill is in point. It is the supreme power of the legislature to declare the law in great and litigated cases. But even this view is unnecessary, if the Court should think that the charge on the land gave a fee.

Clarke, contra. The rights in this case were vested before the act of 1824, and the case must be considered as if that act had never passed. It is not a declaratory act. It enacted a rule of law to be of force there-

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after. *It is not true that there exists any charge in the will on the estate devised to Robert. John is expressly charged with the subsistence of his mother, and William's support is a charge on that part of the plantation devised to John. It is so considered by the parties. Hall v. Goodwyn is conclusive of this case, and that words of inheritance are necessary to convey a fee. Several cases have been decided on its authority and the Court will not change the rule.

Miller, in reply. The testator's widow is to live on and be supported off the plantation. William's charge is equally on the whole plantation. The devise to Robert is of one half, and the other half to John, and how can it be said that the charge on the plantation is only a charge on one half of the plantation. A charge of twenty shillings in Collin's case (Coke's Rep. part 6, page 16) gave a fee.

Curia, per COLCOCK, J. Did Robert Crawford the grantor take a fee in the lands devised to him by his father's will?

This question has very properly been called questio vexata. It may be said, that a majority of the Court also concur; for although the Chancellor has decided that Robert took only a life estate in the land devised to him by his father, it is obviously against his own opinion, and the repeated decisions of that Court of which he has been so long and so distinguished a member, and only in conformity with what he has supposed to be the decision of the late Court of Appeals at Law, but which decision is not considered as affecting the rights of the complainant as I shall hereafter show.

This is a question on which I venture to

say that there is a greater diversity of opinion among those who have gone must fully into it than can be found in any other. I

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*take it that upon the first introduction of wills there was not any rule of law which required the use of technical words in a will; and this is supported by the authority of 3 Comyn. p. 358, and the statute of wills. Nay, it is the language of all who write on this subject. Judge Blackstone, in speaking of the difference between wills and deeds in relation to executory devises, says, "The reason of the difference is that the testator is not expected to be acquainted with technical language, and is very often without the aid of those learned in the law," and I will add, is more often unable to pay them. Whence then originated what is now called the true rule, that there must be words of inheritance, or those which are tantamount, to pass a fee? On the first introduction of wills, it was obvious, from a reference to the state of things which then existed, and the struggles which have been made to introduce the power to alienate estates, that the first rule in relation to them must be, that the intention of the testator must prevail. But the Judges of that day, leaning to the aristocracy of the country and against the alienation of estates, thought proper to introduce the feudal rule which applied to feoffments and grants, the only conveyances then in use in relation to wills, "that where an estate was conveyed without limitation, no more than an estate for life passed, and the reversion descended to the heirs." In a short time however they were driven from this position, and they were obliged, where the intention had been manifestly and obviously expressed, to depart from the rule which required the use of technical language, and in this march there has been from time to time a gradual departure from the rule which was adopted by the authority alone of the Judges of England. But it is said, you have gone far enough and must stop at the last decisions which have been made in England on this subject: and why

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let me ask? Is it simply because they *have laid down the rule so far? I am no advocate for innovation upon the well established doctrines of the law: nor am I disposed blindly to follow the decisions of English Judges. Indeed there is not much encouragement to follow them on this subject, when we find some of them regretting that there ever was any departure from the rigid common law rule in relation to grants, and others, that they are shackled by any rule on the subject.

What is the reiterated language on the subject of the construction of wills? That the intention shall govern: that is, when it does not violate the established doctrines of law; as that a man shall not be permitted to create a perpetuity. Now is it not a mockery to say to a man, "you may make such a disposition of your estate as you think fit," and then to destroy his will because it does not contain expressions which the testator never heard of? In order to arrive at the intention of a testator, the whole will is to be taken together when the intention is not clearly expressed in any particular clause.

The question here is, what did he intend when he said, "I will and bequeath to my son Robert one half of my plantation whereon I now live, joining Wren and Roper?"

There are no words of inheritance or limitation: therefore it is said, he only intended to give a life estate. But on reading the whole will, it is impossible not to conclude that the testator sat down to dispose of his whole estate, and rose up with the firm conviction that he had done so. In the case of Hall v. Goodwyn, the Court were equally divided on this subject; but as the case was decided by myself on the circuit, the opinion of the other three Judges prevailed by the provisions of the act, which declared that the opinion of the circuit Judge who tried the cause should not be taken in the ultimate decision of the case. There the intention to

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*pass a fee was considered as manifested by the use of the word "estate," which it is said comprehends all a man has; and many authorities directly in point were referred to. But that intention may be collected from the whole will taken together, as well as, if not better than, by the use of a single expression. In the case of Richardson and wife v. Noyes, 2 Mass. Rep. 59, Sedgwicke, Justice, says, "I do think that Courts ought to make a liberal construction of wills, and not to restrain in the consideration of those circumstances which tend to enlarge from life estates to fees. For I am satisfied that the idea expressed by Lord Mansfield in Loveacres v. Blight, 1 Cowp. 355, is correct. 'I really believe almost every case determined by this rule as applied to a devise of land in a will has defeated the real intention of the testator; for common people and even those who have some knowledge of the law, do not distinguish between a bequest of personalty and a devise of land or real estate. But as they know when they give a horse they give him forever, so they think when they give land it will continue to be the sole property of the person to whom they left it.'"

This language is peculiarly applicable to the case before us, for the testator has made that only distinction which occurs to ordinary men between giving and lending. When he does not intend to give absolutely, he lends for a time. And it is further manifest that he intends to give absolutely when he does give: first from the circumstance of his making no provision for any remainder; and secondly from his charging the estate with the payment of money for the support of the mother. And this has been considered since the case of Collier, 37 Eliz. p. 16 in Coke's Rep. part 6, as evidence of an intention to pass the fee; and I should conceive it a

waste of time to refer to authorities on that
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point, when *it has been so repeatedly decided in our own Courts. See [Waring v. Middleton] 3 Desaus. Rep. 249, and Hall v. Goodwyn.

I cannot conclude this part of the case without repeating what I have formerly so much relied on in support of my opinion on this controverted point. That distinction which once existed between real and personal property has been gradually lost sight of, and it very often happens that a testator is more concerned about the disposition of his personal than of his real property. How then is it to be expected that ordinary men should suppose that more formality was required in disposing of an hundred acres of pine land, than in disposing of two or three prime negroes?

The legislature however having interposed and declared that no words of inheritance are now necessary to pass a fee, I should think that the case ought to be decided as the case of Gibson v. Taylor [3 McCord, 451] was,—by giving up an opinion in a controverted point, which for the future is put at rest: and in this view of the case my brother JOHNSON concurs. The decree of the Chancellor is therefore reversed.

NOTT, J. (dissenting). I have not been able to concur in opinion with my brethren in this case. But it is nevertheless one respecting which I should feel less indifferent if I did not think that it would be more extensive in its consequences than seems to be imagined, and will go to disturb titles which have been long settled, and quietly enjoyed. I have always supposed that there was no rule of law better settled in this state, than that a devise of land did not convey more than a life estate without some words of perpetuity, or some provision in the will authorizing the inference that a greater estate was intended to be conveyed. That question was well considered and explicitly decided after great consideration in the case of Hall
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v. Goodwyn, 2 Nott & M'Cord's Rep. *383. And although there was a difference of opinion in the Court on another point of the case, there was none on that.

In the case of Jenkins v. Clement & Deas, Harp. Eq. Rep. 72, [14 Am. Dec. 698] the Court of Equity appears to have made a different decision. And Chancellor De Saussure, who decided the case, professes to bottom his opinion on the former decisions of that Court. But by a reference to the cases relied on, it will be found that they do not support the opinion. The cases will be found in 3 Desaus. Rep. 80, 168, and 249. Chancellor De Saussure himself in the index to that volume, title Will, lays down the purport of those decisions in the following words. "Words of perpetuity in a will not necessary, intention being plain." In the case of Clark and Wife v. Mikell, page 168 of that volume, the Court expressly admit that such a devise will not convey a fee without being coupled with some circumstances to manifest such an intention. And in the case of Waring v. Middleton and others, in the same volume, 249, which was the last case decided in that Court before the case of Jenkins v. Clement & Deas, we see the Chancellor labouring through five successive pages to show, that such an intention is to be found in the various provisions of the will; which labour certainly might have been spared if such was the legal effect of a simple isolated devise, without any words of perpetuity, or circumstance evincing such an intention.

By the act of 1824 the law is now altered, and there is no doubt that the present law will be found much more conducive to justice. Persons not skilled in the law are equally liable to omit these technical words which are calculated to carry their intentions into effect, and to use those which express a meaning different from what they do intend. But the legislature has taken care, by the very terms of the act, to give it a prospective
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*operation, by declaring that "no words of limitation shall hereafter be necessary, &c." And the distinction between the effect of an act of the legislature altering a former law, and a judicial change of the law, is, that one meets the minds of the community prepared to receive it by its prospective effect, and the other takes them by surprise, by embracing all cases past present and future. It cannot be considered as a declaratory act, because the object of a declaratory law is, to remove some doubt which previously existed with regard to the law. But on this subject there never had been any doubt. And the Court of Equity do not put it on that ground, but on the broad ground that it is time the law should be changed. And there never was a case less approved by public opinion, or which went more to lessen the confidence of the country in the Judiciary than the case of Jenkins v. Clement & Deas, which is now relied on.

There is no analogy between this case and the case of Gibson v. Taylor, [3 McCord, 451.] That case depended on the construction of our own act of limitations. Contradictory decisions had been made upon it, and the Court was then divided upon the question. Cases had been hanging up in Court for years, undecided, in consequence of that decision. The object of the legislature was to remove that doubt, but not to alter the law, and the Court then felt bound to yield to those decisions which had been in conformity with the act. The decision which the Court is now about to make will go to shake all the titles heretofore depending on the construction of wills, whatever the lapse of time may have been; and I am not prepared to meet the consequences of such a decision.

Decree reversed.

2 McCord, Eq. *182

*BENJAMIN NETTLES v. THORIT ELKINS and Wife, and JOHN H. NETTLES.

(Columbia. Jan. and May Terms, 1827.)

[*Executors and Administrators* ⇐120.]

A. executor of B. recovered a judgment against C. in his own right. B.'s estate was indebted to C. as administrator to D. A. and C. agreed to discount these debts, and thereupon C. settled the debt of B. to D.'s estate, but satisfaction was never entered on the execution. A. afterwards left the state, and the defendants took out letters of administration on the estate of B. de bonis non, and attempted to enforce this execution against C. The Court enjoined the execution and ordered an account between the parties subject to the agreement to discount.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 492; Dec. Dig. ⇐120.]

[*Injunction* ⇐26.]

Courts of Equity have generally adopted the rule at Law as to discount, but in cases of peculiar hardship they will extend the rule, or enjoin one party from proceeding until the matter of set-off be determined at Law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24–49, 54–61; Dec. Dig. ⇐26.]

The defendant John H. Nettles, as executor of Zachariah Nettles, obtained a judgment against the complainant for $243.20, besides costs. This was a bill to enjoin the proceedings on that judgment, on the ground that Zachariah Nettles, the testator, was indebted to Margaret Campbell (now deceased), the administration of whose estate was committed to the complainant, in a greater amount. The complainant alleged in his bill and the defendant John H. Nettles admitted in his answer that Zachariah Nettles was indebted to the said Margaret Campbell in the sum of $600, from which he claimed a deduction of $90 paid to her in her life time by his testator. He also claimed a reasonable compensation which he estimated at $50 for his trouble and expense in collecting the said sum of $600 on account of the said Margaret Campbell. And he further admitted, "that he was well satisfied that his testator stood indebted to the estate of Margaret Campbell in a larger amount than the judgment which he as the executor of the said Zachariah Nettles obtained against the complainant. That after complainant had become the legal representative of the said Margaret Campbell, he entered into an arrangement with defendant John H. Nettles to adjust and settle said claims. And defendant is fully persuaded that it would have been the interest of the estate of his testator, had said arrangement been carried into effect by discounting one debt against the other. That the pretences set up by his co-defendants against the complainant's demand are either not founded in fact or misconceived."

After these transactions and the removal of

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John H. *Nettles out of the state, administration de bonis non of the estate of Zachariah Nettles was granted to the defendants Thorit Elkins and wife; who, disregarding the agreement before stated, were proceeding to enforce the execution founded on the judgment against complainant, and in opposition to the complainant's bill, insisted that the agreement was not binding on them.

Thompson, Chancellor, who heard the cause, dismissed the bill on the ground that the debts were in different rights and could not be set off.

From this decree the complainant appealed.

Johnston, for the appellant. The injunction is not prayed for solely on the ground that the debts could be set off one against the other, but on the express agreement that the same should be so discounted. But in Equity without the agreement the discount would be ordered. Under the agreement of the parties Equity would consider the execution as satisfied.

Pearson, contra. Courts of Equity have adopted the same rule as the Courts of Law as to discounts. They must be in the same right. 4 Johns. Cha. Rep. 287.

Curia, per JOHNSON, J. The question whether the administration de bonis non was properly granted, and superseded the powers of the executor, has not been mooted here, and I shall not turn out of my way to consider its propriety. It is enough that what has been rightfully done by the executor is binding on his successors, the administrators de bonis non. The ground relied on by the defendants Thorit Elkins and wife, and on which the decree proceeds, is that these demands are in different rights, and therefore can not be set off one against the other.

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*It is true that the Courts of Equity have generally adopted the rule of the Courts of Law on this subject, and yet I can conceive a case of such peculiar hardship as would justify a Court of Equity in permitting it, or in enjoining the one party from proceeding until the matter of set-off should be determined at Law. 2 Madd. Cha. 662.

But this question is concluded by the agreement of the parties; as the executor of Zachariah Nettles, John H. Nettles, was competent to make such an agreement. He did enter into an agreement for that purpose; and he then thought and still thinks it was the best interest of his testator. Upon investigation it is found that the demand is justly due to the complainant, and there is no pretence that the estate of Zachariah Nettles is insolvent. Where then is the injustice to permit it?

Again. Confiding in this arrangement, the complainant might not have made the necessary preparations to meet this demand on him; and he has actually accounted with the distributees of the estate of his intestate for a part of the fund. Reposing in security

he has neglected to prosecute his claim at Law until in all probability it would, but for these circumstances, have been barred by the statute of limitations,—and at all events it would have been delayed. To permit the defendants to profit by it would be to sanction a most iniquitous fraud.

It is therefore ordered and decreed, that the defendants be perpetually enjoined from proceeding on their execution at Law against the complainant: and that it be referred to the Commissioner to ascertain how much is due and owing from the defendants as the representatives of Zachariah Nettles to the complainant as administrator of Margaret Campbell; taking into the estimate the amount paid to the said Margaret Campbell, and what shall be found due to the said

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Zachariah Net*tles for his trouble and expense in selling her lands and collecting the money. If upon such reference it shall be found that the amount due to complainant exceeds the amount of the judgment against him, then the defendants are to pay the balance to the said complainant. But if, on the other hand, a balance shall be found due to the defendants, then the complainant is decreed to pay that balance, and the judgment and execution at Law shall stand as a security therefor.

COLCOCK, J., dissented.

Decree reversed.

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2 McCord, Eq. 185

WILLIAM WRIGHT Executor of SAMUEL WRIGHT Deceased v. WILLIAM G. WRIGHT and Others.

(Columbia. Jan. and May Terms, 1827.)

[*Executors and Administrators* ⇐456.]

Costs incurred in suits relative to the estate ought to be allowed an executor, unless good reason be shown against it.

[Ed. Note.—Cited in Lay v. Lay, 10 S. C. 221.

For other cases, see Executors and Administrators, Cent. Dig. § 1965; Dec. Dig. ⇐456.]

[*Appeal and Error* ⇐1009.]

The Court of Appeals can only lay down rules by which cases are to be governed. The facts of the case are to be investigated by the Commissioner and Chancellor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. ⇐ 1009.]

[*Executors and Administrators* ⇐500.]

An executor is not entitled to commissions unless he makes his annual returns to be examined by the Ordinary.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2134; Dec. Dig. ⇐500.]

[*Executors and Administrators* ⇐495.]

If the executor has done his duty he is entitled to his commissions on the aggregate sum, paid over to the distributees, of principal and interest.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2090; Dec. Dig. ⇐495.]

[*Executors and Administrators* ⇐495.]

If money is placed out at interest, the executor is entitled to commissions on paying it away; and whether he places it in the hands of others, or keeps it in his own, makes no difference, so it is paid.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2089–2106, 2108; Dec. Dig. ⇐495.]

[*Executors and Administrators* ⇐495.]

Where an executor lets out money upon interest and receives it in annually, and re-invests it for the benefit of the estate, making it accumulate until paid over, he is entitled to ten per cent. and when he suffers it to accumulate in his own hands in the same way, he will be entitled to the same compensation, but not when he is decreed to pay it over, at the close of his administration, on moneys retained by him.

[Ed. Note.—Cited in Briggs v. Holcombe, 3 Rich. Eq. 17; Bobo v. Poole, 12 Rich. Eq. 228.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2090, 2104; Dec. Dig. ⇐ 495.]

[*Executors and Administrators* ⇐72.]

The only evidence which the parties interested in an estate can usually offer, of the amount to be administered, is the inventory returned by the executor. It is conclusive against the executor, and he must show by satisfactory vouchers how it has been administered.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 321; Dec. Dig. ⇐72.]

[*Executors and Administrators* ⇐503.]

The Ordinary should not allow an executor's accounts, unless the proper vouchers are produced, or their absence accounted for. And it ought to appear on the face of the settlement, what was the nature of the evidence on which the return was accepted and allowed.

[Ed. Note.—Cited in Owens v. Walker, 2 Strob. Eq. 289, 295; Buerhaus v. De Saussure, 41 S. C. 492, 19 S. E. 926, 20 S. E. 64.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2153–2156; Dec. Dig. ⇐ 503.]

[*Executors and Administrators* ⇐503.]

Though the evidence with the Ordinary is not conclusive, per se, in favour of the executor, it ought to be received for as much as it is worth, under the circumstances. The regularity of the accounts, the death of witnesses, loss of vouchers, and lapse of time, must be taken into consideration.

[Ed. Note.—Cited in Owens v. Walker, 2 Strob. Eq. 289.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2153–2156; Dec. Dig. ⇐ 503.]

[*Executors and Administrators* ⇐503.]

Where sixteen years elapsed after the accounts were settled and allowed by the Ordinary, it is not to be presumed that he suffered them to pass without satisfactory evidence of their correctness, and they ought therefore to be a complete protection to the executor; subject however to be impeached by the other side for fraud or error, the burthen of proof being upon them.

[Ed. Note.—Cited in Barnwell v. Barnwell, 2 Hill, Eq. 233; Lay v. Lay, 10 S. C. 215.

For other cases, see Executors and Administrators, Cent. Dig. § 2154; Dec. Dig. ⇐503.]

[*Executors and Administrators* ⇐509.]

An executor may show that an item in his return was charged by mistake. Without such proof he is bound by his return.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2201; Dec. Dig. ⇐509.]

[*Executors and Administrators* ⇐137.]

An executor cannot sell without permission of the Ordinary. If he sells, not having funds, he must account for the value of the property with interest.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 606½; Dec. Dig. ⇐137.]

[*Executors and Administrators* ⇐131.]

If an executor suffers the family of his testator to take possession of the property, and to convert any part improperly to their own use, he is liable for it, they being regarded as his agents.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 542; Dec. Dig. ⇐131.]

[*Executors and Administrators* ⇐109.]

An executor has no right to exceed the income of the estate, and to contract debts, either for the benefit of the estate or tor the support and education of the family and children of his testator, without permission of the Court. Where the income is insufficient, it is his duty to apply to the Court to make such further provision out of the estate as may appear necessary. Such advances by an executor however will be allowed, if he shows the necessity and prudence of the expenditure.

[Ed. Note.—Cited in Anderson v. Sileox, 82 S. C. 115, 63 S. E. 128.

For other cases, see Executors and Administrators, Cent. Dig. § 435; Dec. Dig. ⇐109.]

[*Executors and Administrators* ⇐500.]

If an executor omit to settle his accounts for several years, and then make a return for that whole period, he will only be entitled to commissions for the year in which his account is rendered, and the allowance must not be made to embrace those years in which no returns have been made. And unless his accounts are so made out that the transactions of each year may be distinctly ascertained, no commissions ought to be allowed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2134; Dec. Dig. ⇐500.]

[*Interest* ⇐58.]

The question of annual rests considered.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 131; Dec. Dig. ⇐58.]

[*Wills* ⇐734.]

Interest must be paid on the interest where by the will the interest is required to be paid annually for the legatee's benefit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847–1872; Dec. Dig. ⇐734.]

[*Executors and Administrators* ⇐104.]

As a general rule, in this state, interest is not to be calculated with annual rests on moneys in executor's hands.

[Ed. Note.—Cited in Myers v. Myers, 2 McCord, Eq. 267, 16 Am. Dec. 648; Myers v. Myers, Bailey, Eq. 29; Livingston v. Wells, 8 S. C. 363.

For other cases, see Executors and Administrators, Cent. Dig. § 432; Dec. Dig. ⇐104.]

Some cases require it. Difficult always to draw the line of distinction.

[*Executors and Administrators* ⇐104.]

If the executor keep the funds against the directions of the will, he must pay interest with annual rests.

[Ed. Note.—Cited in Bobo v. Poole, 12 Rich. Eq. 227; Livingston v. Wells, 8 S. C. 363.

For other cases, see Executors and Administrators, Cent. Dig. § 432; Dec. Dig. ⇐104.]

[*Executors and Administrators* ⇐104.]

Same strictness not to be required in this state as in England, on account of the difficulty of vesting funds here.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 423–432; Dec. Dig. ⇐104.]

[*Trusts* ⇐219.]

Exceptions to the general rule, where the will directs the laying out the fund to accumulate, or the executor unnecessarily calls in money which is accumulating, or employs it in trade, or otherwise, and refuses or neglects to account for the property. In such cases annual rests are made. All profit must enure to the cestui que trust.

[Ed. Note.—Cited in Livingston v. Wells, 8 S. C. 363.

For other cases, see Trusts, Cent. Dig. § 317; Dec. Dig. ⇐219.]

[*Interest* ⇐59.]

The rule for calculating interest when partial payments have been made, is to apply the payments in the first place to the interest due, and the surplus to the principal. Subsequent interest is to be calculated on the balance of principal remaining due. If the payment be less than the interest, the surplus of interest is not to be added to the principal.

[Ed. Note.—Cited in Teague v. Dendy, 2 McCord, Eq. 212, 16 Am. Dec. 643; Livingston v. Wells, 8 S. C. 363.

For other cases, see Interest, Cent. Dig. § 132; Dec. Dig. ⇐59.]

[*Evidence* ⇐408.]

A receipt will not conclude a party from showing a mistake in the settlement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1830; Dec. Dig. ⇐408.]

[*Witnesses* ⇐83.]

One defendant may be a witness for or against another in Equity, where his interest is not to be affected by his testimony.

[Ed. Note.—Cited in Capehart v. Huey, 1 Hill, Eq. 408; Etheredge v. Partain, 10 Rich. Eq. 214.

For other cases, see Witnesses, Cent. Dig. § 228; Dec. Dig. ⇐83.]

Case sent back to the Commissioner to have the accounts adjusted according to the rules laid down by the Court.

[*Appeal and Error* ⇐840.]

[Cited in Farrar v. Farley, 3 S. C. 24, to the point that the court of appeals will not examine long and complicated accounts.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3314; Dec. Dig. ⇐840.]

[This case is also cited in Williams v. Gregg, 2 Strob. Eq. 307, without specific application.]

This bill was filed for the purpose, first, of correcting an error made in a settlement which had taken place between the complainant and three of the legatees of complainant's testator, Elijah Watson and wife, Daniel J. Beacham and wife, and Henry Paisley and wife; and secondly, to compel all the legatees to come to a settlement and account with him, against three of whom, William G.

Wright, James Wright, and Tobias Cook and wife, he had demands to the full amount of their shares. The defendants' answer admitted the error in the settlement, the demands which the executor had against three of them, and consented to come to an account. Their answer urged many objections to the executor's accounts, which will

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more fully appear from *the exceptions to the Commissioner's report hereafter to be stated. The five first clauses of the testator's will contained specific legacies of a horse, saddle and bridle to each of the testator's children on their respectively arriving at full age or marrying. The sixth clause of the will was as follows: "Item, I lend to my beloved wife Patience C. Wright, while she remains my widow, all the rest of my property both real and personal; and it is further my desire that my children be kept together and maintained and educated out of the property of my estate until they marry or come of age: My further will and desire is, that, after the death of my wife, all my remaining slaves, stock, household and kitchen furniture, and every parcel of my property real and personal that is not before given, be set up and sold at public auction, and an equal division to be made. I ordain, nominate and appoint my brother William Wright executor to this my last will and testament. It is further my will and desire, that if my wife should marry again, that my executor should lend her property sufficient for a comfortable maintenance during her life."

The case was referred to the Commissioner at June term 1825, and at the next term he submitted a report, to which both parties excepted.

These exceptions came on before Chancellor De Saussure, June 1826.

The complainant excepted first, "Because the Commissioner did not allow him commissions on the interest with which he charged him."

The Commissioner charged the complainant with the interest on the whole amount of assets in his hands from the time he respectively received them; and the complainant contended that under the act of the legislature he was entitled to ten per cent. com-

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missions on *the whole amount of interest with which he was charged. The Commissioner overruled the exception, and the Chancellor confirmed his decision without assigning any reason.

The complainant's second exception was, "That the Commissioner charged him with the receipts charged in the return of 1810, and refused to credit him with the payments made in the same return."

In the year 1810 the complainant made a return on oath to the Ordinary which was approved and filed. In that return he charged himself with $734 received, and credited himself with $608 45 cents paid out. On the reference the defendants, in order to charge the complainant with the amount of $734 contained in that return, introduced the return as evidence. The complainant contended that the return, when so introduced, became good evidence to discharge as well as to charge him, and must be taken altogether. The Commissioner however ruled that the return might operate to charge the complainant, but could not be allowed to discharge him. The complainant then showed by proof the following circumstances in support of the credits contained in his return. He proved that the testator at his death was indebted to the different persons mentioned in that return, and in about the sums there mentioned; that Simpson, one of the persons mentioned in the return, to whom the testator was indebted, was dead, and his books burnt; that Larkin Griffin, Dr. James Moore, W. Caldwell and Andrew Lester, to whom were also debts due by the testator, and which the return charged as paid, were either dead or removed.

By Major Black it was proved, that the testator owed him at his death the sum charged in the return, and that it had been paid. The complainant was enabled to vouch the payments made to Elizabeth Wright and John Neely. The defendants replied that some of

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these debts *were paid by the widow. The complainant rejoined by showing, that under the will the widow was entitled to the whole estate, and actually had the funds with which the complainant had charged himself placed in her hands for the payment of the debts; and if any were paid by her, they were paid out of these funds. He also showed that when he settled with three of the defendants, the receipts and payments contained in that return were considered as mutually balancing each other, and therefore were not taken into the calculation. Notwithstanding these facts the Commissioner rejected the payments contained in the return, and charged the complainant with the amount received.

The complainant's exception was therefore overruled by the Commissioner. The Chancellor concurred with the Commissioner.

The complainant's third exception was, "That the Commissioner had charged complainant with the amount of Reuben Ligon's note, when it did not appear that there ever was such a note due to the estate, but on the contrary, from the return of 1810, it appeared as a debt due by the estate."

The return of 1810 was the only evidence offered to charge the complainant with this item. In that return it appeared to be a debt due by the estate: and the complainant contended that in fact it was a note due by the estate to Reuben Ligon.

The Commissioner overruled the exception, and the Chancellor concurred with him, "but not entirely to his own satisfaction."

The defendants excepted to the report, first, "Because the Commissioner ought to have charged complainant with the value of the negro Cæsar, and his hire from April 1812, as it appeared that he was sold by the executor without any order from the Ordinary, and the executor then had funds sufficient to pay the debts of the estate."

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*It appeared that the negro Cæsar had been seized by the Sheriff of Laurens to satisfy an execution recovered against the estate of Samuel Wright, on a debt due by the testator at his death. The complainant attended on the day of sale, and thinking it would be better for the estate to sell by private contract, he sold the negro for what all the witnesses said was a full price. The negro was sold by consent of the Sheriff, and the money applied to the execution. There was no evidence that the complainant out of the funds of the estate could have paid the debt without selling the negro. The amount for which Cæsar sold, and interest, were accounted for by complainant. The Commissioner overruled the exception, and the Chancellor confirmed his decision.

The defendants' second exception was "That the Commissioner should have charged the complainant with the amount of the property which he suffered Thomas Ligon to dispose of, belonging to the estate."

This exception related to some property which, at the death of Reuben Ligon, Thomas Ligon, his administrator, sold as his property. Reuben Ligon married the widow of Samuel Wright, deceased, and at his, Reuben Ligon's death, his administrator sold the crop at the place where she lived, which the defendants contended belonged to the estate of Samuel Wright. The complainant replied that the widow, Reuben Ligon's wife, having an estate for life in Samuel Wright's estate, her husband would of course have an interest in the same for his own life, as the case might be, and that therefore, the crop made by Reuben Ligon belonged properly to his estate. If he was incorrect in this conclusion, the complainant contended that he was not liable, and that defendants should look to Thomas Ligon. He also urged that the widow, Patience C., was the only one who had any right to complain, for if the property did not belong to Reuben Ligon, it belonged to

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her; and hence *the defendants had no right to ask an account from complainant, when she had lived for nearly ten years after the sale by Thomas Ligon, and made no complaint. The Commissioner overruled the exception, and the Chancellor concurred.

The defendants' third exception was, "That the Commissioner allowed the complainant commissions, although he never made annual returns as required by law, and in other respects neglected to discharge his duty as executor." It appeared that the defendant had made returns on the estate for every year in which he received any sums of money belonging to the estate. The defendants relied solely on complainant's returns to charge him with the testator's estate. The Commissioner allowed complainant commissions on the amount of his returns made. He therefore overruled the exception, and the Chancellor concurred with him.

The defendants' fourth exception was, "Because the Commissioner should have charged the complainant with the amount of property which he suffered Reuben Ligon to sell and dispose of belonging to the estate." Upon the marriage of the widow, the complainant, believing that the whole of the testator's estate was not more than enough for the maintenance of the widow and children, the children being then all small, and of necessity would remain with their mother, permitted, in the exercise of the discretion given him by the will, the property to remain with the widow. Reuben Ligon sold a mare, a few goats, and a steer, amounting altogether to perhaps sixty dollars. It appeared however that the children were supported and maintained by him without any allowance, except the estate in his hands. The Commissioner overruled the exception, and the Chancellor concurred.

The fifth exception was, "That the Commissioner allowed the complainant the costs that

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accrued in the *case of Washington Williams v. Complainant." The case alluded to was brought, and the recovery had against complainant, as executor. The subject matter of the action was for necessaries furnished defendants after Samuel Wright's death, and while living with their mother, Mrs. Ligon, the tenant for life. The judgment at law was for debt and costs de bonis testatoris. The Chancellor allowed the executor these costs. He said that it appeared to him that costs incurred in suits relative to the estate ought to be allowed, unless good reason be shown against it."

The sixth exception was, "Because the complainant, from his negligence and misconduct in the management of the estate, should be charged with annual rests." There was no act of wilful mismanagement or culpable neglect proved against the complainant. Every charge against him was allowed upon his own returns to the Ordinary, and not a dollar was charged to him upon proof aliunde. The complainant appeared to have been actuated by honest motives in every one of his acts as executor. The Commissioner overruled the exception, and the Chancellor concurred with him. The Chancellor observed, "this question depends on the circumstances. It is sometimes allowed and sometimes refused. The rule in this state is against the allowance of rests and compound interest. The exceptions to the rule depend

on the facts of the case. I do not think the exception well founded in this case."

The seventh exception was, "That the Commissioner charged defendants with interest on the specific legacies." The Commissioner's report charged the complainant with interest on the funds in his hands from the time he received them, and allowed him interest on the payments made from the time they were paid. Each of the legatees received for the specific legacy of a horse, saddle, and bridle, and in lieu thereof, one hundred

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dol*lars in cash. Interest on this payment was allowed from the time it was made, because the executor was charged with the interest on the funds out of which he paid the same. The defendants contended that the Commissioner should have calculated interest on the funds in the hands of the executor up to the time the specific legacies were paid, and deducted the legacies from the aggregate of principal and interest. The Commissioner overruled the exception, and the Chancellor concurred with him.

The eighth exception was, "That the Commissioner allowed the complainant a credit for the amount of two receipts given by Daniel J. Beacham and Henry Paisley, which receipts were given on erroneous calculations, and on a settlement which had been set aside. The receipts here alluded to were given on the settlement, to correct an error in which this bill was filed. The defendants offered to prove by Dr. Watson, who made the calculations upon which the receipt was given, the true amount for which they were given, to show the error. The Commissioner rejected his evidence because he was a defendant to the suit, though not interested as regarded the receipts. The Chancellor sustained this exception.

The complainant now appealed, and moved to reverse so much of the Chancellor's decree as overruled his first, second, and third exceptions, and as sustained the defendants' eighth exception. The defendants also appealed, and moved the Court of Appeals to reverse so much of the Chancellor's decree as sustained the complainant's exceptions, and overruled those of the defendants.

O'Neall, for the complainant. The rule as to allowing commissions is, that executors and administrators are entitled to ten per cent. on all the interest with which they are charged. This rule is in conformity with the principles of the act. Brev. Dig. 336.

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Harper's Eq. *Rep. 224. It is no objection to this allowance that the executor has not let the money to interest. Equity compels him to make interest on the amount in his hands; and if he fails to do so, he is chargeable with it. If therefore he accounts for interest as if he had let it out, it is of equal benefit to the legatees, and the executor is entitled to commissions on the interest. This is the case now before the Court. The rule has long been to compute interest on the annual balances of principal, and the interest account is kept in a separate column, and not compounded. The only exception to the rule is where the trustee makes of the fund more than the legal interest, and refuses to account for the profits, or where he neglects to invest the funds as directed by the will. He cited Black v. Blakely, ante, p. 1. Edmunds and Wife v. M'Morris, Harper's Eq. Rep. 224.

As to the second ground, the returns must be evidence as well as to charge and discharge. The whole declarations and acknowledgments of a party must be taken together. 1 Phil. Ev. 78, 79. Besides, sixteen years had elapsed; and the executor after such a length of time would not be compelled to produce the vouchers. The circumstances supported the truth of the return. The testator owed the debts there stated. The returns were made on oath, and examined, approved, and filed by the Ordinary. Greater proof, after such length of time, ought not to be required; the witness being also dead who could have proved the payments. 1 Eq. Cas. Abr. 10. Lapse of time itself was often sufficient presumption of payment. 1 Eq. Cas. Abr. 11. Many of the payments were under forty shillings, and therefore should have been allowed on the executor's oath. Toll. 492.

The debts contracted by the widow for necessaries for herself and children were properly paid by the executor. The defendants assented to it by their settlement. The will directed that the property should be

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left in the pos*session of the widow for their support; so that the executor was not entitled to the income; and if that fund was wasted, the executor was still bound to provide necessaries for the children.

Irby, contra. The complainant is not entitled to commissions on interest with which he is charged. The testator died in 1808, and there was no return of the debts due to the estate, nor any account filed before 1810. The executor has rendered no account of the interest on the interest, and he ought to be charged with interest on account of his neglect, and ought not to derive a benefit from it. As to the returns, the admissions against the executor are good, but what he states in avoidance must be proved. 2 Johns. Cha. Rep. 88. The admission of those who settled with the complainant could not bind the others, who were minors. No returns were made by the executor for two years, he is not therefore entitled to commissions. The executors should pay interest with annual rests.

O'Neall, in reply. The executor is not required to make returns where there is nothing in his hands. As to the costs in the case of Neily, he cited Smith v. Goggans, Harp.

Law Rep. 52. Warden v. Burtz, decided January 1827 at Columbia.

As to annual rests, it had lately received the attention of this Court in the case of Black v. Blakely, ante, p. 1, to which he referred. In the case of Edmunds v. M'Morris, the executors were compelled to account with annual rests, because the bill directed such an investment of the funds as would have compounded the interest. The principle of these cases does not apply here.

Curia per NOTT, J. This case presents a great variety of questions, both of law and

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fact, for our considera*tion. I have heretofore taken occasion more than once to remark, that the province of this Court does not extend to a minute examination of long and complicated accounts. These matters must be left to the Commissioner, who under the supervision of the Chancellor, has more ample means of deliberate investigation than is allowed to this Court. We can only lay down the rules by which cases ought to be governed, and leave the investigation of the facts where they can be better considered, and in all probability more correctly decided.

The case is brought upon exceptions to the report of the Commissioner, and the decree of the Chancellor upon them. It appears that upon a settlement with the executor, a certain sum was found to be in his hands, which he was decreed to pay over, with interest upon it. And the first inquiry is, whether he is entitled to commissions on the amount of interest so decreed to be paid. The act of 1789, prescribing the duties of executors, allows them two and a half per cent. on all moneys received, and the same on all moneys paid away in debts, legacies, &c. The same act makes it the duty of executors and administrators to render annual accounts of their administration to the Ordinary. And it further provides, that if they neglect to do so, they shall receive no commissions for the management of the estate. The great security which minors have, for moneys in the hands of guardians and executors, is the annual examination and settlement of their accounts by the officer of whom that duty is required. Commissions are allowed only when the duty is performed; and the withholding of them in other cases was undoubtedly intended to ensure a faithful and punctual performance of their duties. It is the business of the Court therefore to see that provision of the act rigidly enforced. If the executor in this case has fulfilled his duty, according to the requisitions of the act, he is entitled to the compensation which the law allows; that

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*is, two and a half per cent. on all the moneys which he shall finally pay over to the distributees: and although a part may consist of interest, he will be entitled to commissions on the aggregate amount. If the money had been placed out at interest, he would have been entitled to commissions upon paying it away: and whether he places it in the hands of others, or keeps it in his own, cannot be material to those to whom it is to be paid.

But it is contended, that the executor is entitled to ten per cent. on the interest so paid over. When an executor lets out money upon interest and receives it in annually, and reinvests it again for the benefit of the estate, and makes it thus an accumulating fund until it is paid over, he is entitled to ten per cent. for his management: and when he suffers it to accumulate in his own hands in the same way, he will be entitled to the same compensation; but not when he is decreed to pay it over, at the close of his administration, on moneys retained by him.

The next question is, whether, when the return of the executor to the Ordinary is the only evidence of the amount of moneys received by him, it shall also be received as evidence in his favour of the disbursements of the same. The only evidence which the parties interested in an estate can usually offer, of the amount to be administered, is the inventory returned by the executor: and being his own act, it must be conclusive against himself. And it is incumbent on him to show, by satisfactory evidence and vouchers, in what manner it has been administered. Those vouchers he ought to keep as his security; and the ordinary ought not to allow his accounts, when the vouchers are not produced, nor their absence accounted for. And it ought to appear on the face of the settlement, what was the nature of the evidence on which the return was accepted and allowed. And although the evidence with the Ordinary is not

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con*clusive, per se, in favour of an executor, it ought to be received for as much as it is worth; and its value must depend upon a variety of circumstances: the regularity of the accounts, the death of witnesses, loss of vouchers, and the lapse of time, must all be taken into consideration.

In this case, sixteen years have elapsed since the account was settled and allowed by the Ordinary. It is not to be presumed that he suffered it to pass, without satisfactory evidence that it was correct. I think therefore that it ought to have been allowed by the Commissioner. Executors are not less liable to loss of papers, by time and accident, than other persons. The settlement with the Ordinary is intended as a security for the executor, as well as for the distributees; and, after a lapse of sixteen years, ought to be a complete protection. It will nevertheless be subject to impeachment by the other side. If the defendants' case show any error or fraud in the transaction, they are entitled to the benefit of it: but the burthen of proof must lie upon them.

The third exception is, that the Commissioner has charged the executor with a certain sum due the estate by Reuben Ligon, when in fact it was due to Ligon by the estate. It appears, by the return of the executor himself, to be due to the estate; and therefore must be taken as evidence against him. He may be permitted to show that it was charged by mistake; but the proof must lie upon himself; and without such proof he must be bound by his return.

These observations embrace all the exceptions taken to the decree on the part of the complainant.

There are several exceptions on the part of the defendants which it is also necessary to consider.

The first exception is, that the executor ought to have been charged with the price of a negro sold for the payment of debts and

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also for his hire; when, as it is *alleged, he had other funds in his hands at the time, and had no permission from the Ordinary to make the sale. There is no doubt but that an executor ought not to sell the property of the estate for the payment of debts when he has sufficient funds in his hands for that purpose; nor even when he has not, without the permission of the Ordinary. But it does not appear in this case that he had other funds; and in any event he is only liable for the value of the property with the interest upon it; and with that he is charged.

The second exception is, because the complainant ought to be charged with the property of the estate sold by Reuben Ligon, &c.

By the will it appears that the widow was entitled to the possession of the whole estate both real and personal, during her widowhood, for the support of herself and family. If she married, the executor was required to allow her what he thought would be sufficient for her support; and in other respects all the provisions of the will remained unaltered. The widow married Reuben Ligon, and it became a question of some difficulty to determine, in what manner the provisions of the will, that event having taken place, could be best carried into effect. The widow was entitled to a support out of the property, and the remainder was to be kept together for the maintenance and education of the children. The children could not be separated from their mother, and the executor was obliged probably to employ some person to superintend the plantation and negroes, and if he thought proper to make the husband his agent for that purpose, it appears to me it was perfectly within the scope of his duty. The husband died, leaving a crop on hand, and it appears that his administrator received and applied the proceeds of it to the benefit of his estate. It appears also that Ligon, in his life time, sold some small arti-

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cles belonging to the estate *of Wright, and that he incurred some expenses for the plantation and for the support of the children, which the complainant allowed, and now makes a charge against the estate of his testator.

With regard to the crop, it unquestionably belonged to the estate of Wright, and ought not to have gone into the hands of the administrator of Ligon. Ligon had no right to receive the proceeds of the estate except for the support of the family, and being the agent of Wright he must be liable for his acts. He ought not to have suffered the crop to have gone into the hands of Ligon's administrator, and must therefore be liable for the amount, except what was necessary for the support of the widow and family. He will be equally liable for the property sold or otherwise disposed of by Ligon in his life time, and for moneys received by him belonging to the estate. This charge however will be subject to any disbursement made by him for the use of the estate or necessary advances for the family. But with regard to advances either by the husband or wife, and debts contracted by them for the benefit of the estate, or the support and education of the children, it may be remarked, that an executor has no right to exceed the income of the estate for any of those objects without leave of the Court of Equity. Where the income is found to be insufficient, it is his duty to apply to the Court to make such further provision out of the estate as may appear necessary for that purpose. And any advances made without such authority must be at his own risk and upon his own responsibility. If, however, an executor does undertake to act without such permission, and upon examination it shall appear that there was a necessity for such an expenditure, and that the money has been prudently laid out, it will be allowed. But it is only on the ground of necessity that such an allowance ought to be made, the existence of

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which it will be incumbent on *him to show, and of which it belongs to the Chancellor to judge; if such necessity existed in this case then the charge was properly allowed.

The third exception relates to the allowance of commissions to the defendant, where regular annual returns of his administration have not been made. With regard to the general rule on that subject, I have nothing to add to the observations which have already been made. But I understand that the construction which has hitherto been given to the act by the Court of Equity is, that commissions ought to be allowed for those years in which the executor has rendered in an account of his administration, although he may have omitted some years. The correctness of that construction however is perhaps questionable. But as I have no doubt

that it was adopted upon due consideration, and has been found convenient in practice, until it has now become a settled rule of the Court. I am not disposed to innovate upon it. But it must be received with some qualifications. If an executor shall omit to settle his accounts for several years and then make a return for that whole period, he will only be entitled to commissions for the year in which his account is rendered; and the allowance must not be made to embrace those years in which no returns have been made. And unless his accounts are so made out that the transactions of each year may be distinctly ascertained, no commissions ought to be allowed.

The fourth exception has been considered in the observations which I have already made. With regard to the fifth, I have nothing to add to the views taken by the Chancellor.

The question of compound interest made in the sixth exception does not appear to have received that consideration in this state to which it is entitled. It would seem, from the early chancery cases, that an executor was not held liable even for simple interest

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on moneys in *his hands, in any cases whatever. In the case of Lynch v. Cappy, 2 Cha. Ca. 35, an executor was held not liable for interest on the testator's estate, although he had made interest of it. And in the case of Adams v. Gale, 2 Atk. 106, Lord Hardwicke recognizes the right of an executor to let out money on his own account, without being liable for the payment of interest. The case of Ratcliffe v. Greaves et al., 1 Vern. 196, is the first which I have found where interest was allowed in the English Courts. But there the executor had employed a part of the money in trade, in which he had made a profit, and on a part he had received interest; and it was in those special circumstances that the interest was allowed. But it was not attempted to obtain more than simple interest, and even that, it was said, was contrary to the practice for twenty years; and that there were more than forty precedents against it. So when money is out at interest, and unnecessarily called in by the executor, it was held that he should pay interest. Taylor v. Gerst, Mosely, 99. So in the case of Newton v. Bennet, 1 Bro. Cha. Ca. 361, Lord Thurlow held, that where an executor had employed the funds of the estate in trade, he should pay interest on it; but even then his Lordship said, he would not say that he was bound to pay interest on the ground of having called in a debt which bore interest. In the case of Darrel v. Eden & Wife, 3 Desaus. Rep. 241, [4 Am. Dec. 613,] Chancellor De Saussure mentions the case of Stork v. Blake, where the Court refused to decree interest against an executor. Of late years, however, a more reasonable and correct rule has prevailed; interest is required of an executor in most cases where money has been unnecessarily retained, or for an unreasonable time. But the allowance of compound interest seems to be an invention of modern date. The first case, and indeed the only case where I can find that it has been allowed in this state,

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is the case of Bowles & Wife v. *Drayton, 1 Desaus. Rep. 489, [1 Am. Dec. 689.] But in that case the testator had bequeathed a certain sum to his daughter, and directed the interest to be annually applied for maintenance and education. There the Court required interest to be paid on the interest; because by the express provisions of the will the interest was required to be paid annually for her benefit. But in the case of Darrel v. Eden & Wife, 3 Desaus. Rep. 243, [4 Am. Dec. 613,] where the Master had calculated compound interest, Chancellor De Saussure seemed to think it a doubtful question whether any interest should be allowed: upon consulting the Master, however, and finding that such had been the practice of the Court for some time past, he suffered it to pass. But he reversed the Master's report, which allowed semiannual rests, and directed the interest account to be kept in a separate column, so that compound interest should not be allowed. And, in the case now under consideration, the same learned Chancellor says the rule in this state is against allowing rests and compound interest. And in the case of Myers v. Myers, (post, 214 [16 Am. Dec. 648]) Chancellor Thompson says, he never did allow it, and never will, under any circumstances. We are therefore certainly not authorized by precedent to lay it down as a general rule in this state, that interest shall be calculated with annual rests on moneys in the hands of executors. I differ, however, with Chancellor Thompson in opinion, that it ought not to be allowed in any case.

There are cases where common justice requires it; and where great injustice would otherwise be done. And the only difficulty is, in drawing with precision the line of distinction between those cases to which the rule shall or shall not be applied. In the case of Raphael v. Boehm, 11 Ves. 92, which was decided in 1805, Lord Eldon speaks of it as a question of great difficulty, and refused to decide it until he had consulted sev-

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eral Mas*ters on the subject. His Lordship ultimately allowed it; but it was upon the ground that the testator had expressly directed the money so to be placed out as that the interest should accumulate, and that the executor had kept it against the express directions of the will. But he says, "it has been the habit of the Court to give it."

The same case afterwards came before Lord Chancellor Erskine, on a re-hearing, who affirmed the decree, remarking, that "the

duty of the executor did not depend upon the general rule, as it relates generally to administration of assets, but upon the special rule prescribed by this particular will." 12 Ves. 411. The same rule is laid down in Schieffelin v. Stewart, 1 Johns. Cha. Rep. 626. And I have understood, that in a late case of Edmonds v. Crenshaw in the Court of Equity of this state, Harper's Eq. Rep. 224, where the executors neglected to vest the proceeds of the estate in stock, to accumulate for the benefit of the distributees, according to the directions of the will, it was decreed that interest should be calculated with annual rests.

I take it, therefore, that there is no such general rule as that an executor shall be required to pay compound interest on the balances which may be found in his hands. And even if we had found such a rule more prevalent in England, where money may always be promptly vested in stock, or some other productive fund; yet it would be impracticable in this state, where people are not in the habit of dealing in stock, and indeed where it is only rarely to be purchased. Debts due estates are generally collected in slowly, and in small sums. Moneys can not always be let out promptly, much less safely, at interest: and simple interest is usually more than can be realized with the utmost diligence.

The exceptions to the rule, some of which I have noticed, seem to be where the will it-

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self directs money to *be laid out, in a particular way, as an accumulating fund: or where the executor unnecessarily calls in money which is out at interest and accumulating, or employs it in trade, or in some other manner, and refuses or neglects to account for the property. In these, and such like cases, it is right and proper that annual rests should be made. The cases are numerous, and the principle too familiar to require authority that a trustee shall not make a profit to himself by the trust estate. All moneys received, laid out, or employed in any manner, or property purchased with the funds of the estate, shall enure to the benefit of the cestui que trust. But all these cases come within the principle of those which I have been considering; and must be determined by the same rules. They may sometimes seem to operate harshly, but then it is the fault of the party himself upon whom the hardship falls, because he may always avoid the difficulty by keeping regular accounts. And a person has no right to complain who suffers in consequence of his own neglect. There do not appear to be any circumstances connected with the transactions of this executor to render him an exception to the general rule. I am therefore satisfied with the opinion of the Chancellor on this point.

As to the sixth exception, the rule which the Commissioner has adopted for the calculation of interest is certainly an erroneous one; though I believe it is the method usually adopted by the Commissioners throughout the state: and I believe we have suffered some cases to pass where the accounts have been made up in that way without requiring them to be corrected. The rule for calculating interest, which has always prevailed in this state until a contrary practice has somehow found its way into the Court of Equity, will be found in the case of John Black et al. v. John Blakely & Wife, ante, p. 1, which was decided by the Court at its last sitting.

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The *rule has universally prevailed in the Courts of Law, and I can not conceive upon what principle a different practice has been allowed in the Court of Equity. Certainly no good reason can be given why different rules should prevail in the two Courts. This exception must therefore be allowed; and the interest must be calculated according to the rule laid down in the case above alluded to.[1]

The complainant was certainly entitled to credit for the amount of the receipts which are the subject of the seventh exception. The defendants nevertheless ought to have been permitted to show that a mistake had been made in the calculation, and to have it corrected if any such could be made to appear.

I do not perceive that the witness whose testimony was rejected had any such interest in the question as to render him incompetent. One defendant may be a witness for or against another in Equity, where his interest is not to be affected by his testimony. I am of opinion therefore, that the testimony ought to have been received.

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*I have now gone through with the exceptions on both sides, and expressed my opinion of the principles on which they ought to be decided, without giving any opinion as to the decree of the Chancellor, which has been

[1] The English rule is this, where the executor comes before the Master on a reference of accounts.—"In taking an account of a testator's personal estate, come to the hands of his executors, the decree directs that in taking the accounts the Master shall distinguish what is principal and what is interest thereof; if the executors should not have made such a distinction in their accounts, it must be calculated and ascertained in the charge; and the principal and interest must be distinguished and ascertained. All moneys which became due in the life time of the testator, and which remained owing to him at his death, although part thereof might have been interest on his mortgages or other securities, must be considered as principal money; the interest to be ascertained pursuant to the decree, being such only as hath accrued due on the mortgages and other securities, and on the testator's personal estate, put out to interest by his executors since his death. 2 Fowler's Proceedings in Equity, 280. In the same work, which contains the Exchequer practice on the Equity side, there is a full account of the manner in which receivers are to keep their accounts and make their annual report to the Master. 2 Fowler, 379.

pronounced upon them. The Commissioner acknowledges that he made up his report in such haste, that he had not time to state the evidence and the reasons on which his opinion was founded. The Chancellor also acknowledges that he was not sufficiently informed to enable him to decide with satisfaction to himself. I think the Commissioner did wrong to make a report until he had time to do it in such a manner as to enable the Chancellor to decide, understandingly, the several questions submitted to his consideration. And I think the Chancellor would have done better to have sent the case back to the Commissioner, with directions to give such further exposition of the facts as would enable him to decide with more satisfaction to himself. For it is very apparent that the case has been presented to this Court in such a way as to give us a very imperfect view of its merits.

The case must therefore go back to the Commissioner, in order that the accounts may be settled according to the principles above laid down, and it is ordered accordingly.

Case sent back to the Commissioner.

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2 McCord, Eq. *207

*JOSEPH TEAGUE Administrator v. PATSEY DENDY and Others.

(Columbia. Jan. and May Terms, 1827.)

[*Executors and Administrators* ⇐537.]

A suit in Equity cannot be maintained against the sureties on an administration bond. The remedy is at Law.

[Ed. Note.—Cited in Gayden v. Gayden, McMul. Eq. 445; McBee v. Crocker, McMul. Eq. 488; Taylor v. Taylor, 2 Rich. Eq. 128, 129; Crane, Boylston & Co. v. Moses, 13 S. C. 581; Burnside v. Robertson, 28 S. C. 586, 6 S. E. 843.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2453, 2485–2581; Dec. Dig. ⇐537; Equity, Cent. Dig. § 130.]

[*Equity* ⇐229.]

The sureties after answering in full as to the merits, may object in the answer to the jurisdiction. An answer to the merits does not deprive the defendants of any legal objection insisted on in the answer.

[Ed. Note.—Cited in McBee v. Crocker, McMul. Eq. 488.

For other cases, see Equity, Cent. Dig. § 505; Dec. Dig. ⇐229.]

[*Executors and Administrators* ⇐464.]

It is a sufficient answer to a bill to account, for an administrator, whose administration had been revoked and given to another, to show that he had settled in full with his successor. If there is a mistake in the settlement, it will be opened, notwithstanding the release.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1989; Dec. Dig. ⇐464.]

[*Descent and Distribution* ⇐74.]

The rights of distributees are fixed and prescribed by the state of things at the death of the intestate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 227, 228, 237–242, 260, 262; Dec. Dig. ⇐74.]

[*Guardian and Ward* ⇐30.]

Maintenance to be paid out of the income.

[Ed. Note.—Cited in Ashley v. Holman, 44 S. C. 166, 21 S. E. 624.

For other cases, see Guardian and Ward, Cent. Dig. §§ 116–135; Dec. Dig. ⇐30.]

[*Guardian and Ward* ⇐30.]

A trustee should as a prudent man confine the maintenance of his ward within his income. Cases of necessity may compel one to depart from this rule; but before the Court will permit a guardian, trustee, executor or administrator, to break in upon the capital, it will require them to show the necessity, clearly and distinctly.

[Ed. Note.—Cited in Guerry v. Capers, Bailey, Eq. 161; Ashley v. Holman, 44 S. C. 166, 21 S. E. 624.

For other cases, see Guardian and Ward, Cent. Dig. §§ 116–135; Dec. Dig. ⇐30.]

[*Executors and Administrators* ⇐109.]

The Court must be consulted, as to the expediency, before the act is done, when application can be made without defeating the object.

[Ed. Note.—Cited in Ashley v. Holman, 44 S. C. 166, 21 S. E. 624.

For other cases, see Executors and Administrators, Cent. Dig. § 435; Dec. Dig. ⇐109.]

[*Trusts* ⇐323.]

Where no accounts have been kept, the Court will not suffer a trustee to go into a conjectural estimate to show the necessity of his having broken in upon the capital.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 481; Dec. Dig. ⇐323.]

[*Interest* ⇐59.]

The mode of calculating interest is to deduct the credits, at the time the payments or disbursements (as allowance for maintenance) are made from the sum in hand, whether of principal, interest, or income. The remainder constitutes the balance due.

[Ed. Note.—Cited in Dixon v. Hunter's Distributees, 3 Hill, 207.

For other cases, see Interest, Cent. Dig. § 132; Dec. Dig. ⇐59.]

[*Executors and Administrators* ⇐104.]

If the current expenses exceed the income, the balance must be deducted from the principal, and interest on the remainder allowed. If the income exceed the expenditure, the excess becomes principal to bear interest.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 431; Dec. Dig. ⇐104.]

[*Executors and Administrators* ⇐497.]

An administrator will not be allowed an extra charge for expenses incurred in the ordinary course of administration, but when professional skill or extraordinary aid is required, to which the administrator is not to be supposed competent, his expenses will be reimbursed.

[Ed. Note.—Cited in Jenkins v. Hanahan, Cheves, Eq. 137.

For other cases, see Executors and Administrators, Cent. Dig. § 2117; Dec. Dig. ⇐497.]

[*Executors and Administrators* ⇐109.]

[An administrator is entitled to reimbursement for the expense of maintaining a useless slave belonging to the estate.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 435; Dec. Dig. ⇐109.]

This bill stated that on the death of William Dendy in 1816 or 1817, administration of his estate was granted to the defendants Patsey Dendy and James Young, and that they entered into bond to the Ordinary with

the defendants Gallanus Winn and Andrew Winn, as sureties for the faithful discharge of their duties. That in 1819 that administration was revoked, and a new administration granted to the defendant Patsey Dendy alone; and that she then entered into a second bond with the defendants Andrew Winn and Daniel M. Winn, as sureties. And that in 1823 this administration was also revoked, and administration de bonis non granted to the complainant; and the object of the bill was to compel the defendants to account for the several administrations granted to Patsey Dendy and James Young, and Patsey Dendy alone, &c.

The case came before Chancellor De Saussure, on exceptions to the report of the Commissioner. As all these exceptions are stated in the judgment of the Court, it is unnecessary to repeat them. The Chancellor decided on the exceptions, and they were now taken to this Court on appeal from his decree.

O'Neall, for the complainants. The general principle is clear that parents must support their children if they are competent, and not draw upon the separate estate of the child. Cudworth v. Hall, 3 Desaus. Rep. 259. Cruger v. Heyward, 3 Desaus. Rep. 94. Dower is granted to the mother for that purpose.

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The income of *the child's estate, if the parent is unable to support the child, is the proper fund for maintenance. The executor will not be allowed to break into the capital. M'Dowell v. Caldwell, ante, p. 43. All necessary expenses are to be allowed. An administrator is always allowed fees which he has properly paid to counsel, where it was necessary that he should have counsel. Warden v. Burts, ante, p. 78.

Irby, contra. This case involves the rights of the sureties principally. The administratrix is the widow and mother of the children, and besides she is insolvent, and therefore cares not about the issue of the suit. If the sureties are to pay the funds laid out by the administratrix to maintain her family, surely the sureties ought not to be made liable, unless they have the right to discount the support and maintenance. The income was not competent to the support of the family. If interest be charged on the funds in hands of the administratrix, the same rate of interest must be allowed her on the sums she laid out for maintenance. It must be mutual. But the defendants, James Young and Gallanus Winn, settled with Patsey Dendy during her administration, and her discharge is good; and sureties could be made liable only for funds which she may have received from James Young her administrator. These sureties of the first administrator having settled with the subsequent administratrix, that settlement is conclusive, no error being alleged. Adequate remedy could have been obtained at law on Mrs. Dendy's administration bond. These defendants, the sureties, can not be sued before she has been called to account and a decree taken against her. Howell v. Blanchard, 4 Desaus. Rep. 5.

O'Neall, in reply. It is too late, after an-

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swering and *going into the accounts to except to the jurisdiction. Wilson v. Cheshire, 1 M'Cord's Cha. Rep. 340.

Curia, per JOHNSON, J. Before entering into the several questions which have been made on the part of the complainant, it will be necessary to dispose of the objections which have been raised on the parts of the defendants, Gallanus, Andrew and D. M. Winn, who stand in the relation of sureties only to the administration bond.

The defendant Patsey Dendy has not answered; nor has she rendered any account of her administration: and these defendants, in their answer, go into an account; but they insist in the conclusion, that, although they have fully answered the bill, "this Court ought not to take cognizance of the matter, because the complainant has an adequate remedy at law against them on the administration bonds," and pray the same benefit from this objection, as if it had been specially pleaded, &c.

In the case of Hoell v. Blanchard, 4 Desaus. Rep. 25, the Court lays it down, that a suit in Equity cannot be maintained against the sureties on an administration bond, and that the remedy against them is at Law: and in the latter case of Glenn v. Conner, [Harp. Eq. 267,] decided in the Court of Appeals, at December term 1824, the Court confirmed the decree of the Circuit Judge dismissing the bill as to the sureties of an administration bond. That was a case going all fours with this. There the administrator had neglected to put in an answer. The sureties did answer; and, as in this case, insisted on the objection, by way of defence: and Chancellor De Saussure remarks that the decision was in conformity with the decided cases, and was founded in reason and justice.

I have laboured to get rid of the objection raised in this case, believing that it was to

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the interest of these *defendants, if they were in danger of ultimate liability, that they should be in Court to investigate their accounts, as their principal had neglected to do so: and I at one time thought that the circumstance of their having accounted would enable me to do so; but it is a well settled rule of practice, that an answer to the merits does not deprive the defendants of any legal objection insisted on in the answer. We are bound by the decided cases, and it is the defendants' own concern how far they will be affected by it. As to them, therefore, the bill must be dismissed.

On the part of James Young it is insisted,

that the bill, as to him, ought to be dismissed; on the ground that he had fully settled with Patsey Dendy, his successor, all his actions and doings after the revocation of the administration granted to him, and whilst she was the sole administratrix.

There is no doubt of the correctness of this position. It was his duty, on the revocation of the administration granted to him, to pay over the funds in his hands to his successor; and if he had done so, and obtained a release, he would have been discharged. But the evidence on this subject has not been reported; and it is impossible that we can judge of the fact. It was suggested in the argument, that it had been ascertained that some mistake had occurred in that settlement; which if corrected would show that a balance was still in his hands. If that is the case, he is still liable notwithstanding the settlement and release.

Having disposed of these questions, I will now proceed to consider the grounds taken on the part of the complainant.

1. That the Commissioner ought to have been directed to charge the estate with the maintenance of the children, before he deducted the widow's distributive share.

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*It is evident that this objection to the decree has originated in confounding the administration of the widow with her interest in the estate. The rights of the distributees are controlled and limited by the state of things that existed at the death of the ancestor: and if the administration in this case had been granted to a stranger, it never would have occurred to any one, that the distributive share of the widow was to be withheld until the children had been maintained and educated; for the grant of the administration to her could not impair her rights. This objection was therefore properly overruled.

2. That the Commissioner ought to have been directed to set apart the income of the estate for the maintenance of the children, and allow nothing beyond it.

In the case of M'Dowell and others v. The Administrators of Caldwell, decided at the sittings in January last, the views of the Court on this question are fully expressed, ante, 43, [16 Am. Dec. 635.]

A prudent man would always proportion his expenditures in such a manner as to bring them within his income; and the law imposes the same obligation on him to whom it confides the management of the affairs of others. Cases may and frequently do occur, in which prudent men are from necessity compelled to depart from this rule; but they are out of the ordinary course of events: and before the Court will permit a guardian, trustee, executor or administrator to break in upon the capital for subsistence, it will require them to show clearly and distinctly its necessity. In cases of urgent necessity, the Court would not hold from the administrator the power of exercising a discretion over the subject; but generally it claims the right to be consulted as to the expediency before the act is done, when application can be made without defeating the object. In this case, as in that of M'Dowell v. Caldwell,

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no account had been *kept, and no vouchers were produced to show the amount of disbursements on account of maintenance: and the defendants go into a conjectural estimate of what might have been the probable amount; and in the result it appears, that they have not only swallowed up the income, but a large portion of the capital. This is inadmissible and in this respect, the decree must be reformed.

3. That the Commissioner should have been directed not to allow interest on the allowance for maintenance.

Referring to the case of Wright v. Wright, decided during the present term, ante, 185, for the general rule as to the mode of calculating interest, it will be sufficient to remark, in reference to this case, that the mode of calculating interest is to deduct the credits at the time the payments or disbursements were made from the sum in hand, whether it consist of principal, interest or income: and the remainder constitutes the balance due. See the case of Black v. Blakely, ante, page 1.

4. That the Commissioner should have been directed to deduct from the funds in the complainant's hands a counsel's fee of one hundred dollars, for the case of Teague v. Dunlap, [Harp. Eq. 97,] and the present case.

It is not seen, how the defendants are interested in that question. When the complainant is called on to account for his own administration, it will be time enough to enquire into the merits of this claim.

5. That the Commissioner should have been directed to charge interest on the whole amount of funds in the hands of the administratrix, and not on the annual balances only.

And here again I must refer to the case of Wright v. Wright, for the rule. If the current expenditures of the year exceeded the income, the balance of course must be deducted from the principal, and interest on the remainder could only be charged to the defendant. And if on the contrary the in-

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come exceeded the expenditure, *the excess became principal, on which the defendant was chargeable with interest.

The sixth and last ground of objection is, that the Commissioner should have been directed to disallow the charges for extra expenses in settling with the bank, and the charge for the maintenance of old Bob.

With respect to the extra expenses of settling with the bank, it may be observed, that the undertaking of the administratrix was to

discharge all the duties that devolved on her in that character; and if these expenses were incurred in the ordinary course of administration, the compensation allowed by law was intended to cover it. It is, for instance, the duty of an administrator to keep and render a just account of his administration; and if he is incompetent or too indolent to do so, and thinks proper to keep a clerk or employ an accountant for that purpose, he must do it at his own expense.[1]

There is, it is true, a distinction between those services for which a compensation is allowed by the statute, and the expenses incurred in the course of the administration. The former referred to those duties which an administrator is supposed to undertake; and the latter to such as require the aid of professional skill, to which he is not supposed to be competent. The conduct and management of a law suit is an illustration of the latter.

It does not appear however that the settlement with the bank involved any difficulty or required the aid of counsel. That charge was therefore improperly allowed.

The defendants' third exception relates to the support of an useless old slave named Bob. The Commissioner allowed the administrator for his support. The Chancellor says, "in his opinion most justly. To refuse it would be to compel executors and administrators to be guilty of gross inhumanity. The

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estate was bound to *support an old worn out slave. The administrator did his duty and he must be allowed the charge." This Court concurs with the Chancellor.

The case is ordered back to the Commissioner to settle an account between the parties conformably to this opinion.

Case sent back to the Commissioner.

[1] Logan v. Logan, 1 M'Cord's Eq. Rep. 1.

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2 McCord, Eq. 214

JOHN MYERS AND OTHERS v. DAVID MYERS Executor of Jacob Myers and Others.

(Columbia. Jan. and May Terms, 1827.)

[Reported and annotated in 16 Am. Dec. 648.]

[*Wills* ⟸524.]

A devise to grandchildren, without any definite future period fixed for distribution, vests only in such grandchildren as are in esse at the death of the testator.

[Ed. Note.—Cited in Oswald v. Givens, Rich. Eq. Cas. 343; Holeman v. Fort, 3 Strob. Eq. 73, 51 Am. Dec. 665; Keitt v. Andrews, 4 Rich. Eq. 351; Gourdin v. Deas, 27 S. C. 484, 4 S. E. 64; Waddell v. Waddell, 68 S. C. 338, 47 S. E. 375; Coogler v. Crosby, 89 S. C. 510, 72 S. E. 149; Adams v. Verner, 102 S. C. 11, 86 S. E. 212.

For other cases, see Wills, Cent. Dig. § 1117; Dec. Dig. ⟸524.]

[*Wills* ⟸487.]

There may be cases where the Court may look beyond the will for the meaning of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026–1032; Dec. Dig. ⟸487.]

[*Wills* ⟸524.]

In a devise to children, if there is no definite period for distribution, the legacy vests at the death of the testator, and none can take but those in esse at that time. But where there is a fixed period, all the children born before that time will be let in, and none others.

[Ed. Note.—Cited in Oswald v. Givens, Rich. Eq. Cas. 343; Gourdin v. Deas, 27 S. C. 484, 4 S. E. 64; Tindal v. Neal, 59 S. C. 15, 17, 36 S. E. 1004; Waddell v. Waddell, 68 S. C. 338, 47 S. E. 375; Robinson v. Harris, 73 S. C. 477, 53 S. E. 755, 6 L. R. A. (N. S.) 330; Coogler v. Crosby, 89 S. C. 510, 72 S. E. 149; Adams v. Verner, 102 S. C. 11, 86 S. E. 212.

For other cases, see Wills, Cent. Dig. § 1117; Dec. Dig. ⟸524.]

[*Wills* ⟸630.]

A legacy may be vested, though the time of payment is postponed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464–1480, 1486, 1487; Dec. Dig. ⟸630.]

[*Wills* ⟸524.]

All who can entitle themselves under the description of the devise at the time of distributing the fund, may claim a part: as well those born after the death of the testator, as before.

[Ed. Note.—Cited in McGregor v. Toomer, 2 Strob. Eq. 61.

For other cases, see Wills, Cent. Dig. §§ 1116–1127; Dec. Dig. ⟸524.]

[*Wills* ⟸524.]

To let in children born after the death of the testator, there must be some subsequent period of distribution fixed, or it must depend on some contingency, and not left indefinite. If left indefinite, none but those born before the death of the testator can take.

[Ed. Note.—Cited in Oswald v. Givens, Rich Eq. Cas. 343; Gourdin v. Deas, 27 S. C. 484, 4 S. E. 64; Tindal v. Neal, 59 S. C. 17, 36 S. E. 1004; Waddell v. Waddell, 68 S. C. 338, 47 S. E. 375; Coogler v. Crosby, 89 S. C. 510, 72 S. E. 149; Adams v. Verner, 102 S. C. 11, 86 S. E. 212.

For other cases, see Wills, Cent. Dig. §§ 1116–1127; Dec. Dig. ⟸524.]

[*Wills* ⟸524.]

The period of distribution is indefinite in this case. And the devise vested only in those born at the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116–1127; Dec. Dig. ⟸524.]

[*Wills* ⟸630.]

The words of the will, "now bequeathed," shewed intention to vest on the death of the testator. So appointing a guardian to manage the property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464–1480, 1486, 1487; Dec. Dig. ⟸630.]

[*Wills* ⟸630.]

Where the devise is indefinite, a legacy of a slave to a third person for life, and at the death of the tenant for life, to fall in the general division of the estate to children, will not postpone the vesting after the death of the testator. The general bulk of the estate will not be

affected by a trifling legacy falling in at some subsequent period.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464–1480, 1486, 1487; Dec. Dig. ⟸ 630.]

[*Wills* ⟸524.]
If there is an intention that the distribution should take place at some future period, yet if the period is indefinite, none can take but those born at the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1117; Dec. Dig. ⟸524.]

[*Wills* ⟸524.]
The age of twenty-one cannot be assumed as the period, because it is the most suitable period to complete one's education.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116–1127; Dec. Dig. ⟸524.]

[*Wills* ⟸524.]
An exception to the rule is where there are no children at testator's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116–1127; Dec. Dig. ⟸524.]

[*Wills* ⟸524.]
Where a parent directed his property to be equally divided among his children, a posthumous child, not provided for, before our Act, would have been excluded; as in Viner v. Francis.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116–1127; Dec. Dig. ⟸524.]

[*Wills* ⟸524.]
The gift being per verba in præsenti could only vest in those in esse at the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116–1127; Dec. Dig. ⟸524.]

[*Wills* ⟸866.]
A devise of "all my landed estate," with a particular description following of the tracts devised, does not comprehend a town lot not enumerated, and the heir at law takes it by descent, though excluded from all testator's estate with a shilling legacy.

[Ed. Note.—Cited in Mellichamp v. Mellichamp, 28 S. C. 130, 5 S. E. 333.

For other cases, see Wills, Cent. Dig. § 2203; Dec. Dig. ⟸866.]

The construction aided by the residuary clause comprehending personal estate only.

[*Parent and Child* ⟸3.]
The court will not allow a father, who is trustee for his child, for maintenance unless the parent is in indigent circumstances. Expenses of education allowed, being charged on the child's estate.

[Ed. Note.—Cited in Johnson's Adm'rs v. Johnson's Ex'rs, 2 Hill, Eq. 294.

For other cases, see Parent and Child, Cent. Dig. § 54; Dec. Dig. ⟸3.]

[*Executors and Administrators* ⟸132; *Trusts* ⟸184.]
A trustee (executor) is entitled to be remunerated for the actual amount of money or labour bestowed on such improvements as are necessary to preserve the property, or to render it permanently more beneficial; but not on ideal or unsuccessful experiments.

[Ed. Note.—Cited in Ex parte Palmer, 2 Hill, Eq. 218; Palmer v. Miller's Legatees, Cheves, Eq. 64, 34 Am. Dec. 602.

For other cases, see Executors and Administrators, Cent. Dig. § 437; Dec. Dig. ⟸132; Trusts, Cent. Dig. § 238; Dec. Dig. ⟸184.]

[*Trusts* ⟸231.]
All purchases made by a trustee with the funds of the trust estate belong to the cestui que trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 330; Dec. Dig. ⟸231.]

[*Trusts* ⟸352.]
It is no answer on the part of the trustee, that he has so mixed up the two funds that he can not distinguish his own from that of his cestui que trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 520–525; Dec. Dig. ⟸352.]

[*Trusts* ⟸352.]
A person by mixing the estate of another with his own, may sometimes subject himself to the loss of both.

[Ed. Note.—Cited in Green v. Green, 56 S. C. 213, 34 S. E. 249, 46 L. R. A. 525.

For other cases, see Trusts, Cent. Dig. §§ 520–525; Dec. Dig. ⟸352.]

[*Trusts* ⟸219.]
Where the trustee refuses to account, the Court will adopt the most rigid rule for calculating interest.

[Ed. Note.—Cited in Wright v. Wright, 2 McCord, Eq. 202.

For other cases, see Trusts, Cent. Dig. § 317; Dec. Dig. ⟸219.]

[*Trusts* ⟸219.]
Compound interest sometimes allowed on that ground, and calculated on short rests.

[Ed. Note.—Cited in Wright v. Wright, 2 McCord, Eq. 202.

For other cases, see Trusts, Cent. Dig. § 317; Dec. Dig. ⟸219.]

[*Trusts* ⟸219.]
If the property purchased by the proceeds of the trust estate cannot be ascertained, the Court will charge the executor with the rents of land and hire of negroes, and with interest on the annual balances.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 305, 314–317; Dec. Dig. ⟸219.]

[*Trusts* ⟸219.]
As where interest is ordered to be paid annually for maintenance and education, interest was allowed on the annual balances.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 305, 314–317; Dec. Dig. ⟸219.]

[*Trusts* ⟸219.]
It is often a matter of discretion with the Court.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 305, 314–317; Dec. Dig. ⟸219.]

[*Trusts* ⟸219.]
Where the annual income is appropriated to the education of the cestui que trust, the trustee must pay interest on the annual balances.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 305, 314–317; Dec. Dig. ⟸219.]

[*Trusts* ⟸225.]
Deduction allowed for improvements, education of the children and for the maintenance and taxes of the young negroes. And reference ordered to ascertain at what age of the young negroes maintenance should cease.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 322; Dec. Dig. ⟸225.]

[*Appeal and Error* ⟸1178.]
Reference ordered to ascertain if property given to one child, on marriage, was intended

as an advancement in marriage, or a payment of the legacy.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604–4620; Dec. Dig. ⟸ 1178.]

[This case is also cited in Rainsford v. Rainsford, Rice, Eq. 369, without specific application.]

Jacob Myers, late of Lexington district South Carolina, made and executed his last will and testament on the 16th of February 1804. He was possessed of a considerable real and personal estate, and died soon after making his will: and the defendant, David Myers, his only child, on the 6th of August ensuing, qualified as executor. The questions in this case arose upon the construction of this will. The testator, in the first place, devised as follows:

"I give and bequeath unto my dear and beloved grandchildren, being the lawful issue of my dear son David Myers, to them and their heirs for ever, all my landed estate, which consists together of three thousand seven hundred and fifty acres, &c. &c. [here followed a description of the tracts, not mentioning a lot of land in the town of Columbia, which will hereafter be alluded to] as appears by the plat thereof, and which said land I do hereby direct may be divided, &c. in manner and form following. Item, if only

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one grandson and two *granddaughters, I give and bequeath the one-fourth of the said land to be divided equally between the two granddaughters, and the remainder to the grandson. If more than two granddaughters, in such case the said granddaughters shall be entitled to one-third part of the said land, to be equally divided, share and share alike, and the remainder to the grandson. But if two or more grandsons, I direct the said lands shall be divided in equal proportions amongst them, my said grandsons; the swamp land in proportion with the pine land, and my granddaughters are then in such case not to inherit any part of this my real estate, but shall be provided for as hereinafter directed.

2. "Item, All my negroes (except a devise hereinafter mentioned) together with all future increase of the family, I give and bequeath unto my said dear and beloved grandchildren, to be divided equally amongst them, share and share alike.

3. "Item, I also give and bequeath unto them, my said dear beloved grandchildren, all the rest and residue of my personal estate, of every species, kind, and denomination whatsoever, to be divided equally amongst them, share and share alike.

4. "Item, I give and bequeath unto my dear and beloved son, David Myers, one shilling sterling, as full compensation, and as his full share of all my estate, both real and personal.

5. "Item, I give and bequeath unto my dear beloved daughter in law, Talby Myers, wife to my son David Myers, one shilling sterling.

6. "Item, In case of the total dissolution of my son and his issue, lawfully begotten of his body, I bequeath all the aforesaid property, real and personal, to be divided equally between the children of my brother Conrade Myers and the children of my sister Magdalina Theus, to them and their heirs for ever.

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*7. "Item, I give and bequeath unto my esteemed friend, Mrs. Elizabeth Dutilly, during her natural life only, my negro girl named Rachael, at this time about ten years of age: and at her decease the said negro and such her increase, if any, shall be deemed as part of my personal estate, and go in division with my other negroes, as part of the bequest made unto my dear and beloved grandchildren, to them and their heirs for ever.

8. "Item, I hereby appoint and constitute my dear and beloved son, David Myers, to be sole executor of this my last will and testament, and do hereby direct him to call in all and every of my outstanding debts, and to pay all and every of my just debts, dues or demands, that I may be justly indebted, but at present I do not recollect of any; in consequence, I leave a clear and valuable estate to his management, and I earnestly exhort him, my said dear son, David Myers, to be a true and faithful guardian and protector of this valuable property, which is for the sole benefit, in the end, of his dear children. I request him to have them well educated out of the profits arising from this estate now bequeathed unto them; for a good education is a valuable blessing: and I now earnestly recommend him, his wife and his dear children, to the protection of Almighty God." &c. &c.

At the execution of the testator's will, his son, David Myers, had two children born, the complainant Dr. John Myers, and the defendant Mrs. Clendenin: his wife, then being pregnant, was delivered of another son, the defendant William Myers, previous to the death of the testator. Since the death of the testator, and before the filing of the bill, the defendant, David Myers, had six other children born. This bill was filed by the complainant, Dr. Myers, against the executor for an account and for a division of the estate, according to the will of his grandfather. It appeared in evidence that the de-

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*fendant had kept no accounts, but had mixed up the property with his own, and with the proceeds of the whole had purchased other estates, and had greatly increased the property. That at the time he qualified and took into his possession the estate of his father, he was worth little or nothing, but he had now an immense estate, which he claimed as his own, mingled with the trust estate. He never made any returns to the Ordinary, and upon the whole had acted with regard to, and so conducted, the estate, as if the same were entirely his own. The defendant in his

answer contended that he had a right so to manage the estate. That the will was made at his particular request and suggestion. That the property was intended for the benefit of all of his children, and that he had intended to divide this estate, as well as his own, equally among all his children: and that by the will he was authorized to keep possession of it, and to manage it in such manner as he saw proper, during his own life time: and that it was not the intention of the testator to have it divided before that period, at which time all such children as he might then have would be entitled to come in for their portion, under the will.

The testator at the time of making his will owned a lot in the town of Columbia, which was not mentioned in the will. The complainant contended, that it passed under the first and last clauses of the will, and that the defendant David Myers was expressly excluded from any part of the estate by the fourth clause in the will, and that therefore it was not to be presumed that the testator intended to die intestate as to this piece of real property.

It was admitted on all hands that the estate was a very large one; and as Dr. Myers was of age and had a family to support, Chancellor De Saussure, on motion, and upon

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reading the bill and answer, and ex*hibits and affidavits on behalf of both parties, ordered the defendant, the executor, to pay over quarterly to Dr. Myers an annuity of $1600 until the future order of the Court, and the sum of $5,000 as an outfit. This order was, at a later stage in the cause, extended to William Myers, who had, in the meantime, also come of age and married, so far only, however, as to the annuity.

On the hearing of the cause the following points were made.

1. Were the children of David Myers, born since the death of the testator, entitled under the will with those born before his death?

2. Whether the lot in Columbia was included by the will, or whether it descended, as undevised, to David Myers?

3. Whether the defendant, David Myers, should be allowed for the education of the nine children, if all were entitled; and if only three were entitled, whether he would be made such allowance for those three?

4. Whether David Myers should be allowed for the improvements on the lands of the estate?

5. Whether David Myers should be allowed any thing for his services?

6. Whether David Myers should be charged with annual rests, or, in other words, with the interest on the funds, he had received, compounded?

7. Whether the estate of Jacob Myers included the purchases of property made by David Myers since the death of the testator, or in other words, whether David Myers was bound to account for the profits of that estate, or only for the rents and liens?

8. Whether David Myers should be allowed for the raising and maintenance and taxes of the younger negroes until they attained the age of fourteen?

9. Whether David Myers should be allowed

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for ad*vancements made to Dr. John Myers, William Myers, and Mrs. Clendenin?

[For subsequent opinion, see Bailey Eq. 23.]

Preston, for the complainant John Myers. The question is, who are entitled under this will? The cases on the subject are very numerous. The general rule applicable to this case is as to its vesting. The earliest period is always adopted. 2 Ves. Jun. 689. The earliest period is adopted, because the law sees no other at which the party may not have children. Horsly v. Chaloner, 2 Ves. Sen. 83. When given to take effect at an indefinite period, it vests at the death of the testator. Stapleton v. Palmer, 4 Bro. C. C. 490. Hutchin v. Mannington, 1 Ves. Jun. 366. This is rather a rule of law than one of construction. Whatever may be the meaning, if it be indefinite, it will be confined to that period. An intention to extend the provision to persons beyond the period of the testator's death, unless clearly expressed, will be inoperative. The Court will not make such construction unless compelled. Ellison v. Airey, 1 Ves. Sen. 111. An express, immediate disposition is not to be altered by a subsequent inference. Collet v. Laurence, 1 Ves. Jun. 268. If this case can be brought under any one of these rules, it will be sufficient. It is deemed possible to bring it within all of them. The first rule laid down is one of policy. It is injurious to property to hang it up. The policy of the country is, to circulate and render it serviceable to the happiness of the people at all periods. What period is contended for by the defendants? The death of Colonel Myers? That is indefinite. So the coming of age of the children generally is indefinite. But the will in neither case says any such thing.

The third rule is, that the intention must be clearly expressed, and that the Court must be compelled by the clearness of the expres-

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sion to suspend the distribution *beyond the period of this rule. The law presumes that David Myers may have children to the period of one hundred years. The counsel for the defendants have contended that the period of Myers's life was intended, and the Chancellor, notwithstanding their argument, seems disposed to fix upon the period of twenty-one. Certainly, then, the expression of intention is not clear to extend the period beyond the death of the testator, when the party can fix no period when it does vest. They argue various periods. That shows it to be uncertain and indefinite; and if they can not shew at what period, the general rule then applies,

and restricts it to the death of the testator.

The other rule is, that an immediate disposition in a will is not to be altered by subsequent inference. 1 Ves. Jun. 269. Whenever this rule is extended, it is only in cases where a father gives to his children, but never where any other person gives to the children of another. Here is a distinct immediate devise to the children, and no inference is to suspend it till any period subsequent to the death of the testator.

The defendant was living in North Carolina, and he had, at the time of the testator's making this will, paid a visit to his father with his family. His wife then had two children, and was enseint with a third. The testator's words then, doubting the number of his grandchildren, were owing to this circumstance. He might have contemplated the possibility of his son's wife having twins. The thing was very possible, and he intended the will not to operate the day he made it, but when he died, which he might have considered would not happen for several years, when his son might have had several children. And it is evident that the defendant looked to a subsequent state of things to change the construction of the will, instead of construing it under the circumstances exist-

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ing at the death of the testator. The *will speaks for that period. It is immaterial how many children were contemplated: if five hundred, it did not vary the rules of construction contended for. The testator looked to this contingency, and the period of his death, says the law, shall settle the contingency, unless the testator, by express words, fixes some future or other period. David Myers is barred. He is expressly excluded. The children alone are to take, and it vested in them immediately upon the death of the testator. It was a stronger case than those which give the interest and the principal, differently. The mode of division is prescribed, but nothing is said about the period. Out of the profits of the estate now bequeathed to them, he orders the children to be educated. The son, David Myers, was as rich as the father at that period, as he contends. If so, the testator had no necessity to provide for all of David Myers's children. David Myers could provide for those afterwards born as he pleased. The order to educate the children is urged as a reason for fixing the period at the time of the oldest arriving at the age of twenty-one. But appointing David Myers guardian was nothing more than the law had already done, and it was only done to direct as to the education. For although the children being minors could not sue for their shares until they were twenty-one, yet that did not prevent their right vesting, as in every case of minors. As to the argument about Mrs. Dutilly's negro girl, it would scarcely be contended that the great body of the estate was to be kept together until that lady should die, to wait for the distribution of such a trifle. In Ellison v. Airey, 1 Ves. Sen. 111, the legacy was held to be contingent, as the reason why it was extended beyond the period of the testator's death. It was suspended until the death of Elizabeth, the previous tenant for life. In Coke v. Coke, 2 Vern. 545, the general principle is laid down. It is one of the oldest

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cases. * "All the children" meant such as were born at the death of the testator. So also in Stapleton v. Palmer, 4 Bro. C. C. 490, 1 P. Wms. 196. To a younger child or children, at twenty-one, vested in those in esse, at the death of the testator. Horsly v. Chaloner, 2 Ves. Sen. 83, which case is referred to as authority in Devisme v. Mello, 1 Bro. C. C. 540, a leading case. Chaloner and Horsly is precisely like the present case. In that will too there was a remainder over, which was relied on in that case. There the period of twenty-one years was mentioned, and, notwithstanding, the Court held none could take but those in esse at the death of the testator. But here this testator fixes no period. It is only to be inferred. 14 Ves. 576. Where property vests in interest, and the possession is postponed, those only take when it vests in interest. In Singleton v. Singleton, 1 Bro. 541, in the note, a legacy to "every the child or children,"—none were allowed to take that were not in esse at the death of the testator. In Whitbread v. St. John, 10 Ves. 152, the words were "born or to be born," none born after the first's arriving at twenty-one, that being the time they were to take, were admitted. So in Prescott v. Long, 2 Ves. Jun. 690. In Isaacs v. Isaacs, Amb. 348, the testator, living in the East Indies, gave to such children as his niece had in England, to be divided between them at twenty, and if his niece had no children, it was to go to her husband; yet, all the children not born at the death of the testator were excluded, though the testator was at a great distance, and did not know the number of the children. All and every of the children, was held to vest only in those born at the death of testator. Heathe v. Heathe, 2 Atk. Rep. 122. The defendants here first assume that the period of distribution is postponed, and then argue that the rights do not vest till then. A legacy given in præsenti, solvendum in futuro, vests nevertheless in præsenti.

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This is not *a gift in futuro. This is a devise of real property. It can not be said of it, that it is given in præsenti, solvendum in futuro. The Court is called upon to presume a contingency of the real estate until it vests. But this can not be done of real property. The rule as to personal property was introduced by the Ecclesiastical Courts from the Civil law. But they can not apply it to real property in contradistinction to the common law. The exceptions to the general rule are

in cases of a trustee to support the estate till some future period, or where a life estate is first carved out, or where no children are in being at the death of the testator. All the cases of these exceptions are collected in 2 Fonbl. 375, note. Heathe v. Heathe, 2 Atk. Rep. 122. (Edit. Saund.) 1 Roper on Legacies, 71.

The next question is as to the method of computing interest.

The argument upon that question will be put in such a shape as not to conflict with decided cases. It will be argued that the interest vested at the testator's death, but that it would open and let in others. If so, the shares of those born at the testator's death have a different rate of interest from the others, should they be admitted, as was decided in Hodges v. Isaac, Ambl. 348. The elder children are entitled to their share from the testator's death with interest on their shares till the birth of the others; and the English Courts give interest with annual rests against an executor, who should have put the fund out to interest: and the interest again should be put out. 4 Bro. 359. Raphael v. Boehm, 11 Ves. 108. In the latter case the interest was calculated with semi-annual rests. It is necessary that some fixed rule should be adopted in this state; for it is literally better to be executor than legatee, and it is, as Lord Coke has said, "giving the lamb to the wolf." It became so notorious, that the late act renders the

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Commissioners and even the Chancellors *liable if guardians and trustees are not called to account every year. It is absolutely necessary that some severe rule should be adopted by the Court of Chancery to prevent these frauds of executors. They must be compelled to put the profits out at interest; or be made to pay interest with annual rests, if they have received profits, or might have made them by a proper use of the estate. In this case the executor has kept no accounts. He is answerable for not keeping them. That which he had now rendered for the occasion was got up fraudulently. The order made by Chancellor De Saussure, granting an annuity to Dr. Myers, &c. was upon a discussion and review of the accounts, and that order will satisfy this Court that the account is fraudulent. The executor refused to discover, and exceptions were taken and decided against him. He has denied that he ever made any purchases, and refused to disclose his profits; which is the only way to avoid paying compound interest. The executor has been guilty of every sort of evasion to avoid it. A trustee is not allowed to make a profit for himself, and if he make a profit and will not disclose it and account for it, he is chargeable with compound interest. Schieffelin v. Stewart, 1 Johns. Cha. Rep. 620. Bowles v. Drayton, 1 Desaus. Rep. 496. If a person confounds his property with another's, he loses his own. Hart v. Ten Eyck, 2 Johns. Cha. Ca. 108. Lupton v. White, 15 Ves. 432. The executor is bound to use his industry and care, and is paid for it by his commissions. Here there was nothing more required. Admitting that he was worth half as much as his father, and their estates have been confounded, the law will at least give the legatees and devisees one half of his present estate, including that of the testator. But it is a great question, whether the defendant was not insolvent at the death of the testator. Compound interest, it is believed, would be less than the true amount of profits.

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*As to the lot in Columbia, it was evident the testator intended to exclude the defendant in favour of his children. The lot being regarded as worth nothing, the testator supposed it would pass with the rest of his estate.

W. Thompson, for the executor. The defendant, David Myers, not only claims the estate for himself, but for his children. The first view that will be presented is, that if the benefit under the will was to take effect at the death of the testator, the will was void, because there were not persons at that time existing capable of taking under the different provisions of the will. The testator says, "if more than two daughters;" and nothing in the will shews what the disposition would have been if he had known there would be but one daughter. The will is therefore void for the want of a devisee. Suppose the testator had left only a daughter, could the will have had any operation? There was no such case contemplated. Unless all the persons contemplated by the testator be living, the will is void. The presumption is, that, unless the particular state of events happened as he had anticipated, he intended to die intestate. If there are but two sons to take, how will they take under this will? Suppose there had been but one daughter and one son, would she have taken a third? The will evidently contemplates the existence of two daughters, Powell on Devises, 411. In Richardson on Wills, 155, 163, the word issue is held to be so general, that it being difficult to say whether it meant children or grandchildren, the heir was let in. Richardson on Wills, 166. A mistake cannot be rectified, 1 Ves. 362, there being nothing to shew what the intention would have been, 2 Eq. Ca. Ab. 342. Whenever the will is doubtful, the heirs at law, in this country, should be more favoured than in England, as all the children inherit under

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one *statute of distributions. Supposing this position to be wrong, the question will be then considered in relation to the vesting of the right in the lands. Does the interest vest immediately upon the death of the testator?

If not, it remained in the heir at law, and the devise is void.

As to the question relative to the interest of the children, it has been said that the rule laid down in Heathe v. Heathe is a rule of law, and not of construction. The distinction is incorrect. It is always a question of intention, and of course one of construction. It is not like the case of a question of remoteness, which is one of law, and not of construction; for if it be too remote it is against law, Wilde's case, 4th Reports, 16. In Congreve v. Congreve it is said, that Ellison v. Airey puts the case upon the contingency whether they should be born before the period of paying over to the oldest at his arriving at twenty-one. In Stanley v. Baker, Moore, 220, the intention, though not very plain, was held to comprehend future children. In Devisme v. Mello, the words, it is said, must have their whole effect, and must comprehend as many as possible. The gift comprehends all who are in esse before the gift takes effect in all its consequences. Andrews v. Partington says, when a precise time of payment is fixed, all can come in that are born before that time. In Norris v. Mills, all were included on the ground that there was a limitation over, and the testator could not have intended it to go over until all the issue failed, thereby comprehending all the possible children.

The rule is said to comprehend all in esse before the necessity of a division. This rule prevents all the mischief spoken of. No mischief can result by delaying thus long. In Middleton v. Messenger, the interest, though vested at the death of the testator, was extended to those born after. In Whitbread v. St. John, a period was fixed for the division.

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There must be a period *fixed for division, to exclude any born afterwards. Leake v. Robinson, 2 Meriv. Rep. 363. Shepperd v. Ingram, Amb. 444. The testator in his will looked forward to considerable lapse of time; but he was ill at the time, and must have contemplated dying very soon, and that his son's family therefore would have changed after his death. Besides, the legacy to Mrs. Dutilly shews clearly that he looked to some length of time after the period of his death for distribution. The testator also contemplates the total dissolution of issue of David Myers in the subsequent part of the will, and could not mean that the property should go over upon the death of these three children to the exclusion of others that might be born afterwards. The will says the estate is in the end for the defendant's children. Suppose the children born before the testator's death had died before their becoming twenty-one, what would become of the property? Would the other children take it according to this construction? No! The limitation to Conrade Myers's children is not too remote, and they would have come in. The legacies would have vested upon the death of the testator, if interest had been given, but not in this case where only allowance and maintenance is given. This case was important, as it was the first of the kind that had come up in this country. It was therefore of some weight, whether the reason of the English rule would apply; for under our act of distribution the inclination of the Court should always be to include all the children who would come in under the statute. In this case a guardian is appointed over the property to provide for the education of the children, and therefore the testator did intend to postpone the vesting until they become twenty-one, the period when the guardianship would expire.

As to charging the executor with annual rests, in the case of Raphael v. Boehm, 13 Ves. 407, the will expresly ordered the fund

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to be put out at interest. He cited *Black v. Blakely, decided in this Court at its last session, (ante, page 1). As to Chancellor De Saussure's order, it can have no weight with this Court, as there had not been an account before the Master.

As to the lot in Columbia which is said to pass by implication, such implication must be necessary and inevitable. All that is given in the will is most specifically described, which precludes the possibility of such a presumption.

M'Cord, for the complainant, and for Clendenin and wife. Where the words are not clear, none other than a necessary implication can prevail. Upton v. Ferrers, 5 Ves. 801. "Clear words in the operative clause should not be affected by ambiguous words used in other parts." Orford v. Churchill, 3 Ves. & Beames, 67. Where there are any persons to answer the description, no others can be let in: but where there is a total want of persons properly answering the description, others who do not so completely answer it may be let in, if, as soon as one can take, all must take or be excluded. The vesting cannot be suspended. Walker v. Shore, 15 Ves. 124. If John Myers had been twenty-one when the testator died, could he not have demanded his share? Nothing but infancy delayed him. If all possible children are comprehended, the oldest son might die before the father, without receiving one cent even to pay his debts. He might starve while the executor has the estate. Keeping the accounts open to an indefinite period would involve the Courts in great difficulties in adjusting the various rights which might arise. No case can be found where children born after the death of the testator were admitted, where there was not some future period fixed for their taking; or some trust established to postpone the taking; or an intervening life estate, where future children alone are intended to be

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provided for: or *a provision to survivors, to tie up the estate to children alone, to prevent the father's coming in, or the next of kin, in case one dies before the period of distribution, for the share of one so dying; or where future children are expressly provided for. The real and personal estate must vest at the same time. If the real estate does not vest at the testator's death, is it in abeyance? Not to the heir, for he is excluded with a shilling. Madison v. Andrew, 1 Ves. 57, and Ellison v. Airey, 1 Ves. 111, are the two strongest cases in favour of the executor D. Myers. But these two cases, as well as all others in the books, fall under one or other of the classes of cases which have been mentioned. Madison v. Andrew is badly reported as to this point. The opinion of the Chancellor is stated in one sentence. But the case was a trust to executors to pay three hundred pounds, at twenty-one or marriage, to any child of his sister Sarah, who the testator knew had but one, and to the survivors. And it did not appear that any children were born after the first became twenty-one, as it is likely the question was made then, and all born up to that time were admitted; the distribution or vesting, or in other words, the execution of the trust being delayed till then. No one could take sooner. No partial distribution could have been before that time. It is evident that these were the grounds on which that case was decided, because the same reasons were assigned by the same Chancellor in Ellison v. Airey, decided but one year afterwards, in the report of which the reasons are fully stated. It was a contingency till twenty-one. 2 Mad. Cha. 14. In Wilmot v. Wilmot, 8 Ves. 10, it is said, that "surviving" or "survivors" meant "others," and this explains still further the construction in Madison v. Andrew. And in Hodges v. Isaac, Amb. 349, Madison v. Andrew is referred to, and the reasons of that decision are there stated, as they are conjectured to be, for the

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purposes of *this argument. I will confine myself exclusively to the question, who took under the will. That none others took but those in esse at the death of the testator (there being none in ventre sa mere) there will be an endeavour made to show, by a classification of all the cases under the heads heretofore stated.

The first class is, where the gift or legacy has no time fixed or expressed for its distribution or vesting. Under this class the present case falls. The trifling circumstances in the will, which have been seized upon, are not such as to take the case out of this general and leading rule. The other classes of cases form the exceptions to this rule. In Heathe v. Heathe, 2 Atk. 122, the legacy was confined to children in esse, because it might as well be extended to children born twenty years afterwards, and that, the Court said, would produce great confusion in unravelling accounts. In Hutchinson v. Manningham, 4 Bro. C. C. 490, it was decided that, though the testator did not intend the legacies to vest immediately, yet, having fixed no time, they vested at the death of the testator. Would it be required of the complainant to wait until the death of his father, as it was impossible to fix upon a period at which he might not have another child, as in Godfrey v. Davis, 6 Ves. 49, where no child existed at the time, and therefore it was contended that a child in future was embraced, as none other could be meant? The Chancellor said, "all the lamps must be burning at the same time." The arguments of Messrs. Alexander and Cox in that case contain a correct view of all the cases. Roberts v. Highman, note to 1 Bro. C. C. 532, is a case like the present. In Singleton v. Singleton, cited in 1 Bro. C. C. 541, the decree is in all respects conclusive upon this case. The devise was to "every child, or children if more than one, and in case of failure of issue of all such children, or if but one such child and in default of such issue, he gave it over.

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The *Chancellor said, there was no time fixed, and that none could come in who were not born at the death of the testator. In Viner v. Francis, 2 Bro. C. C. 658, the death of the testator was held the time for vesting: though the legacy was given to be divided in the life time of his brother, the father of the children, or at his death, none but those in esse at the testator's death took. The same case is reported in 2 Cox, 190. The devise was to the father for the children, which made it a stronger case. In Horsly v. Chaloner, 2 Ves. Sen. 83, the gift being immediately to be paid to the children at twenty-one, a child born after the death of the testator was excluded. This last is a strong case. The gift was to the younger child, if more than one, and if any die before twenty-one, to the survivor and for want of such child, then over. This case was decided on the authority of Madison v. Andrew, and serves as a comment on that case. It would seem, from the manner in which that case is spoken of, that it was not thought to be correctly reported; for it is said in this case, that the children took at the death of the testator, to avoid the inconvenience of keeping children out of the provision expressly appointed to be paid at twenty-one. In Baldwin v. Karver, 1 Cowp. 312, Lord Mansfield said, the great point in all these cases was the time when the legacy is to vest, for that is the period when the testator looks forward for the property to pass from one channel into another. The Court there refers to Ellison v. Airey as a leading case, and says, that if the gift be immediate, none but those in esse could take at the testator's death. All are let in here at the expiration of the intermedi-

ate estates. In Northy v. Strange, 1 P. Wms. 340, even a child in ventre sa mere was not let in. A will is not to be construed as if the testator was speaking in his last breath. In the case before the Court the testator calculated on his son's having more children before his dying, and the possibility

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of those *living dying before him, as in Thornhill v. Thornhill, 3 Mad. Rep. 377. In Freemantle v. Freemantle, 1 Cox's Ca. 248, which is an important and pointed case, South Sea annuities were given to trustees in trust for the testator's great grandchildren. The interest in the mean time was given to Frances their mother, for their support and education, and on each attaining the age of twenty-one, to pay him or her their share. A child in ventre sa mere at the death of the testator was excluded, as well as another child born subsequent to the death of the testator. In Jee v. Audley, 1 Cox's Ca. 324, the distinction is well drawn by the Chancellor, between cases where the devise is immediate and where there is an interest in remainder. In the former case only the children living at the testator's death take, in the latter those born before the interest vests in possession. He also cited Burke v. Wilder, 1 M'Cord's Cha. Rep. 551.

Secondly. It is proposed to review the cases accompanied with a power of appointment, a trust to pay, and a contingency to happen at some period future to the death of the testator.

In Devisme v. Mello, 1 Bro. C. C. 538, it is said, nothing will postpone the vesting but a prior interest, a power of appointment, or a contingency. A trust with a power to pay at some future period might have been added. It is also said it will vest, unless some thing in the will prohibits the gift from taking effect "immediately in all its consequences at the death of the testator." Now what is there in Jacob Myers's will to prohibit the gift from taking effect as to those in esse at his death? No act of the executor is necessary to effectuate or complete their rights. No future period is fixed. It is indefinite, and therefore void if not to take effect at the death of the testator; for no time, act, or circumstance, after the death of the testator, is necessary to complete the rights of

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those in esse. In 1 Plow. 345, it *is said, the devise is void if the devisee be not in esse, with capacity to take, at the same time when it ought to vest. Otherwise the fee would be in abeyance. There is no trust to support it. Jernynham v. Wells, 2 Ves. Sen. 198, was a trust of a term, and was for children to be begotten, and a future time of payment directed. There it was continued open till the time for payment. In Coleman v. Seymour, 1 Ves. 209, the legacy was to younger children. None but those that were younger children when the testator died were admitted, though younger children were born after his death; and this, although the wife had a power of appointment, which would seem to imply the intention of extending the period during the life of the person having the power, which is generally executed by will. Besides, the word survivors was used, which indicated all the children. Congreve v. Congreve, 1 Bro. C. C. 580, was of a trust to pay at twenty-one. Graves v. Boyle, 1 Atk. 509. A mere trust, without a power of appointment, or some estate carved out of it for a particular purpose of the trust, will not postpone the vesting; as in Roberts v. Higman, 1 Bro. C. C. 532, where a devise to trustees to sell and pay debts, and the overplus to his daughter's children, was held not to include any child born after the testator's death. So ordering money to be paid "when received," "when got in," "when recovered," "when laid out." Stapleton v. Palmer, 4 Bro. C. C. 493, (Eden's ed.) Hambling v. Lyster, 13 Ves. 336. Sitwell v. Bernard, 6 Ves. 520. Steuart v. Bruere, cited by Eden. Gaskill v. Harman, 11 Ves. 484. Wood v. Penoyre, 13 Ves. 325.

In Singleton v. Gilbert, 1 Cox's Ca. 68, the devise was to trustees for a term of 500 years, for the use of two persons for life, and after their deaths "to all and every the child, and children of her brother if more than one, to take, &c. at twenty-one, the term

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to be for their *benefit, on failure of such issue to Richard, her brother. The Chancellor "saw no circumstances to take this case out of the general rule." It is an estate given directly, although given charged with the terms, and therefore I cannot consider the after born as entitled."

Thirdly. The cases where future children were expressly provided for by the word "survivors," &c. formed but few cases of exception to the general rule. In Hodges v. Isaac, Amb. 348, is a strong case. The testator being in the East Indies, and his friend in England, gave legacies to be paid in bank for the children of his niece, to defray their learning, and at twenty to be divided equally between them, and if she had only one child, it should have the whole, but if his niece had no children, it was to go to her husband. The legacies were held to vest at the death of the testator, and subsequent children were excluded. Here was a devise over on failure of issue, and the testator did not know that there were any. The case can not be distinguished from the present, except that it was somewhat stronger from the fact of the legacies in the former case being to be paid at twenty, which indicated a postponement till that time. Madison v. Andrew was a trust, payable at twenty-one or marriage, and was to be paid to children, or any child, when the testator knew there was but one, and was to go to the survivors of them, and upon failure of such, over. It may there-

fore be ranked under this head. In Spencer v. Bullock, 2 Ves. Jun. 687, the devise was to Jane for life, and after her death to her child and children; if more than one, share and share alike. Provided his son or daughter died without any lawful issue, he gave their share to the survivors. Those born up to the death of the daughter were let in. The principle was there laid down, that there was a difference between a direct gift and a trust, where the only thing constituting a gift is the distribution directed. Ellison v.

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Airey *comes under this head of cases. It is like that of Madison v. Andrew. Besides, it would have vested in that case at the death of the testator, but for life estate given to the parents of the children. Staughton v. Harrison, 2 Atk. 329.

Fourthly. Cases wherein the legacy is payable at twenty-one, or at some other period, or marriage.

In these cases all are admitted that are born before the oldest arrives at twenty-one, but none born after that period, as in Hughes v. Hughes, 3 Bro. C. C. 352, 435. S. C. 14 Ves. 246. Andrews v. Partington, 3 Bro. C. C. 401. Pulford v. Hunter, 3 Bro. C. C. 416. So in Gilbert v. Boorman, 11 Ves. 238, though the legacy was for "all the other children hereafter to be born." It was also said in that case, that where a partial distinction is to take place, future children cannot come in. Gilmore v. Severn, 1 Bro. C. C. 582. Congreve v. Congreve, 1 Bro. C. C. 530. Prescott v. Long, 2 Ves. Jun. 690. Horte v. Pratt, 3 Ves. 730. Barrington v. Tristram, 6 Ves. 344. Whitbread v. St. John, 10 Ves. 152. Manning v. Hubert, Amb. 575. In Stapleton v. Palmer, 4 Bro. C. C. 490, although the legacy was to all his sister's children alive at the division, which he directed to be made in three years, it was held the legacy vested at the testator's death, and none were allowed to come in not then in esse. In Ringrove v. Ringrove, 1 Cox, 384, the legacies were to children when they came of age, yet none were admitted but those in esse when the testator died. The argument then in this case, that the gift did not vest till the oldest son came of age, would apply to all cases; for in all cases they are minors. But in Davidson v. Dallas, 14 Ves. 9, 576, which was the case of a legacy to children, and if either of them die before twenty-one his share to go to the "survivors," it was held the legacy was immediate, and none but those

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in esse when the testa*tor died were let in, notwithstanding the word "survivors," as to which term the Chancellor said, there had been a forced construction adopted.

Fifthly. Cases of gifts to children after a gift to a previous tenant for life. Those only take who are in being at the death of the tenant for life. Walker v. Shore, 15 Ves. 123. Congreve v. Congreve, 1 Bro. C. C. 530, which in Hughes v. Hughes is said by the Chancellor to be a strained case. Bartlett v. Hollister, Amb. 334, wherein the Master of the Rolls refers to the case of Madison v. Andrew as a similar case. Devisme v. Mello, 1 Bro. C. C. 538. Marlborough v. Godolphin, 2 Ves. Sen. 61. Harding v. Glin, 1 Atk. 470. Attorney General v. Crispin, 1 Bro. C. C. 386. Malim v. Baker, 3 Ves. 150. Taylor v. Langford, 3 Ves. 119. Ayton v. Ayton was first heard by the Master of the Rolls, whose decision is reported 1 Bro. C. C. 542, and reheard by the Lord Chancellor. The latter decision by the Lord Chancellor is now referred to, and will be found in 1 Cox's Ca. 326. Paul v. Compton, 8 Ves. 375, is a very strong case. Middleton v. Messenger is a strong case, and affords a complete answer to the argument derived from the legacy to Mrs. Dutilly. Annuities continuing after the life estate were held not sufficient to suspend the vesting of the estate, and none not born during the life estate were let in. The annuities falling in afterwards were divided among those who had received the rest of the estate. So in Godfrey v. Davis, 6 Ves. 42, a case likewise of annuities. So in Will v. Chapman, 3 Bro. C. C. 391, the dropping in of annuities at different periods was held to have no effect upon the bulk of the property devised. The case of Jee v. Audley, 1 Cox's Ca. 323, is a very strong case, and is a complete answer to the argument derived from the words in the will in relation to the

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dissolution *of David Myers's issue. Haughton v. Harrison, 2 Atk. 328, is a case like Ellison v. Airey.

As to the cases relied on by the opposite counsel, Shepperd v. Ingram is not a case in this connection. Mills v. Norris is a case like Shepperd v. Ingram. They were both questions of interest on shares falling in at different times. So Difflis v. Goldschmidt, 19 Ves. 566, is not a case like this. It is on a different subject. It was only a question with the executor. The mother there too had a life estate, and all the children could take during that time. Leake v. Robinson, 2 Meriv. Rep. 363, was a devise to trustees to pay at twenty-five.

O'Neall, for the executor. The question is, whether the will does not closely show an intention to comprehend all the children. As to the rules of construction, he cited 4 Ves. 312, 329. 1 Ves. 270. After the use of a general term, a term still more general will extend it. Suppose the word children stricken out, would not the word issue give it to all the children? The issue could not be known till David Myers's death, and at that period those who answered the description may take. It is the duty of the Court to comprehend as many as possible. 1 Roper on Legacies, 107. The word issue would be a word of purchase. 2 Ves. Sen. 195. Hanbury v. Hanbury, 3 Ves. 257. Merryman v.

Merryman, 5 Munf. 440. The limitation over is to take effect after a total failure of issue, and by implication would give a share to all the children. The property could not go over till David Myers's death, and the death of his issue. The Court must come to the conclusion that the testator meant to divide the property between two grandsons and one granddaughter, before they can give it to them to the exclusion of others. But the will shows no such intention. The testator pro-

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vided for a *state of things entirely different from that now presented to the Court by the complainant. Collet v. Laurence was relied on by the complainant's counsel to show, that the testator after giving cannot modify the legacy in a subsequent clause. The case does not support that position. The last clause is regarded always as most obligatory in a will; but in this case the clauses are perfectly consistent. It is a mere amplification of the intention. The clause limiting it over on a total failure of issue is parallel with Madison v. Andrew. The Court there, because it was limited over on a failure of issue, let in all the children. The only difference is a clause of survivorship in it, which can make no difference in the construction. The management enjoined upon the executor is prospective, "which in the end," says the will, was for the benefit of his children. This must have been intended a management until his death; that during his life he should keep the estate together, and after the executor's death to be divided among his children.

It has been contended on the other side that David Myers was insolvent when his father died. If so why should the grandfather not provide for all his children, as he was young, and the probability was that he would have a large family? In case David Myers lived until many or any of the children became of age, the Court will give the profits and income of the property to those thus coming of age. There are the same reasons for the construction in marriage settlements as in wills. In Ellison v. Airey, it is said, slight circumstances will vary the construction. In Devisme v. Mello, the devise was extended to all children before distribution. Hutchinson v. Manningham. Thellusson v. Woodford, 4 Ves. 336, 337. In Detllis v. Goldschmith, 1 Meriv. 417, it is said, the intention not being to exclude any of his sister's chil-

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*dren they would all be let in, though it should be necessary to impound the whole estate; and in this case they must all come in, though it impound the whole estate until the death of David Myers. Admit the intention to be doubtful. When is the time for distribution fixed by the will? If the time of the eldest child's coming of age be the period, any might take before John Myers became twenty-one. If the argument was correct that the issue take, then it follows that each may come in for their share at their arriving at twenty-one. At law John Myers could not claim this property before twenty-one. His father had the custody of his person until twenty-one, and the guardianship over the property created by the will extended to the same period. 1 Ves. Sen. 89, 90. The devise is given for a particular purpose, and no arrangement could be made that would alter that purpose. The testator intended the profits to educate the children, and therefore the estate is to be kept together until the children became twenty-one.

As to the bequest to Mrs. Dutilly. The negro given to her is not to go as the counsel has contended, but the testator contemplated a division subsequent to that period, and spoke of that property forming a part of the partition to be made, and certainly at a period subsequent to her death, and it is immaterial whether the period of distribution be fixed at her death or the coming of age of John Myers, the oldest child. Wherever a legacy is given to a particular class of children, any coming within the description at the period of distribution may take. In Congreve v. Congreve, all were permitted to come in that were born before the oldest became twenty-one. He cited also Devisme v. Mello, 1 Bro. C. C. 537. Hughes v. Hughes, 1 Bro. C. C. 352. The cases of gifts to a tenant for life with a remainder to children are exactly applicable to the legacy given to Mrs. Dutilly, and all the children born

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during her life *may take. In Viner v. Travers, 2 Bro. Cha. Rep. 658, children who died before the distribution were held not to be included. Barrington v. Tristram, 6 Ves. 345. Andrews v. Partington, 3 Bro. C. C. 60, 401. Bartlet v. Hollister, Amb. 334. The general rule is said to be an artificial one, and that the convenience of the Court gave it importance. If there be no better reason for it, the sooner it is got rid of the better. A legacy may be said to vest, and yet open to let in subsequent legatees arriving at the period when they may take. It is a shifting use which is allowable. Attorney General v. Crispin, 1 Bro. C. C. 386. Singleton v. Gibbert, 2 Cox's Ca. Crane v. Odle, 1 Ball & Beat. 459. 1 Cox, 72, 326. In Coleman v. Seymour, 2 Ves. Sen. it is said the circumstances, the particular words, &c. should give construction to the will. If all were excluded but three, then the Court should allow the expenses not only of education but maintenance also. Hughes v. Hughes, 1 Bro. C. C. 387.

As to allowing for the improvements, he contended that the lands were much improved, and of course the executor should be allowed for it. The improvements are permanent, not only increasing the annual rents, but rendering the lands permanently more valuable.

If Myers applied the funds of the estate to buy property, it can only be decreed a resulting trust, which cannot be raised unless clearly proved. 2 Fonbl. 118, 119. The rate of hire, with interest compounded, would amount to an incalculable sum. It is out of all reason. One negro might become $9,000. The trust in this case did not require an investment. In Raphael v. Boehm, 13 Ves. 407, the will directed the fund to be put out for accumulation. Besides then the testator could have put the fund out, but how could he do it here? The case of Crenshaw v.

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M'Morris, Harper's *Eq. Rep. 224, directed the fund to be put out, and the interest to be collected annually. The case of Bowles v. Drayton, 1 Desaus. Rep. 489, was the case of an annuity for maintenance, and the maintenance, having been withheld, the Court granted an account against the executor with annual rests. It is impracticable, in most parts of this state, to effect loans or to invest funds in any way that will produce interest, payable annually. No honest man would undertake a trust if such a doctrine could be supported.

As to the lot in Columbia, it must have been forgotten, and the legacy of one shilling and no more can not exclude David Myers from property not given in the will. It was only inserted to exclude him, from some notion of necessity, from the lands devised to his children. Snelgrove v. Snelgrove, 4 Desaus. Rep. 274. As to the case of Vachell v. Breton, 5 Bro. Par. Rep. 51, (Edit. Toml.) two of the children, to whose legacies the words "and no more" were attached, were allowed to take. The others were excluded for illegitimacy.

Gregg, for the executor. Did the testator intend to confine his bounty to the children born at the time of his death? It is not pretended that the testator could not, by express words, have extended it to the afterborn. It has now become a question of construction, whether he has not done so. This intention is to be collected from the circumstances and from the whole context of the will. The state of the testator's family will be looked into. 8 Com. Dig. 422, Devise 9, sect. 17. 2 Rob. on Wills. 27. Rob. on Frauds, 28. Goodinge v. Goodinge, 1 Ball & Beat. 481. Powell on Devises, 508. Cole v. Rawlinson, 1 Salk. 234. Fonnereau v. Poyntz, 1 Bro. C. C. 472, and Powell's observations on that case, Pow. Dev. 513, 519. Selwood v. Mildmay, 3 Ves. 306. Lyton v. Lyton, 4 Bro.

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*C. C. 459. 2 Ev. Poth. 212. 3 Hen. & Munf. Rep. 283. 10 Mass. Rep. 303. Cowp. 312. 1 Wash. 55. Haughton v. Harrison, 2 Atk. Rep. 329. This rule is stronger when the testator himself refers to the state of the family. The testator knowing that he had but two grandchildren, and his son's wife being pregnant, yet makes provision for more than four children. He could not have expected three children at a birth. He speaks of his "granddaughters inheriting," "if there be more than two or more grandsons." He could not have contemplated more than one birth before his death, because he declares in the will that he expected soon to die. The limitation over to the children of Conrade Myers, upon the total dissolution of David Myers's issue, showed clearly that the testator meant all children born or to be born. Madison v. Andrew. He declares the property to be for the sole benefit in the end of David Myers's children. This certainly showed an intention to comprehend all the children to the end. There could have been no special attachment to the two children born at the making of the will. It must have been for the whole family. Will it violate any principle of law to comprehend all the children? It is a leading rule that if the period of distribution is fixed at some time future to the death of the testator, that all born by that time will be admitted. 1 Roper on Leg. 71. 2 Fonbl. 348, note. Devisme v. Mello, 1 Bro. C. C. 537. Viner v. Francis, 2 Bro. C. C. 658. S. C. 2 Cox, 191. Congreve v. Congreve, 1 Bro. C. C. 529. Gilmore v. Severn, 1 Bro. C. C. 582. Godfrey v. Davis, 6 Ves. 49. Walker v. Shore, 15 Ves. 135. Andrews v. Partington, 3 Bro. C. C. 401, and note. Ellison v. Airey, 1 Ves. Sen. 111. Barrington v. Tristram, 6 Ves. 345. It has been lamented that the construction had not been established upon the footing of marriage settlements, by comprehending all

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children. Andrews v. Parting*ton. Hill v. Chapman, 1 Ves. Jun. 407. Ellison v. Airey. The rule excluding all children after the death of the testator is arbitrary, artificial and unsatisfactory, and the Court will go as far as it can to comprehend all children. Andrews v. Partington. Hill v. Chapman. Leake v. Robinson, 2 Meriv. 312. Hoste v. Pratt, 3 Ves. 733. The rule is not applied to wills made by parents to their children. 1 Rop. Leg. 99. Matchwick v. Cock, 2 Ves. 609. The testator in this case stands as a parent to his grandchildren. David Myers was the only child he had. The time of distribution means the time of vesting in possession. 1 Bro. 537, note. The distribution could not take place at the death of the testator, if contrary to his intention, which was evident from the provision for more than four children, there being but three. So the limitation over on failure of issue to Conrade's children. So the direction in relation to the girl given to Mrs. Dutilly, "to go in division with his other negroes" to his grandchildren, showed he did not intend the distribution to take place at his death. So the declaration, that the property was for the sole benefit of his grandchildren in the end. So the directions to have the children well educated out

of the profits of the estate. The case of Madison v. Andrew is like this, and the Lord Chancellor let in after born children, because the testator gave to children, knowing there was but one child, and limited the property over on failure of issue. Haughton v. Harrison, 2 Atk. 329. As it is manifest the testator did not intend the distribution to take place at his death, nothing but a technical rule of law will confine it to the time that John Myers, the eldest child, arrives at twenty-one. Andrews v. Partington. Prescott v. Long, 2 Ves. Jun. 692. Hoste v. Pratt. Gilbert v. Boorman. Defflis v. Goldschmidt. 19 Ves. 570. A legacy to A. for life and to

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her children at her death, *goes to all the children as they come in esse, though liable to be divested to let in others. 2 Mad. Cha. 15. Spencer v. Bullock, 2 Ves. Jun. 687. Walker v. Shore. Skey v. Barns, 3 Meriv. Rep. 343. It is not the vesting in interest, but the period of vesting in possession or time of distribution which fixes the time after which after born children are excluded. Unless the devise is to take effect immediately in all its consequences after born are admitted.

As to maintenance, if the estate belonged only to the three children born in the testator's life time, yet the executor should be allowed for maintaining them. 1 Bro. C. C. 387, note. Hoste v. Pratt. The same rule would apply if the property belonged to all the children.

As to improvements in the land. Trustees are always allowed for necessary and beneficial improvements. Green v. Winter, 1 Johns. Cha. Rep. 39. Fountain v. Pellet, 1 Ves. Jun. 337. The improvements were of that character here. The management was left to the executor, and with no further directions as to the profits than in relation to the education. The expenditures for improvements were made entirely out of the profits.

David Myers should certainly be allowed for his services, if it be decreed that the purchases made since the death of the testator belong to his estate.

As to the question of interest. Formerly no interest was allowed against an executor. Scheiffelin v. Stewart, 1 Johns. Cha. Rep. 624. Darrell v. Eden, 3 Desaus. Rep. 242. Simple interest is now only allowed. 1 Johns. Cha. Rep. 510. Manning v. Manning, 1 Johns. Cha. Rep. 535. Darrell v. Eden. Benson v. Bruce, 4 Desaus. Rep. 463. Walker v. Bynum, 4 Desaus. Rep. 556. Jenkins v. Fichling, 4 Desaus Rep. 369. Compound interest has never been allowed but in cases of gross breaches of trust, and of detaining the funds of

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*the estate improperly. Scheiffelin v. Stewart. Piety v. Stace, 4 Ves. 620. Pocock v. Reddington, 5 Ves. 794. Raphael v. Boehm, 11 Ves. 92. Dornford v. Dornford, 12 Ves. 127. The executor here had neither abused his trust, nor improperly detained the funds.

The answer avers that none of David Myers's purchases were made with the proceeds of the estate of Jacob Myers, nor for that estate. His answer is not contradicted, and therefore is conclusive on the question. According to the answer, and the proof, David Myers owned as much property at the death of the father, as the father did. The complainant claims the purchases and compound interest besides. How can he claim both? The Court can do no more than to require compound interest on the rents and profits. It will neither compel the defendant to account for profits, nor deprive him of his purchases. Scheiffelin v. Stewart. Raphael v. Boehm. It is immaterial to the children whether the interest be paid by David Myers or by a stranger. The funds could not have been made to yield more. He was not authorized by the will to invest the proceeds of the property. He has not confounded the capital of the two estates. Was it possible to have made more than the rents of the lands, the hire of the negroes, and the interest thereon? As he has committed no breach of trust, he can not be made to account for more. To raise a resulting trust, the complainant must not only show, that the purchases were made with the funds of the estate, but for the estate. Perry v. Phillips, 4 Ves. 108. 17 Ves. 173. Lench v. Lench, 10 Ves. 511. In all cases where a resulting trust has been declared, there were directions to invest the funds. There were none here.

As to the lot in Columbia. The lands devised, being specific, precluded all presump-

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tion that this lot *was intended also to be included. The construction is favourable to the heir at law.

The defendant is entitled to have refunded to him the expense of raising, &c. the younger negroes, if he be made to pay more hire than according to the ten pound act. It is also equally reasonable that he should be allowed for advancements to the three elder children.

Harper, in reply. In relation to the matter of advancement it will not do for the Court to decide upon it, as the questions have not been heretofore made and there has been no reference on the subject. The advancements are said to be gifts. So also the question as to improvements is prematurely raised. It cannot be settled before the accounts are finally taken. In Briggs v. Bolton, the defendant was not allowed for improvements. That case was decided by the late Court of Equity. A trustee is not allowed for improvements, unless in particular cases; and no evidence having been taken on this subject the question is premature. As to the lot in Columbia, the latter clause in the will, "I leave a clear estate for my

grandchildren," gives them a fee in this lot. The case from Plowden was that of a devise to the heir at law after the death of the wife: it gave the wife a life estate. There the implication was necessary, as no one could take in the mean time. But here David Myers is excluded expressly: therefore in that respect it is stronger than the case in Plowden of the estate by implication.

The general principles on which the accounts are to be made up will produce questions of more importance. The defendant has used the property as his own, confounded it with his own: kept no account: and now lays claim to it. In Pocock v. Reddington, 5 Ves. 794, the executor vested the stock in his own name, but sold it and accounted for it with the dividends; but it was held

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*a fraud, and if he had made more than interest he should be charged that, for he should not have risked the fund by keeping it. Roach v. Hart, 7 Ves. 57, decides that the executor should pay the interest he makes, and if he does not vest it, the presumption is that he made legal interest. Ex parte Shakeshaft, 3 Bro. C. C. 198, decides that the fund must be replaced. Massey v. Davis, 2 Ves. Jun. 317, that no profits can be retained made by a breach of trusts. The complainant is entitled to the profits the executor made if they can be ascertained, and it is the fault of the trustee that the profits are not known. But if the fund can be traced to property in the hands of the executor, the title to that property will be good to the cestui que trust. The right will not be by way of resulting trust, but the cestui que trust will be entitled to his share of the profits, and if the executor has confounded the funds and profits, it is his fault, and Equity gives the whole to the cestui que trusts, unless the trustee can point out his own. The defendant has said in his answer that he has confounded the estates; for he took it as his own. The statement of the defendant must be false; for this estate was as large as his own, and consisted of equally valuable and excellent lands; and yet he tells the Court, that though he has made a large fortune with his half, yet this estate has made nothing. In Lupton v. White, 15 Ves. 402, the defendant was held to lose his property by mixing it with another's, though he was not to blame himself, but his under lessee. That was a case of mines. So in Chedworth v. Edwards, 8 Ves. 45, the same principle as to confounding funds is laid down. Hart v. Ten Eyck, 2 Johns. Cha. Rep. 93. Upon whom should fall the burthen of separating this fund? Was it the fault of the infants? Whoever was in fault should take the burthen—such is the law—and if the rule be a hard one, it is the fault of the defendant for bringing himself within its application. Can the de-

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fendant not show what property *he has purchased with his own fund? If not, how can the complainant shew it? The cases are collected in 2 Madd. 115. In all such cases the cestui que trust is entitled to compound interest. Schieffelin v. Stewart, 1 Johns. Cha. Rep. 624. Stoughton v. Lynch, 2 Johns. Cha. Rep. 209. Evertson v. Tappen, 5 Johns. Cha. Rep. 497, says the rule is made for cases where profits are made, and the trustee will not disclose; which is the present case. Brown v. Rickets, 4 Johns. Cha. Rep. 303. 4 Dow. Rep. The executor in England has some rights of his own as to the residue, but the provisions of our act, which constitutes him a trustee, entirely put it upon the footing of the executor in the case of Raphael v. Boehm, 11 Ves. 91. 13 Ves. 408. Interest with annual balances is to be the same as compound interest. But in Raphael v. Boehm it was granted with semi-annual rests.

As to the main question, he laid down these positions.

First. If there be a devise to children without a future period fixed, only those in esse at the death of the testator can take, however clear the intention of the testator may be to extend it to all the children; except where there are no children at the death of the testator.

Secondly. That if it was not a fixed rule, yet none but those at the death of the testator could take, unless it was impossible to put any other construction upon the words than by letting all in.

Thirdly. That this was simply the giving to children without fixing any period of distribution.

As to the first position, he was not aware that it was contested: but he would refer to that class of cases, Ellison v. Airey, and Devisme v. Mello. In Gilbert v. Bodman, a devise to one child by name, and to all the children hereafter to be born, being payable at twenty-one, none could take born after that period. The intention to provide for future children will not postpone the period for vesting. Whitbread v. St. John, 10 Ves.

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*52, was to the children born or hereafter to be born, as many as might be at twenty-one, yet none but those born at the oldest becoming twenty-one could take. In Ayton v. Ayton, 1 Cox, 326, the devise was to tenant for life, and to all the children of that marriage, which was plainly the intention, yet the Court would not postpone the rights after the death of the tenant for life, and before an actual distribution. In Hoste v. Pratt, the devise was to trustees, which is material, and "to all and every the children," yet it did not comprehend those born after the period of distribution. In Pulsford v. Hunter, 3 Bro. C. C. 401, the estate was to the daughter for life and "to all the chil-

dren begotten, or to be begotten," and money legacies at twenty-one, yet none of those born after the eldest became twenty-one could take. Barrington v. Tristram, the devise was to "all and every the child or children," which was not held to comprehend all the children. There were but two cases at all equivocal, Madison v. Andrew and Norris v. Mill. Godfrey v. Davis, 6 Ves. 43, was cited on the other side, but it seems to sum up the whole case in our favour. As soon as it vests, the parties who take must be in esse. Cook v. Cook, 2 Vern. 545, had nothing to do with this case, except the dictum of the Chancellor expressly in our favour, that a subsequent child could not take. Defflis v. Goldschmith has been a good deal relied on. The children were let in there; but not on the principles contended for here. The principle expressed by the Master of the Rolls is in our favour; for he said, the reasons there did not apply in cases of distribution. In Leake v. Robinson, the legacies were payable at twenty-five, and all born before that period were let in of course. In Northey v. Strange, 1 P. Wms. 340, it is said none but those born at the making of the will were let in by the old rule. In Hughes v. Hughes, 1 Bro. C. C. 386, the period of distribution

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was when the young*est attained twenty-one; the others, being born after the death of the testator and before the then youngest attained twenty-one, were let in.

As to the second position. In Heathe v. Heathe, a life estate was given first to the wife, and after her death to all and every the children of that marriage, and yet none were suffered to come in after the death of the tenant for life. In Baldwin v. Karver, Lord Mansfield says the rule is correctly laid down in Ellison v. Airey, and that the period was when the estate passed from one channel to another. It was some time before the rule was extended to let in any child after making the will, though born even before the death of the testator. The reason for confining it to the death of the testator is, that to extend it to the period of the father's death would render the property valueless. In Horsly v. Chaloner, it is said, if the testator had been asked, if he intended all to come in, he would have said yes; but if asked whether he intended to postpone it till some were fifty, he would have said no. As to the policy of the rule, Lord Thurlow expressed a doubt, whether it should not be put upon the footing of marriage settlements: but would the Court shut up the property without its making profits, or let each legatee come in as they may arrive at twenty-one? To do the former would be in violation of all the cases, and would defeat the intention in favour of the elder children for others which may never be born. The older children may live and die in poverty, and in debt, for the purpose of accumulating an estate for them. Being entitled to the rents and profits is a vesting of the estate not only on interest but in possession. And the vesting in possession is merely the period of distribution. And suppose in the second place, that each child may be suffered to come in and get their share of the rents and profits as they become twenty-one, how are such of the children to be con-

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trolled? The estate vests in no trus*tee, and would the Court say they could not enter and occupy? Could their rights of occupancy and use be restrained in any way? Because the executor is their father, are they to remain under his tutelage all their lives? As executor he has nothing to do with the lands. In character of guardian to his minor children he might manage their estate as such, but now they are twenty-one, is he still to hold it as their trustee? There is no mode prescribed how they are to receive the rents and profits. Will the Court now appoint a trustee for the complainant against his will? He has the right to manage for himself, and having that right the Court can appoint no agent for him without his consent. The profits must accumulate, or the complainant be entitled to receive his share. Both are utterly impracticable. Can the Court prevent a partition? The children are absolute owners. That is admitted: and the only question made is that the others can come in. It has never been suggested that part owners can not make partition and hold their lands in severalty. Can the Court prevent it? Can the Court prevent John Myers from selling his interest? Lord Thurlow decided, that even in the case of a vested legacy, the Court will not order security in favor of the remainder-man. How will the Court apply that rule to this case? The whole estate might be destroyed before the objects of the testator's bounty were let in by this implied trust for life in the executor. Where legacies are given payable at a future time, no rents and profits follow: but here the will gives immediately, and the executor is expressly excluded. At the period of distribution, when it is fixed, the legacy must vest. If no period is fixed by the will, it must vest upon the death of the testator. Suppose partition were now made, three of the children being twenty-one, and hereafter others are born, are they to sue those who have taken in distribution, and have an unravelling of all

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the old accounts? *Would not the Court order bonds to account afterwards on such contingency? If so, would not the whole property be tied up subject daily to such new distributions and fresh arrangements and settlements? But Lord Elden says the rule is one of necessity, and must be confined to the testator's death unless a future period is fixed. Rules, which seem at first

to be harsh, when examined, often result in a conviction of their propriety and justness. Necessity requires it to be so, and this rule is one of that sort. No evil after all is likely ever to result, for it is often the case that the life estate is given to the father, unless as in this case the father is opulent, and then the father may by will conveniently make an equality among his children by a proper distribution of his own property. To extend it to all the children in this case would be imposing a hardship; for there could be little doubt the father would give the whole of his own estate to the rest of his children, which will be giving them two-thirds more than the three elder will get. As to marriage settlements it must be for future children, as there are none others contemplated by such instruments. They are always prospective. In Horsly v. Chaloner, 2 Ves. 81, because the gift was immediate, those in esse at the testator's death only were suffered to come in. Coleman v. Seymour, 2 Ves. 269, was the case of a power of appointment, to be made of course during the life of the person having the power; yet it was held that none could take but those in esse at the death of the testator. Hodges v. Isaac, Freemantle v. Freemantle, 1 Cox's Ca. 248. Ordering interest to be paid vests a legacy. Norris v. Mills, 5 Ves. 336, is thought to be incorrectly decided. Lord Rosslyn was not a Chancellor of great discernment. Shepperd v. Ingram, Amb. 448, was a case where there were no children in esse, and therefore those born after the death of the testator must

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ex necessitate come in. It is *said the gift is direct, but that the words "it shall be divided in the manner following" meant a state of things which has not happened, and that the testator did not intend a disposition, unless those circumstances occurred. But the fact was that the testator looked to the pregnancy of his daughter in law, and to the possibility of her having twins. The first clause certainly only looked to the result of the next birth making two grandsons and one granddaughter. In the next clause the whole provision could have been complied with by the next birth. It was possible that the wife of the defendant might have had two daughters. Then there would have been one son and three granddaughters.

As to the argument, from the gift to Mrs. Dutilly, and the circumstance that the estate is left to the care of David Myers, in the end, for his children, it is frivolous indeed if urged to prevent the vesting of the estate which was an immediate gift to the children. As to Mrs. Dutilly's legacy, the gentlemen have not been so good even as to shew how that circumstance was to fix the period. If they meant at her death, it might be after David Myers's death. But in Singleton v. Singleton there were annuities given which were to return to the estate, and yet the Court did not suspend the vesting of the legacies on that account, but ordered a division, also, of this interest in reversion or expectancy. So in Hill v. Chapman, which was a similar case of annuities. In Middleton v. Messenger, annuities were given to continue after the death of the tenant for life, yet that estate was divided among all who were in esse before the annuities fell in, at the death of the tenant for life. If educating the children would suspend it till twenty-one, then it would suspend the distribution till the youngest, at the death of the testator, is educated, and then any born before that period might come in, and so any born before he is educated may come in, and so all may be comprehended, which would

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be suspending *it to David Myers's death: then, after his death, should he have a child not yet educated. The testator left the estate to David Myers's management, and so he has managed it. But does that mean for ever, or only until the children could manage it for themselves? He was their natural guardian. The testator probably thought the division would not take place till the children grew up; but that was very different from giving directions about it, and will not vary the nature of the estate given to the children.

As to the argument upon the limitation over, after a total failure of issue of David Myers, if it shews that all the issue take as tenants in common, it would shew that David Myers also took. In Norris v. Mills the issue was to stand in the place of the parent, from which Lord Rosslyn concluded that the death of the parent was the period for the legacy to go over. Here the limitation is too remote. It could not go over at David Myers's death, but upon the total failure of his issue, no matter how remote. The same kind of limitation was in Singleton v. Singleton, and in Barrington v. Tristram, which was held not enough to suspend the vesting. The Court cannot divest the right of the complainant, and tie it up till a future period. It would be, in fact, taking away the property given by a proper legal title, and making other dispositions of it.

Thompson, Chancellor, who heard the cause, decreed that all the children of David Myers, born before the oldest child John Myers came of age, should be admitted. Ordered the shares of John and William Myers to be paid over to them, they having arrived at the age of twenty-one. The defendant was not allowed for the maintenance of the children, but was allowed for the expenses of education. On this subject the Chancellor said: "This is a subject altogether within the dis-

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cretion *of the Court, which will be governed by circumstances; as if the father is in low and indigent circumstances, and the children

are wealthy, there the Court will allow for maintenance, but where the parent is in circumstances to allow it, the first law of nature makes it his duty to do so. The Court is of opinion that the circumstances of the defendant were amply sufficient for that purpose, and therefore will not allow him any compensation for maintenance. But with respect to the expenses for their education, the case is different. The testator having provided that the expenses of their education should come out of the profits of his estate, created a charge thereon, and the defendant must be allowed a discount out of the rents and hire, pro tanto." The defendant was also allowed for all the necessary and permanent improvements and repairs made upon the estates, and for the support and taxes of the younger negroes until they became fourteen years of age. The charge for his personal services as a steward over the estates, was rejected. The Chancellor, also, refused to allow compound interest, or an account with annual rests against the executor, but ordered the accounts to be taken for the rents and hire, with usual rate of interest, without the defendant's accounting for the profits in any other way. It was also decreed that the testator died intestate as to the lot in Columbia, which of course descended to David Myers. The defendant was also allowed for all advancements made to John and William Myers, and to Mrs. Clendenin. The costs to be paid out of the profits of the estate.

From this decree John Myers, William Myers, and Clendenin and wife (the children born before the death of the testator) appealed. The grounds made were the same as those taken before the Chancellor, and the case was again argued at length.

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*Preston, Harper, M'Cord, and Chappell, for the appellants.

Gregg, O'Neall, and Thompson, for the appellees.

Curia, per NOTT, J. At the death of Jacob Myers, the testator, David Myers, had three children, two sons, and a daughter, now Mrs. Clendenin. He had several born afterwards. The question submitted to our consideration is, whether the children in esse at the time of the death of the testator are exclusively entitled to the property, or whether the after born children are entitled to participate with them.

I concur in opinion with the Chancellor, that in the construction of wills the intention must govern, and that the intention must be collected from all parts of the will taken together, and not from particular parts or expressions. And I am willing, in this case, to adopt the other part of the proposition, that we must judge of the intention from the will itself, without regard to extraneous circumstances; though I am inclined to think that there may be cases where we may look beyond the will for the meaning of the testator.

I also agree with the Chancellor, that "the general rule upon this subject is, that where there is an indefinite period for distribution, the legacy vests at the death of the testator, and that none can take except those in esse at that time.[1] But where there is a fixed period when the distribution is to take place, as when the legatee shall arrive at the age of twenty-one, then all the children born before that time will come in for a distributive share, and such as are subsequently born will be excluded." But although I concur in the rule as thus laid down, and think that it con-

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tains the true principle *upon which this case must be decided, I do not think that it is well illustrated by the case put by the Chancellor.

A, says the Chancellor, gives his estate to B and C, the children of D, to be divided between them when they arrive at the age of twenty-one years. A dies, and D has six other children born before B and C arrive at that age. A and B (I presume it was intended to say B and C) do not take the whole estate at the death of the testator; but the other six children of D, born before the distribution is to take effect, will come in, and are entitled to a distributive share.

Now, with the utmost deference for the opinion of the Chancellor, I should presume that B and C would take a vested legacy, although the time of payment was postponed until they arrived at the age of twenty-one, and that the after born children would not be entitled to participate with them in the distribution. Where a legacy is given to children generally, without the specification of any in particular, all who are in esse at the time of distribution may come in; but where it is given to two or more individuals by name, the postponement of the time of payment or of distribution, I should presume, would not affect their rights. After-born children, therefore, could have no claim on a legacy thus given, though born before the time of distribution. I am constrained, therefore, to withhold my assent from the case put by the Chancellor, although I concur in the general principle which it seems intended to establish.

I also further agree, "that where legacies are given to a class of individuals, payable at a future period, as to the children of B when the youngest shall attain twenty-one, or to be divided among them at the death of C, any child who can entitle himself under the description at the time of distributing the fund, may claim a part of it, as well the chil-

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dren living at the period of distribu*tion, though not born till after the testator's death, as those born before, and living at the hap-

[1] See Taveau v. Executors of Ball, 1 M'Cord's Eq. Rep. 7.

pening of the event." But then the period of distribution must be fixed, or it must depend upon some contingency, and not be left indefinite. For when the period of distribution is indefinite, those living at the death of the testator alone can take, according to the rule first laid down by the Chancellor. And that distinction will be found to run through all the cases. And in every case relied on by the Chancellor it will be seen, that a time of distribution is expressly fixed by the testator, or some contingency, upon which the property is to go over, is expressly mentioned in the will, except the case of Hughton v. Price, said to be decided by Lord Redesdale, but as it does not appear from the decree where that case is to be found,[2] nor the principle decided, I am unable to determine how far it is applicable to the case now under consideration. In the case of Ellison v. Airey the property was given over to the younger children of F. E. upon the death of C. P. before twenty-one, or marriage; it was held that all who came within the description at the time the contingency happened, should take. 1 Ves. Sen. 111. In the case of Bartlett v. Hollister, 1 Bro. C. C. 530, the property was given to the testator's daughter H. for life, with a remainder over to the children of his sister upon the contingency of H.'s dying without issue. She did die without issue, and it was held that all the children of the sister, born before the termination of the life estate, should take. So in the case of Congreve v. Congreve, 1 Bro. C. C. 530, where property was given to all the children of A. at their respective ages of twenty-one, it was held that all were entitled who were born before that time, though after the death of the testator. So where property is

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given *to a parent, or to any other person for life, with a limitation over, as in Wild's case, 6 Coke, 17, and the case of Stanley v. Baker, Moore's Rep. 220, it vests in all the children in esse at the termination of the life estate, or the happening of the contingency, because that is the time they are to take, and not before. The same observations apply to the cases of the Attorney General v. Crispin, 1 Bro. C. C. 386, and Congreve v. Congreve, 1 Bro. C. C. 530. For in both of those cases there is a fixed period when the legacies shall vest. The case under consideration, therefore, does not come within the principle of any of the cases relied on, because there is no time fixed for the distribution of the property, nor does it depend on any future contingency. The words of the will are, "I give and bequeath unto my dear and beloved grandchildren," without any qualification or limitation of time or circumstances. The legacy to his son David Myers is in the same words, and it will not be pretended that that did not vest at the death of the testator. The testator appoints his son David Myers "guardian of this valuable property," and unless he had considered it the property of his grandchildren it would have been unnecessary to appoint a guardian to manage it for them. But he even goes farther, and "requests him to have them well educated out of the profits arising from this estate now bequeathed unto them." It would seem, therefore, that from the very words of the will, the grandchildren took an immediate and vested interest; for the possession of the guardian was the possession of his wards. And whatever latitude we may indulge in looking for the meaning or intention of a testator where it is not expressed, we are not authorized to presume an intention contrary to his express declarations.

It is admitted that there is no time fixed for the distribution to take place. But two circumstances are relied on, one to show that the testator had some future period in contemplation, and the other to show when that

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pe*riod was. The first relates to the negro girl given to Mrs. Dutilly during her life, and at her decease to go over with her increase if she had any, in the same manner as the other property. It is said that "it is obvious a considerable time must elapse before a negro girl of ten years old could have increase." But the limitation over of the negro girl did not depend upon her having increase. She would have gone over at the death of Mrs. Dutilly if it had happened the day after the death of the testator. It is a circumstance which goes rather to show that the other property had already vested, because at her decease it is to "go in division with the other negroes as part of the bequest made unto his dear and beloved grandchildren." The property given to Mrs. Dutilly could not be distributed until her death, but that cannot affect the property given to the children. The bequests are not at all dependent on each other. The life estate of Mrs. Dutilly might terminate before either of the other legatees arrived at the age of twenty-one, or it might not happen for many years after. But let us suppose that the circumstances relied on by the Chancellor go to show that the distribution was to take place at some future period, yet as the period is indefinite, the result will be the same, according to the first rule laid by the Chancellor himself. The circumstance relied on to fix the period of distribution at twenty-one, is that sixteen years of age is the period at which a young man must enter college, and that it requires two years after the termination of his college life to acquire a profession. Now there is no law requiring a young man to enter college at sixteen, nor prohibiting him from entering at an earlier period. Neither is there any requiring him to finish his professional studies at twenty-one, nor even requiring him to study a profession at all. Both of

[2] See Hoghton v. Whitgreave, 1 Jac. & Walk. 146, which is probably the case referred to.

those periods therefore are equally arbitrary and conjectural. I cannot authorize any such

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conclusion. If the *Court may gratuitously adopt such a rule, the time of distribution can never be indefinite, because then if the testator fails to fix a period, the Court may. I am of opinion therefore that according to the legal construction of the will, the children in esse at the testator's death are exclusively entitled to the property in question. And I think that all the authorities concur in that construction. Mr. Maddock lays down the rule, that "where a legacy is given to take effect at an indefinite period it will be considered as vested at the death of the testator." And he adds, "the Court will not conjecture against the general rule." 2 Madd. Cha. 18.

In the case of Ellison v. Airey, 1 Ves. Sen. 111, Lord Hardwicke says, "the Court generally take it that there ought to be a legatee in being, and therefore will not construe a will to extend to persons not in being, unless the testator shows his intention to be such from his will." In the case of Heathe v. Heathe, 2 Atk. 121, the testator gave a legacy among all the children of his sister Catharine Heathe, share and share alike. Lord Hardwicke held that it went to the children then in esse, and excluded an after-born daughter. That is a much stronger case than the one now under consideration, because the legacy was given to all the children of the testator's sister. In the case of Horsly v. Chaloner, 2 Ves. Sen. 84, the testator gave a legacy to the younger child of his son William, or if more than one, then to such younger children, &c. to be paid at their respective ages of twenty-one. The Master of the Rolls said, "the not keeping demands of this sort open, had very properly induced the Court to confine it to such children as were in being at the death of the testator, when the number is known and the portions they are entitled to and the time when they are to recover it." He held therefore, that it vested in those who were living at the testator's death, although the time of distribu-

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tion was *postponed until their respective ages of twenty-one. In the case of Hutchin v. Mannington, 1 Ves. Jun. 366, an estate devised to be sold with all possible diligence or in a reasonable time, was considered as sold from the testator's death, and that the legacy vested at that time. Lord Thurlow said there seemed to be some faint indications of an intention when the legacy should go over, and that it should not vest in the mean time, but that it was too uncertain to act upon. He agreed that the intention must prevail if it could be found out, but that he must have some rule to go by. In the case of Stapleton v. Palmer et al. the rule is again recognised "that a residue to be divided at an indefinite time vests at the death of the testator," 4 Bro. C. C. 490; and so also when no time is mentioned. Hutchinson v. Manningham, in note. An exception to the rule is where there are no children in being at the time of the testator's death. There it necessarily embraces after-born children, because there are none others to take. But even in those cases, those only can take who are born before the time of distribution, even though the will expressly mentions those hereafter to be born. Whitbread v. Lord St. John, 10 Ves. 152. Gilbert v. Boorman, 11 Ves. 238.

The case of Singleton v. Gilbert, 1 Cox's Ca. 68, is so exactly like this, that it is difficult to discover a distinguishing feature between them. The testatrix gave the premises to all and every the child and children of her brother T. G., and to the heirs of their bodies. T. G. had two children at the time of the death of the testatrix, and one born afterwards. The Lord Chancellor said "this was an estate given directly, and therefore he could not consider the afterborn child as entitled." It is indeed a stronger case than the one now under consideration, because the devises were subject to an annuity, and the an-

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nuitant was still living when the *youngest child was born. See also Crane v. Odel, 1 Ball & Beat. Rep. 459; Freemantle v. Freemantle, 1 Cox's Ca. 248; and Viner v. Francis, 1 Ball & Beat. Rep. 190. In the case of Ringrove v. Braham, 2 Cox's Ca. 384, the testator had given to the children of A. B. fifty pounds to every child he hath by his wife to be paid them as they shall come of age. There were eleven children at the date of the will, thirteen at the testator's death, and three born afterwards. The thirteen children living at the testator's death were held entitled to the legacies, but not those afterwards born. And in the case of Burke and wife v. Wilder, 1 McCord's Eq. Rep. 551, where the father had given the residue of his estate to his children born or to be born, this Court held that he died intestate as to an afterborn child. After such a host of authorities and many more which might be adduced, all tending the same way, it would seem impossible that a doubt should remain on the subject if we are to be governed by authority. And although the rule may operate unequally in some cases, it is one founded in experience, and, in all probability, as a general rule, is the best than can be adopted. It furnishes certain land marks to direct our course, and prevents that litigation which would necessarily arise in every case without some fixed and determinate rule. It is also conformable with the well settled rule of law, that where a parent directs his property to be equally divided among his own children, a posthumous child not particularly provided for cannot take. In the case of Viner v. Francis, 2 Cox's Ca. 191, the Master of the Rolls puts the very case. "Where a testator gives a fund to be divided among

his own children, he shall be supposed to mean such children as are living at the time of his death." If so, why shall not the same principle apply in other cases? We have indeed an act of our legislature now which provides for a posthumous child. But until

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the passage of that *act the property vested in those only who were born at the death of the testator. The gift being made per verba in præsenti could only vest in those who were then in esse, and not in those who might never exist.

That part of the Chancellor's decree, therefore, which directs the land to be equally divided among all the sons of David Myers, and the slaves among all the children, must be reversed. The lands must be equally divided between the two sons, John Myers and William Myers, and the slaves and other personal property must be equally divided between the three legatees, John and William Myers, and Mrs. Clendenin.

With regard to the lot in Columbia, I concur in opinion with the Chancellor: for although the testator uses the words "all my landed estate," the subsequent specifications clearly restrict their operation to the particular lands therein described. And although the bequest of one shilling to David Myers is expressed to be as "full compensation and as his full share of all (testator's) estate, both real and personal," yet as this lot is not otherwise devised, it must descend to his son as his only heir at law. And this construction is aided by the residuary clause which relates to the personal estate only. The decree of the Chancellor in this respect is therefore affirmed.

The next point noticed in the Chancellor's decree relates to the allowance claimed for the maintenance and education of the children. On that point the Court concur with the Chancellor, and the decree in that respect is also affirmed.

The next question is, whether the defendant is entitled to improvements made on the land. On that point also I concur in opinion with the Chancellor. I think the defendant is entitled to remuneration for all such improvements as were necessary to preserve the property or to render it permanently more

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beneficial or valuable *to the cestui que trust. But he is not entitled to remuneration for money uselessly expended in ideal or unsuccessful experiments, nor for any improvements beyond the actual amount of money expended, or the value of the labour employed.

Another question however of no little importance is, whether the property accumulated by David Myers shall be considered as belonging to the trust estate, or whether he shall be liable for the rents and profits of the land and the hire or labour of the slaves.

There can be no doubt but that David Myers, having been appointed the guardian of his children, and having the management of their estate, must be considered as a trustee. And there is no rule of Equity better settled, than that a trustee shall not be permitted to employ the trust fund for his own benefit. All purchases therefore made with the funds of the trust estate will be considered for the benefit of the cestui que trust. That principle is exemplified in numerous cases where it has been held that executors, attorneys, and trustees, shall not purchase at their own sales, nor of their cestui que trusts, clients, &c. All persons acting in such representative capacities are considered in Equity as trustees, and are governed by the same rules; and it is no answer on the part of the defendant, that he has so mixed up the two funds together that he cannot distinguish one from the other. A person may sometimes by mixing the estate of another with his own subject himself to the loss of both; for it is his own fault that they have not been kept separate. But it does not appear to me, that this is a case which will subject the defendant to the loss of all the property he has in possession, merely because he cannot show what part of it has been purchased with the proceeds of the trust estate. His refusing to account, however, furnishes a very good reason why the Court should adopt the most rigid rule of calculation

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which the law affords *in behalf of the cestui que trusts as a substitute for such omission. Compound interest has sometimes been allowed on that ground, and directed to be calculated on short rests. State of Connecticut v. Jackson, 2 Johns. Cha. Rep. 14, 16. Schieffelin v. Stewart et al. 2 Johns. Cha. Rep. 620. Raphael v. Boehm, 11 Ves. 92. 13 Ves. 407, 590.

In this case if the property which has been acquired by the proceeds of the trust estate cannot be ascertained, perhaps the method adopted by the Chancellor is the best, and probably the only method which can be resorted to to effect the object. I cannot however concur in the opinion expressed by the Chancellor, that compound interest ought not in any case, nor under any circumstances to be allowed. There are many instances where compound interest has been allowed, as will appear by the cases already referred to, and without which the greatest injustice would be done. That question was settled in this state as early as the year 1796, in the case of Bowles et al. v. Drayton, 1 Desaus. Rep. 489, [1 Am. Dec. 689], a case very similar in principle to the one now under consideration. The testator gave three thousand pounds to his daughter, to be paid on her marriage or when she should attain the age of twenty-one, and that the lawful interest of the said sum should be annually paid and applied for her use, behoof, maintenance and education. The interest being more than was necessary

for those purposes, a balance remained for several years in the hands of the executors. The question was whether they should pay interest on the annual balances of interest so remaining unappropriated. Chancellor Rutledge who delivered the opinion of the Court said, "that it was a matter resting in the discretion of the Court, and that the interest would be allowed, or not, according to circumstances. And the decree was, that "the Master should make a statement of the ac-

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*count, allowing interest on the yearly balance of interest, &c." The only difference between the two cases is, that in one, the annual interest on the legacy is directed to be appropriated to the use of the cestui que trust, or legatee, and in the other, the annual income of the estate is appropriated to the same use. And in every case since, where the Court has had occasion to lay down any general rule on the subject, the same principle has been recognized, and particularly in the case of Wright v. Wright, decided at our last sitting in this place, ante, page 185. For although compound interest was not allowed in that case, the principle laid down was distinctly noticed and recognised. In this case the defendant has received the rents and profits of the lands, and the profits arising from the labour of the negroes. These constituted an annual fund in his hands for the benefit of the cestui que trusts, and it is incumbent on him to shew that he has employed it for that purpose, or he must pay interest upon it. He will be allowed a deduction for improvements, the education of the children, and the maintenance, taxes, &c. of the young negroes. But I do not think that the allowance for the support of the young negroes ought to be carried up to the age of fourteen. A slave, I think, must certainly be able to maintain himself by his labour before he arrives at that age. That, however, will be a matter of reference to the Commissioner to ascertain. After making an allowance for the just claims of the defendant, according to the principles above laid down, to be deducted annually as they arose, the defendant must pay interest on the balance remaining in his hands. In taking an account, however, of the income of the estate, a distinction must be made between the rents and profits of the land, and the labour of the negroes. The two sons are exclusively entitled to the rents and profits

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of the land; and the *hire of the negroes must be divided among the three claimants.

With regard to the property given to Mrs. Clendenin, soon after her marriage, whether it was intended as an advancement of his daughter in marriage, or a payment of the legacy, is a question which has not been tried. The Court, therefore, can express no opinion upon it. That part of the case must be referred back to the Court of Equity for a hearing.

It is therefore ordered, decreed, and adjudged, that the land in question be divided equally between John Myers and William Myers; and that the negroes, together with the increase of the females, be equally divided and distributed between the said John Myers, William Myers, and Mrs. Clendenin. It is also further ordered, that it be referred to the Commissioner to inquire, whether there is any, and what property in the hands of David Myers, the defendant, which has been purchased with the funds of the trust estate, and to take an account of the rents and profits of the said land, and the hire and labour of the negroes and that after making all proper deductions for the improvements on the land, the education of the children, and the expenses of raising and maintaining the young negroes, according to the principles herein before laid down, and all other necessary expenses and disbursements incurred for the benefit of the devisees and legatees, the amount due for the rents and profits of the land, with the interest on the annual balance thereof, be paid over in the manner directed for the division of the land, and that the balance due for the labour of the negroes, to be calculated in the same manner, be paid over, and distributed in the manner as directed with regard to the negroes.

And with regard to the property received by Mr. Clendenin, that the case be referred back to the Court of Equity to hear and de-

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termine, whether the same was *given to him in advancement of his wife in marriage, or in payment of the legacy due her under the will of her grandfather. And that the decree be reformed so as to correspond in all respects with the principles herein before laid down, and that the costs be reserved until a final hearing of the cause.

Decree modified.

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2 McCord, Eq. 269

SARAH C. HALL v. WILLIAM HALL and Others.

(Columbia. Jan. and May Terms, 1827.)

[*Frauds, Statute of* ⇐56.]

The Courts now adhere more strictly to the statute of frauds than formerly.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83–89, 136–138; Dec. Dig. ⇐56.]

[*Frauds, Statute of* ⇐129.]

Parol evidence is inadmissible to set up a parol agreement between husband and wife, to compensate the wife for consenting to renounce her dower.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 289; Dec. Dig. ⇐129.]

[*Wills* ⟸486.]

In what cases parol evidence is admissible as to wills.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1016–1022; Dec. Dig. ⟸486.]

[*Wills* ⟸487.]

No case where the Court has admitted parol evidence to add or strike out a clause in a will on such evidence of declarations of intention after the execution of the will, and the lapse of any time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026–1032; Dec. Dig. ⟸487.]

[*Wills* ⟸488.]

Admitted in cases of latent ambiguity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1024, 1025, 1033–1036; Dec. Dig. ⟸488.]

[*Wills* ⟸488.]

And to prove what property was intended, there being two parcels of the same description.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1024, 1025, 1033–1036; Dec. Dig. ⟸488.]

But these cases are treading on dangerous ground.

The case is within the statute of frauds.

[*Frauds, Statute of* ⟸129.]

The renunciation of dower is not such part performance as will admit parol evidence to enforce a specific performance.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 289; Dec. Dig. ⟸129.]

[*Frauds, Statute of* ⟸129.]

Part performance, it seems, will sometimes take a case out of the statute of frauds, where a specific performance is sought. But it must be where the contract is between man and man acting at arm's length.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292, 303, 306–308, 311, 314, 318–320, 322, 325, 326; Dec. Dig. ⟸129.]

[*Wills* ⟸487.]

The fact that the wife has renounced her dower raises no presumption that she is to be compensated, in order to let in parol evidence of an agreement to compensate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026–1032; Dec. Dig. ⟸487.]

[*Specific Performance* ⟸120.]

The court is particularly reluctant to let in parol evidence after the death of one of the parties, where a specific performance is asked.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 384–386; Dec. Dig. ⟸120.]

[*Wills* ⟸486.]

Parol evidence not admissible to shew that the testator did not intend a devisee to lose by a sale of the land devised by the testator before his death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1016–1022; Dec. Dig. ⟸486.]

[*Executors and Administrators* ⟸306.]

Where the testator gives his wife an annuity until his estate is settled, and his debts and legacies are paid, it is not a ground for nonpayment that it would be a devastavit in the executor, if the estate should prove insolvent, there being no probability of an insolvency.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1248–1250; Dec. Dig. ⟸306.]

[*Wills* ⟸790.]

A widow cannot be compelled to elect before the estate is settled, and if the will allows her an annuity until the estate is settled, it is no objection to the payment of the annuity, that she has not elected.

[Ed. Note.—Cited in Williams v. Newton, 82 S. C. 229, 64 S. E. 219.

For other cases, see Wills, Cent. Dig. §§ 2043–2048; Dec. Dig. ⟸790.]

[*Wills* ⟸796.]

In some cases the widow has been allowed to retract from an election prematurely made, the condition of the estate not being known.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2064–2068, 2070; Dec. Dig. ⟸796.]

[*Annuities* ⟸5.]

Where an annuity is given without particular instructions, it is payable at the end of the year.

[Ed. Note.—For other cases, see Annuities, Cent. Dig. § 9; Dec. Dig. ⟸5.]

[*Wills* ⟸729.]

Annuity left to the wife, payable "annually, or in any way she may wish," ordered to be paid quarterly in advance.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1782; Dec. Dig. ⟸729.]

[*Wills* ⟸784.]

The testator left his widow a "provision in lieu and bar of all claim of dower, inheritance, or any other claim on her part." *Held* that the widow was not excluded from a distributive share of real property purchased by the testator after making his will, and as to which he died intestate.

[Ed. Note.—Cited in Blackman v. Gordon, 2 Rich. Eq. 45, 44 Am. Dec. 241; Seabrook v. Seabrook, 19 Rich. Eq. 510, 511, 512.

For other cases, see Wills, Cent. Dig. § 2010; Dec. Dig. ⟸784.]

[*Partnership* ⟸185.]

The testator's private debts are first to be paid out of his private estate, and his copartnership debts out of his copartnership funds.

[Ed. Note.—Cited in Kuhne v. Law, 14 Rich. 24.

For other cases, see Partnership, Cent. Dig. §§ 337, 338, 346; Dec. Dig. ⟸185.]

[*Executors and Administrators* ⟸272.]

The personal estate is first liable to pay debts of a deceased person.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052–1057, 1059, 1065, 1068; Dec. Dig. ⟸272.]

[*Executors and Administrators* ⟸271.]

The statute abolishing the laws of primogeniture does not alter the law in that respect, which is the English rule.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1044–1051; Dec. Dig. ⟸271.]

[*Executors and Administrators* ⟸271.]

Descended real estate is not first liable.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1044–1051; Dec. Dig. ⟸271.]

[*Executors and Administrators* ⟸271.]

The English rule:—1. Personal estate not bequeathed. 2. Personal not specifically bequeathed. 3. Lands devised to be sold to pay debts. 4. Descended real estate. 5. Lands devised subject to payment of debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1044–1051; Dec. Dig. ⟸271.]

[*Wills* ⟸832.]

Where the testator devised his estate real and personal to be divided among his next of kin "as soon as his debts and legacies are paid"

and "not until then," it charges the estate with payment of the debts and legacies: and after acquired real estate, as to which the testator died intestate, is exonerated until the other is exhausted.

[Ed. Note.—Cited in Pell v. Ball's Ex'rs, Speers, Eq. 527; Pinckney v. Pinckney, 2 Rich. Eq. 244.

For other cases, see Wills, Cent. Dig. § 2152; Dec. Dig. ⇐832.]

[*Executors and Administrators* ⇐50.]

A debt due from the executor to the testator, is considered as cash in the hands of the executor. The Court will often order it to be paid into Court for the security of the parties interested.

[Ed. Note.—Cited in Gray v. Brown, 1 Rich. 364.

For other cases, see Executors and Administrators, Cent. Dig. § 302; Dec. Dig. ⇐50.]

The application of testator's private funds to his copartnership debt ordered to be corrected.

[*Wills* ⇐790.]

Widow not bound to elect before the estate is wound up, and may receive her annuity under the will in the mean time, the estate being solvent.

[Ed. Note.—Cited in Hull v. Hull, 3 Rich. Eq. 92; Williams v. Newton, 82 S. C. 229, 64 S. E. 219.

For other cases, see Wills, Cent. Dig. §§ 2043–2048; Dec. Dig. ⇐790.]

[*Executors and Administrators* ⇐272.]

Slaves specifically bequeathed, not liable for debts before descended real estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052–1057, 1059, 1065, 1068; Dec. Dig. ⇐272.]

[*Wills* ⇐778.]

There are two classes of cases of election: 1. Where there are inconsistent dispositions; and 2. Where a condition is annexed to the gift.

[Ed. Note.—Cited in Powers v. McEachern, 7 S. C. 300.

For other cases, see Wills, Cent. Dig. §§ 2004, 2006, 2010; Dec. Dig. ⇐778.]

[*Wills* ⇐457.]

The intention must prevail, unless technical words are used, which must receive their technical meaning.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 975; Dec. Dig. ⇐457.]

[*Executors and Administrators* ⇐260.]

The rule as to the payment of debts not so inflexible as not to be departed from on some occasions.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 934; Dec. Dig. ⇐260.]

[*Executors and Administrators* ⇐507.]

A report of the Commissioner is necessary before the Court will order the executor to pay into Court a debt he may owe the testator, there being a settlement of accounts to be made.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2004, 2005, 2178–2191; Dec. Dig. ⇐507.]

[This case is also cited in Seabrook v. Seabrook, 10 Rich. Eq. 514, without specific application, and in Anderson v. Rhodus, 12 Rich. Eq. 110, on the doctrine of election.]

This case arose under the last will and testament of the late Mr. Ainsley Hall of Columbia, South Carolina, duly executed on the 3d of May 1822, which he left in full force when he died in August 1823. By his will he directed,

1. That all his individual debts should be paid out of his individual estate and the proceeds of his plantations, and that the division of his estate thereinafter directed should not take place until all his debts and legacies should be paid.

2. He further directed that on his decease the copartnerships of Kirkpatrick, Halls & Co. of Charleston, and Halls, Kirkpatrick & Co. of Columbia, of which he was a member, should be dissolved (so far as he was concerned), and that his share of the profits of said concerns at the time of his death be considered as part of his estate, to be disposed of as directed by his will.

3. That all debts due by A. & W. Hall & Co., Halls, Kirkpatrick & Co., and Kirkpat-

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rick & Halls, *be paid out of the funds of said concerns before recourse be had to any other part of his estate.

4. He devised the house and lot in the town of Columbia, occupied as his dwelling house, with its appurtenances, furniture, &c., carriage and carriage horses, and six household servants (whom he names) to his wife Sarah C. Hall during her life; and that at her death the said property should be divided in the manner specified, and among the persons named in the sixth, seventh, eighth, and ninth clauses of his will.

5. He directed that his wife, Sarah C. Hall, should be paid annually, or in any way she might wish, $3,000 for her support until his estate should be divided as he directed by his will, and that such sum should not be considered as part of her third as thereinafter divided.

6. That as soon as his debts and legacies were paid, his estate real and personal should be divided into three equal parts, without being delayed by any provision made in his will for annuities.

7. He devised to his wife, Sarah C. Hall, one of the three parts during her life, with a power of disposing by deed or will over one-half part thereof, whether she should leave issue or not. And if she died without making any disposition, then he devised the same to her brother Jesse Goodwyn and his heirs. The other half she might dispose by will in case she should leave issue living at her death, &c. But in case of her leaving no issue, or such issue should die before attaining twenty-one years of age, the said last mentioned half of the said one third should be equally divided between his brother William Hall, George Cotchet, John Cotchet and Eliza May M'Cord, their heirs, &c.

8. and 9. He devised the other two-thirds of his estate amongst his brother William Hall, and nephews and niece, George Cotchet, John Cotchet and Eliza M. M'Cord in certain proportions.

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*The clauses from the tenth to the twenty-fifth inclusive, contained various legacies and annuities to several of his friends to the amount of about $10,000.

The twenty-sixth directed that in the division of his estate under his will, his wife should have allotted her as part of her third, the negroes and their increase which he got by her in marriage. He then proceeds to give directions respecting the management of his planting interest and estates, and to make regulations respecting Mr. Thomas, who was concerned with him therein.

By the twenty-seventh the testator desired "that the provision made by his will for his wife should be taken in lieu and bar of all claim of dower, inheritance, or any other claim on her part."

By the twenty-eighth he declared his wife Sarah C. Hall, his brother William Hall, George Cotchet, John Cotchet and Eliza M. M'Cord his residuary legatees, and devised to them absolutely any residue that might be.

By the twenty-ninth, he earnestly recommends to his legatees and executors that all matters of dispute arising between them should be referred to one or more gentlemen of the law, and that the opinion of the referee be conclusive.

The thirtieth nominated Sarah C. Hall executrix, and William Hall, George Cotchet, James Hopkins and John Hopkins, to be his executors.

After the execution of his last will and testament, the testator sold and conveyed his mansion house in Columbia and the furniture thereof to General Hampton, for the sum of $37,000. He then purchased a square in the same neighborhood, and contracted to build thereon another mansion house, which contracts were in part executed at the time of his death. These contracts amounted to about $22,000.

On the death of Mr. Hall, all the devisees and legatees in America were living, and

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William Hall and *George Cotchet proved the will and qualified thereon as executors, and took possession of the estate. Disputes having arisen among the devisees and legatees, this bill was filed, to have the judgment of the Court thereon and for the settlement of the estate.

The first question which was brought before the Chancellor was as to the right of the complainant, the widow, to produce parol evidence to prove, that she was induced to renounce her dower in the house and lot by the promise of her husband to purchase another lot, and build another house on it of equal value with the former and give it to her. That in pursuance of his promise he did purchase another lot, and contracted to build a handsome brick house thereon, and declared his intention to give her the same. But unfortunately he died before the house was finished, and without having executed any deed, instrument, will, or other writing for carrying into effect his intentions and promises in favour of his said wife. The object of the parol evidence was to establish these facts, and to obtain compensation or relief in such a way as might be judged proper, out of the estate of Mr. Hall. The defendants objected to the admission of the parol evidence, on the ground that it was contrary to the statute.

Gregg and Stark, for the evidence.

Harper, Preston, M'Cord and De Saussure, contra.

De Saussure, Chancellor. This question has been fully argued, and I have considered it attentively.

The mind of every Judge is anxiously disposed to get at the whole truth in every cause, so as to enable him to decide knowingly on the merits of the case. There is therefore always a reluctance to shut out

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evidence *which might, if admitted, disclose important facts applicable to the cause.

Experience has however demonstrated that there is great danger in the universal admission of testimony. Various rules have been established to guard against the admission of testimony which might mislead the Court. Hence the exclusion of all witnesses who are interested, on account of the bias on the mind of every human being in his own behalf. This rule is uniform in its application, and excludes every day witnesses of the purest integrity. Experience also demonstrated, that in many other cases it was proper to restrain the free admission of testimony even where the witness had no interest. Hence the statute of frauds was enacted, declaring that certain transactions in life should be in writing. It is unnecessary to state the provisions of that famous statute, which was considered so valuable at the time of its enactment, that Lord Nottingham, the great founder of the modern system of Equity, declared every line of it to be worth a subsidy; and posterity has confirmed the judgment.

Still, such is the reluctance of the mind to give up testimony which may lead to truth in particular cases, though known to be dangerous in general, that the Judges gradually relaxed in the application of the statute, until great experience again retaught the danger, and compelled them to admit that the wisdom of the law is greater than the wisdom of individuals, however enlightened. In consequence of this the Courts adhere more strictly to the statute in our time than they did some time since. This we perceive in the case of Cooth v. Jackson, 6 Ves. 12, and other cases in England, and in Givens v. Calder, 2 Desaus. Rep. 171 [2 Am. Dec. 686,] in this state. In the case we are now considering, the offer of parol evidence is to establish a right in the complainant to a provision out

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of the estate of Mr. *Hall, equivalent to the property devised to her by the will of Mr. A. Hall, and afterwards sold by him. In other words, it is to add a clause or a codicil to his will in her favour, which it is alleged he was bound to do, and was willing to do, but was prevented by death: or it is to set up a parol agreement to make compensation to the wife for consenting to renounce her dower in the land in question.

There are cases certainly in which the Court has, upon plain proof of mistake or fraud, struck out clauses in a will, and in others added clauses. The example of the former is, where a clause has been inserted by misapprehension in the testator; as where he makes a provision by will for persons for whom he had already provided in another way, but was induced to believe the same was a nullity, and on that ground alone gave the legacy, as in Webley v. Langstaff, 3 Desaus. Rep. 504. Yet even there it was thought to be so dangerous, that it was preferred to put the case on the ground of an election between the two provisions. The example of the latter is, where a testator is about to make provision for a particular person, and is dissuaded on account of his own illness, and assured by his heirs and devisees that they would make the intended provision. In such cases the Court compels the persons benefited by the will to make the provision promised, and attempted to be eluded, which in effect is adding a clause to the will on parol evidence. So in Lyde's case, a clause intended and directed to be made by the testator was decreed to be supplied. All these cases however were founded on the transactions which occurred at the time of making the will. I do not recollect a single instance, nor has any been quoted, in which the Court ever consented to add or strike out a clause in a will, on parol evidence of transactions or declarations of intention after the execution of the will, and the lapse of any time.

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In other cases parol evidence has been *admitted to explain latent ambiguities, as in the case of two persons bearing the same name. There, parol evidence has been received to explain which of them was intended by the testator as the legatee. And so parol evidence has been received, to prove what property was intended when the testator was possessed of two of the same description. All these cases are however treading on dangerous ground, which is constantly giving way under our feet, and sinking us into the quagmire of parol evidence contrary to the provisions of the statute.

It is a vain attempt to seek for universal justice in every particular case, even at the expense of those enactments which were made to attain a safe general rule. Lord Chancellor Talbot felt this danger so strongly, that he refused to allow a clause to be inserted in a will (for it cannot be disguised that that is the effect), though it was proved, by unquestionable parol evidence, that it was the decided intention of the testator to insert a clause giving a large legacy to a particular person, but was dissuaded by his counsel on the ground that it was unnecessary, as the legatee would get what he intended to give him in another way and character. In that case Lord Talbot was satisfied, that the mistake of the counsel had misled the testator contrary to his intentions, yet he thought it too dangerous to act on parol evidence. See Roberts on Wills, p. 3, and Cas. Temp. Talb. 240.

It is unnecessary to follow out the examination of the various cases on this subject. The case we are considering does not appear to me to fall within any of those in which parol evidence was received; and I do not feel at liberty to enlarge the boundary of parol evidence, especially where the parol evidence related to transactions long after the execution of the will. It was, however, contended for Mrs. Hall, that this was an agreement by which she consented to renounce her contingent dower in the house and lot devised to her, in consideration of

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*the promise made to her that a house and lot should be purchased and given to her; and that she, having performed her part of the contract, was entitled to have the benefit of it out of the estate of Mr. Hall, who was prevented from fulfilling it by death.

I will not stop to inquire into the capacity of the wife thus to contract with her husband for the renunciation of her legal rights, nor into the old custom of the country now disused, that the purchaser, in order to make his purchase secure, must give the wife a gown or a petticoat for her renunciation of dower. But I will at once examine the question on the supposed state of facts. If it be considered as a contract for land, it becomes subject to the statute of frauds. There is not a tittle of proof in writing. The agreement offered to be proved is acknowledged to be wholly parol: the terms are stated to be wholly parol. Then consider the extreme uncertainty of witnesses remembering terms expressed loosely, at various times, to persons not called upon to witness any act. The bill of Mrs. Hall puts it on the ground that the promise was to build as good a house for Mrs. Hall as the one sold to General Hampton for $37,000; and this for renouncing a contingent dower. All this alarms the mind, and drives it from reliance on loose and floating recollections of verbal declarations testified even by good and accurate men, to the safe harbour of the statute.

The renunciation of dower is stated as part performance, which is argued to be sufficient to take the case out of the statute. The counsel wisely laid stress on this

ground. Without this they would not have had an inch of ground to stand upon. I have paused on this, and should not have regretted that it had furnished a basis strong enough to support the claim. For it cannot but be a subject of regret, that this lady should be deprived of a benefit intended for her by her husband, by the subsequent sale

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of the property devised to her. I can*not however permit these regrets to guide my judgment: I must decide according to law.

Part performance certainly in some cases takes the case out of the operation of the statute; formerly on too easy terms: latterly more strictly guarded. Part performance in contracts between man and man acting at arm's length, each pursuing his own interest, raises a presumption of some corresponding obligations on the other side, and thus induces the Court reluctantly to open the door to parol evidence in a limited circle of cases. Is that presumption raised by a wife's renouncing her dower here? In this country, where lands are sold as frequently almost as personal property, there is not one case in a thousand where any compensation is stipulated or given to the wife for renouncing her dower. I do not say she may not so stipulate, but I do say that the fact of renouncing dower raises no presumption of such a stipulation. Not a single case exists of such a demand in our courts of justice by a wife against her husband or his representatives on this ground. And the absence of any such case shows how little reliance can be placed upon it as a basis on which to ask the Court to let in parol evidence to establish such a contract. It is inconceivable what an extent of litigation might ensue from opening this door. It would apply to all cases of dower renounced by the wife: and in every family which was unfortunate, and stimulated by necessity, applications might be made to obtain relief through parol evidence of promises of compensation for renouncing dower. And this too always of course after the death of the husband. The Court is particularly reluctant to let in parol evidence in cases seeking specific performance of a parol contract, after the death of one of the parties.

Upon the whole, I feel bound to say that I dare not admit this evidence, however hard

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the case may be, and *however satisfied I might be that there would be no danger of perjury or fraud in this case. I must act on principles, and they are against the admission of the parol evidence offered.

The motion for the admission of parol evidence must therefore be refused.

Mr. Gregg then moved the admission of the same evidence to prove that the testator did not intend that Mrs. Hall should lose and be deprived of any benefit under his will, by the sale of the house and lot to General Hampton. This evidence was rejected on the same grounds.

Another question in this case arose upon the annuity bequeathed to the wife. The executors refused to pay the annuity to Mrs. Hall, on the ground that the estate was considerably indebted, and that the debts should be paid before her annuity. It was admitted by the executors, that they thought the estate was worth $300,000. But there were debts of A. & W. Hall & Co. and Halls, Kirkpatrick & Co. due to British merchants, and guarantied individually by A. Hall, and they therefore contended that these debts, as well as others, should be paid before the widow could receive her annuity.

Gregg, for the widow.

Preston, for the executors.

De Saussure, Chancellor. The testator directs, that the annuity of $3,000 should be paid his widow in any way she might wish, and at any time, for her support, until his estate should be divided, which was not to take place before his debts and legacies were paid. The executors allege, that the estate is considerably indebted, and they state it will

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require a considerable time to *get in the assets and pay off the debts. This state of things was manifestly foreseen by the testator, for he looks to and provides for the payment of considerable debts, and directs that all his individual debts be paid out of his individual estate and the proceeds of his plantations: and that all the debts due by the copartnership, in which he was concerned, should be paid out of the funds of said concerns before recourse should be had to any other part of his estate: the copartnership to be dissolved, and his share of the profits to be considered part of his estate. And it is immediately following this sentence, and forming part of it, he makes the provision for the annuity of his wife. The executors have paid on account of the annuity (according to their statement) $6,448.50. But they have since objected to go on with the payment of the annuity on two grounds. First, that the estate being greatly indebted, it was possible there might be an insolvency; and in that case any payment of the annuity would be pro tanto a devastavit. Their own statements shew such a large surplus that it is next to an impossibility for an insolvency to occur, unless the estate should be grossly mismanaged and wasted. This ground was not seriously persevered in. If it had been, and should be supported, then it would be impossible, in any case, for a testator to provide for the temporary subsistence of his wife until his estate, if at all complicated, could be settled and divided.

The other objection was, that the wife had not yet made an election to take under the will, or to give up her claims under the will, and resort to her legal claims; and that she

was bound to do so immediately before payment of the annuity.

I think this objection is not well founded. The testator appears to have foreseen that it would take some time to wind up his affairs, and pay his debts; for he directs this annuity to be paid his wife, as a support,

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*till his debts and pecuniary legacies should be paid; when, and not before, a division of his estate should be made among his devisees and legatees. Now, until the settlement of the estate, the law gives the wife the election. She has a right to know what she has to elect. Election is choice, and she is entitled to know correctly what she is to choose between. The cases have gone so far, that after the wife has made her election, and has received benefits under the will, she has been allowed to retract and resort to her legal rights, when the estate has turned out differently from what it was believed and stated to be at the time of the election prematurely made.

Her counsel have stated very properly, that in all probability she will adhere to the will; but that if her interest should require a different decision, and she should be obliged to give up the money received under the annuity, that the estate would be safe, and the executors would have in their own hands the means of reimbursement. It would appear to be peculiarly hard to compel the widow to make her election before she knows the true situation of this estate, and how to choose judiciously and beneficially; for the estate is greatly altered since the will was made. A large house and lot, of great value ($37,000), which was specifically devised to her, has been sold by testator before his death. This she loses, and considerable acquisitions of real estate have been made which do not pass by the will. The estate is entirely unsettled; she cannot, therefore, make a judicious choice. Now nothing could be more opposed to the intention of the testator, than to stop her annuity, given her for support, because of the unsettled situation of the estate, when in fact that appears to have been the motive of granting the annuity. It appeared to me that the counsel for the defendants were satisfied with the force of this reasoning, and were not very

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unwilling that *the annuity should be paid, provided that a fixed and reasonable rule should be given to them agreeably to their wishes as to the time of paying the annuity. That, therefore, becomes the duty of the Court to determine. When an annuity is given simply, without any particular instructions, the rule of law is, that the annuity is payable at the end of the year. In this, however, the testator has declared, that the sum of $3,000 shall be paid her, "annually, or in any way she may wish," for her support. He means then to leave it in her power to depart from the rule of law, and to make a law for herself, and to require the payments earlier if she wished. In the exercise of this discretion, she claims the payment of the whole annuity in advance. I, at one period, thought that the words, and apparent intention, would bear out even that construction; and I am not now very sure that they would not. But I would rather adopt the more moderate construction, that she should be at liberty to call for the payment of the annuity at short periods; that is to say, at the beginning of each quarter. This will be adhering to the general principle, that annuities are payable when due, and also to the modification of the rule as made by the will of the testator, who meant it for her support.

Decreed accordingly.

This case came up again before the Chancellor, on an application of the executors for an order to sell the real estate which the testator had purchased after executing his will, amounting in value to about $30,000, and which of course did not pass by the will, but descended to his heirs at law. His heirs at law were William Hall the defendant, a brother, and George, John and Sarah Cotchet now Robson, his nephews and niece, the children of a deceased sister, and Eliza May M'Cord, the wife of R. P. M'Cord, Esq. the

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daughter of a de*ceased brother of the testator, besides the complainant his widow. At this hearing these questions were made.

First. That the widow was excluded expressly from any portion of the descended or undevised real estates by the twenty-seventh clause of the will, which was in these words, viz.: "I desire that the provision made by this will for my wife, shall be and be taken in lieu and bar of all claim of dower, inheritance, or any other claim on her part;" and that she should elect to take under the will or against it.

Secondly. That the descended real property, or after acquired estate was primarily liable for the payment of debts, in exoneration of the personal and other estate which had been devised. This question involved the general doctrine as to what funds were first liable to pay debts.

Thirdly. That the new mansion house, for the erection of which the testator had entered into contracts before his death, was liable to be sold to indemnify the personal estate of the testator for the moneys paid out by the executors, in compliance with the contracts for the erection of the buildings, and that such contracts stood as liens on the house for its cost.

Fourthly. That the parties were bound by the twenty-ninth clause to decide all questions arising between them by a reference to arbitrators, which the widow had refused, all the others consenting thereto.

Fifthly. The executors having confessed in their answers, that they were considerably indebted to the testator as surviving partners of the different mercantile houses to which they had belonged, it was contended that they should be ordered by the Court to pay into Court the amount which they had so acknowledged to be due, viz. $112,000; although the acknowledgment had been qualified by the statement that the affairs of the

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*copartnership were unsettled as to other creditors, and would take some time to be arranged.

Gregg and O'Neall, for the widow.

Harper and Preston, for the executors.

M'Cord and De Saussure, for the heirs at law (whose claims were the same as those of the widow, except as to her exclusion from the descended real property in which they joined the executors. The reporter has not deemed it necessary to separate the arguments).

For the widow. As to the question of election (the first ground). The widow is not excluded by the words of the will from the undevised real property. To make a case of election there must be a disposition of both estates. There must have been a disposition of the property which Mrs. Hall now claims under the statute of intestacy. The party must give full effect to the instrument under which he claims, and unless it be shown that Mrs. Hall has not given full effect to the will it is not a case of election. Is it necessary to give effect to this will that the widow of her husband, the Court must conclude that should elect? In what manner? Can the counsel state? If it had been stated in the will, that the widow should be excluded from all share in the real property which might be bought after making the will, it might have made a case of election. But there is neither an express nor implied intention of the sort derivable from the will. But if there had been an implied intention of that sort apparent in the will, it would not have been sufficient. The twenty-seventh clause does not say that she shall be excluded from the lands bought after making the will. There is an expression, that she shall not take dower or

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inheritance of the *lands devised. If there be any adjudged cases like the one in point, why have they not been produced? The case of Thellusson v. Woodford, 13 Ves. 220, is not in point. The testator there had contracted for the lands. He had only an equitable title. It was not a case of descended property. The case of Cogdell v. Cogdell, 3 Desaus. Rep. 388, is a case in point for us. The widow in that case was admitted to the descended property. They admitted, however, that the point was decided by Chancellor De Saussure alone.

One class of cases similar to this is, where there is a defective execution of a will of real and personal estate, or the testator incompetent to dispose for any cause. In such cases the land being given to a stranger, and the personal estate to the heir at law, the Court can not look into the will to put the heirs to an election. In Hearle v. Greenbank, 1 Ves. Sen. 306, Lord Hardwicke held the heir entitled to both the real and personal estate, there being no express condition attached to the gift of the personal. There the intention could but be implied. It was evident the testator did not intend the heir to have both; and yet the Chancellor held the heir could not be put to his election.

The case of Boughton v. Boughton, 2 Ves. Sen. 12, seems to be a leading case, differing somewhat from Hearle v. Greenbank. In Boughton v. Boughton, there was an express condition that no party claiming under the will should dispute it. But to make that case applicable the testator should have said, "I intend this provision in bar of any claim my wife may have of lands purchased after making this will." Lords Eldon, Erskine, Kenyon, and Sir William Grant, have all expressed their doubts of the case of Boughton v. Boughton. They considered the distinction a nice one between Hearle v. Greenback, and Boughton v. Boughton. The cases of Sheddon

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v. Goodrich, 8 Ves. *482, 495; Carey v. Askew, 1 Cox's Ca. 244, follow the rule laid down in Hearle v. Greenbank. Snelgrove v. Snelgrove, 4 Desaus. Rep. 295, was a case decided in this state, acknowledging the rule in Hearle v. Greenbank.

By saying that to constitute a case of election there must be an express condition, it is not meant to comprehend all cases; for there are cases of implied condition, as in the case of Hearle v. Greenbank. In the case before Lord Roslyn, Pickering v. Stamford, 3 Ves. 492, he said, he could not look into the will to see whether it was a case of election or not. And Lord Hardwicke seems to have acted upon the same principle in Hearle v. Greenbank. If in those cases therefore the property could not pass under the will, and for that reason the Court could not look into the will, how can the Court look into the will in this case? There could be as little doubt of the intention in those cases as in any other; but the intention could not be got at in a legal manner, and therefore could not be regarded. Is there any evidence of disposition by Ainsley Hall of the property bought after executing the will? The will says nothing about it. You can not travel out of the will to get the intention; and therefore it is to be presumed, that the testator had no intention as to any real property he might buy after making the will. Not one case can be found of election, where the property from which the party was to be excluded was not given to some other person. We challenge the counsel on the other side to produce a

single case. The Court then is called upon to decide a new case, and to put the widow to her election will be to extend the principle beyond any case heretofore decided. In cases of informal devises it is not only necessary that the testator should endeavor to pass the particular estate, but the attempt to pass it

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must be expressly with a view to put *the heir to his election. Brodie v. Barry, 2 Ves. & Beames, 130. Carey v. Askew, 1 Cox's Ca. 244. Implication will not answer. There must be an express condition, as in Boughton v. Boughton.

We are aware of the copyhold cases, and at first did suppose they might be applicable; but upon looking at them it will be found that copyholds will pass under a will which would pass only personal estate. Besides the surrender necessary to qualify copyholds to pass may be made after making the will as well as before. And as to copyholds, the Court can look into any will of copyholds, because it is not necessary to have witnesses; to be sure it is necessary to see if they were surrendered. But in all such cases there must be an express condition, which does not exist here.

There was another class of cases, where there was personal property not disposed of. In the case of Simpson v. Hulton, and Pickering v. Stamford. The former case was stated in full by the Master of the Rolls, in arguing the case of Pickering v. Stamford, and may also be found in Roper's Law of Husband and Wife, 25. The Master of the Rolls in the latter case changed his mind, and said he was led into the erroneous opinion which he first entertained by considering the cases of wills similar to those of marriage settlements, which he afterwards acknowledged to be an error, and let in the widow. The distinction between wills and marriage settlements is good. Neither the heir at law nor the next of kin can be put to election without a disposition made of the property from which they are excluded by the testator. Pickering v. Stamford, 3 Ves. 332, 493. For whose benefit could this election have been made? For the heirs at law? That could not be, for one of them the testator excluded from his will. He gave nothing to Mrs. Robson, and he could not have intended to exclude his wife from the descended property

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to let her in. *Moreover, the heirs at law would take as such in different proportions from those made by the will. The testator never could have intended that. In Sympson v. Hutton, the exclusion of the widow and daughter Jane was in favour of the other daughter; yet as the object of the testator's bounty failed, the undisposed residue was divided among the representatives of the three. A devise of things expressed could not put the party to an election of things not expressed. East v. Cook, 2 Ves. Sen. 33. In Cogdell v. Cogdell, the Chancellor, who presides now, looked upon the claims of the widow for dower and under the statute as similar. A widow's claim was always more favoured than that of strangers. Judd v. Pratt, 13 Ves. 176.

As to the second question, whether the undevised real property was liable for debts before the personal estate, they said the first case in this state on that point was Stuart v. Carson, 1 Desaus. Rep. 511. There the English rule was acknowledged, that the personal estate was the primary fund for the payment of debts notwithstanding all the alterations of our laws. So in Halyburton v. Kershaw, 3 Desaus. Rep. 115, and in Dunlap v. Dunlap, 4 Desaus. Rep. 329, 325. It is unnecessary on this point to do more than cite the cases as to the general principle. The cases in Brown's C. Cases were Ancaster v. Mayer. Samwell v. Wake. Davis v. Topp. Vol. I. 144, 454, 524. Donne v. Lewis, 2 Bro. C. C. 263. Manning v. Spooner, 3 Ves. 117. Taitt v. Northwick, 4 Ves. 816. Harmood v. Oglander, 8 Ves. 124. Watson v. Buckwood 9 Ves. 447. Inchiquin v. French, 1 Cox's Rep 34, in note. Tower v. Rous, 18 Ves. 138. Booth v. Blundell, 1 Meriv. 218. Githens v. Steele, 1 Swan. 28. The same rule prevails in New York. Lupton v. Lupton, 2 Johns Cha. Rep. 628. Livingston v. Newkirk, 3 Johns. Cha. Rep. 319. Thompson v. Tappen, 5 Johns. Cha. Rep. 521. There were many

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reasons why the *English rule should still be adhered to in this country. Money, in the hands of an executor could be applied more promptly. The property would not be sacrificed to obtain ready money. Lands were assets under our statute after the failure of the personal estate. Besides personal estate is of a more perishable nature, and can always be sold to greater advantage; and the policy of the country would rather protect that property which cannot go to aliens, than that which might be carried off by them; and the widow could not be compelled to elect between her dower and testamentary provision; and to sell the real property subject to her claim must greatly depreciate the price. Besides, the will here expressly charged the whole estate devised with the debts. This was a devise after the payment of debts. The testator first of all orders his debts to be paid, "and that the division of my estate hereinafter directed shall not take place until all my debts and legacies be paid." He orders that his individual debts be paid out of his individual estate and the proceeds of his plantations, and that the debts of the mercantile houses to which he belonged should be paid out of the funds of those houses, before recourse should be had to any other part of his estate. Here were express directions, and the executors must pursue them. 2 Johns. Cha. Rep. 614. 1 Vern. 45. 1 Ves. Jun. 440. Before the Court will order

a sale of descended real property, an account must be rendered of the amount of the debts, and a deficiency of personal estate shown. 2 Johns. Cha. Rep. 62. 6 Johns. Cha. Rep. 389. 406. From the words of this will it might be questioned, whether the whole of the devised property real and personal was not liable before the real property undevised, the will making a charge on that devised. 2 Johns. Cha. Rep. 623. Executors have no control over descended real property. It is not assets inter main. The common law calls personal property alone "assets inter main." Termes de la Ley. The executor can only

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come *against the real property undevised as a creditor. But how could they show themselves creditors before an account was finally taken, and until then no sale of real property could be ordered. It will be necessary here to inquire into the capacity of the firms to pay their debts, before the testator's individual estate can be sold; for until then the creditors in no case can become creditors upon the real property.

As to the third ground. The debts contracted for building the new mansion house are of course to be paid out of the personal estate. No recovery can be had on these contracts but in assumpsit. The personal fund therefore can alone be made to pay these contracts. Halyburton v. Kershaw, 3 Desaus. Rep. 106; Pringle v. M'Pherson, 3 Desaus. Rep. 106. Cumberland v. Addington, 3 Johns. Cha. Rep. 234. 317. 1 Vern. 36. 6 Bro. P. C. 520. Moers v. White, 6 Johns. Cha. Rep. 388. Langford v. Pitt, 2 P. Wms. 632. Whitaker v. Whitaker, 4 Bro. C. C. 31. Broome v. Monk, 10 Ves. 611.

As to the fourth ground, it was said that the will was not peremptory as to submitting all disputes to arbitrators it was only recommendatory.

As to the last point, it was said, that here the executors had applied to sell the real property, and yet acknowledged themselves indebted to the testator to an enormous amount. They should long ago have paid up their debt. Indeed such debts were assets in their hands. They must be considered as having received so much money for the testator; and having done so they yet state that the testator owes debts, when this fund alone, besides the crops of his plantations, &c. might long ago have paid them all. It was now three years since the death of the testator, and yet the executors had not settled their own debts due to the estate. The Court in such cases will order the executor

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to pay the money *into Court immediately. 2 Cox's Ca. 377. 8 Ves. 466. 11 Ves. 87. 13 Ves. 264. 2 Meriv. Rep. 491. Toll. on Exec. 480. 11 Mass. Rep. 256. 6 Mass. Rep. 149. It was sufficient cause for the appointment of a receiver. Winthrop v. Bass, 12 Mass. Rep. 199. Middleton v. Dodswell, 13 Ves. 268.

In reply. The question whether the testator could have made a disposition of this property by the will is no question at all. The only real question is whether there is a condition annexed to the portion given to the wife. During the whole argument the counsel have never once attempted to give any meaning to the 27th clause—contrary to the rule that words are not to be rejected as surplusage where they can have a meaning. And the true question is whether these words are so utterly unmeaning that they may be stricken out. What is the meaning of the word inheritance? We can see no change in its meaning in this country except as modified by the statute of distributions. It is the taking property by descent. It is the legal as well as the vulgar sense. The only doubt in this country is, whether it does not comprehend personal as well as real property. It certainly is the vulgar sense that it does. But that it did mean real property obtained under the statute of distributions no one could doubt. The word is somewhat more extensive in this country than in England. That is all. "The law of inheritance," says Judge Brevard in his Digest, Vol. I. p. 425, in note, "in this state, in cases of intestacy, is established by this act (1791) and other statutes." The general principles of succession or inheritance, the same accurate judge observes, as to real and personal property are the same. The act of 1791, abolishing the laws of primogeniture, establishes new heirs, and of course the old doctrine of inheritance must be applied to these new heirs;

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and if *the act creates an inheritance as to one heir it creates it also as to another, and as to all circumstances to which the act applies, as well between husband and wife, parent and child, as between collaterals. The law of descents may properly be said to have been abolished. That was a common law right—this a statutory right. In this state a father may be said to inherit from his son, a wife from her husband, as well as a child from its parent.

That it is prospective can not be doubted; for no one can take as heir until the death of the person whose estate is distributed by the statute. It is contended, on the other side, that it should be restricted to lands owned at the time of executing the will. But all such lands are devised in the will. And if there had been such lands, it would have been a refinement to make a difference between such lands and lands bought after making the will. The will plainly means inheritance at the death of the testator. And if the construction contended for was good, then the lands bought before and after making the will, if not devised, would be distributable under the statute in a different way. The residuary clause would hardly

have been inserted if there was an intention to lease a part of the real estate undevised. The residuary clause was inserted to meet legacies that might lapse. Therefore the testator, who was an intelligent man, knew there was nothing left to exclude the wife from. It cannot apply then to any property he had at the making of the will; for there was nothing then to which it possibly could apply. It is said that the will could only be considered as made in relation to property he then had. But this is presuming against the express intention of the testator. Besides, the observation is not just. It is frequently the case that a particular portion is

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given to the wife, to con*stitute her whole share, in every way, of the husband's estate. The condition attached to the widow's claim is intended to save the necessity of making a new will for every piece of real property purchased. The will is the words and intention of the testator from the time of making the will to the time of the testator's death. If a party sells property he is supposed to revoke his will quoad the thing sold. Does that revoke the condition attached to Mrs. Hall's benefit under the will? Do the words operate before the death of the testator? If he intended to alter his will he would have revoked it. The rules for construing wills were to be found in 1 Roberts on Wills, 562.

It was suggested yesterday that the word inheritance might have been intended to mean dower, and that inheritance must have meant the estate which the wife had when she married her husband. But the testator meant his own estate. No question was made as to her estate. Besides, Mrs. Hall had no such estate. The testator only bars her of any claim on his estate. The expression of the testator is as direct as if he had said, in bar of any distributive share of lands I may hereafter acquire. If the intention be thus clear, what rule of law would prevent it from having effect? They have referred us to Pickering v. Stamford, which is the leading case on the subject. But in that case the wife was barred in favour of a particular person, who not being able to take, it was held, that should not then prevent the widow from taking. And it decides, in effect, that if the particular devisee could have taken, she would have been excluded. This was the view of the Master of the Rolls, as explained in Waring v. Ward, 5 Ves. 670. It was upon the ground of intention. The intention was only to favour the charity, and, that object failing, the condition was held

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not to apply to the *circumstances as changed. The case has not been approved of. The Master of the Rolls appears confused throughout. He appears doubtful, and thought that Simpson v. Hutton governed him. Before the Court examine that case, they can not but observe, that in that case it was said the widow was not put to her election. But that differs from a legacy with an express condition, which one can not take but with the condition attached. Pickering v. Stamford came up four times. This question did not arise until its second appearance in Court, which is reported in 2 Ves. Jun. 581, and the question then was, whether she had the privilege of election, after twenty years' delay, and under the words of the will. In Waring v. Ward, the Master of the Rolls says expressly that he first decided that case on the ground that the wife could not take at all—that she could not elect. It was conceded in the argument of Pickering v. Stamford, that the case could only be decided on the ground of the accidental failure of the object for whom the exclusion was intended. The liberty of choosing seems to have been the question. The case of Simpson v. Hutton, was where all the parties were excluded in favour of one child who died, and the wife, who was intended to have the estate after the death of the daughter, did not get it on account of the failure to execute some necessary power. So that the bar of the widow did not apply. But if the lands had descended to the favourite daughter, could the Court have held that the widow could have come in for distribution and retain her testamentary provision? Pickering v. Stamford is considered as a case of a lapsed legacy. But it is admitted by all the cases, that where the testator by his own act revokes the legacy, it will not alter the condition. The dictum of the Chancellor, that you cannot look into the will at all, if it means to say that you must shut your eyes, and not look to see if

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there is an express condition *in the will, was foolish and wrong, and every lawyer in England knew better. But he did not mean that, but when the testator's views have accidentally been defeated. Can you not read the will against any one claiming under the statute of distributions or by descent? If it had been on condition that it should be in bar of her claiming any thing against W. Hall, George Cotchet, and E. M. M'Cord, under the statute, would it be said that the Court could not look into the will? It is true the widow could not be absolutely excluded under the statute. She could only be put to her election, and of course, of property, either not contained in the will, or which the testator could not devise. The testator may annex any condition. To talk of condition in any other sense is idle. There is no difficulty of disposing of this property undevised. If she were out of the way the law would provide for that. Vachel v. Breton, 5 Bro. Par. Rep. 141, was of good authority, and was expressly in point. The two children with "ten shillings and no more" were excluded. It is incorrectly cited in Snelgrove v. Snelgrove. In the report of the case in Brown no reference is made to the legitimacy of the chil-

dren. It is put upon the ground of intention alone. By expressly excluding two of the children, the implication was absolutely necessary that the other two should take. So in Pickering v. Stamford, it is suggested, that if all the heirs at law are excluded, what is to be done? We can only say, let the next of kin come in; for those that stood nearest to the testator are to be considered as dead. We can not see the difficulty which the Master of the Rolls felt in that case. The dictum of Lord Roslyn, that there must be an effective disposition of the property, is as erroneous as the last referred to; as the very reason of election is the want of power in the testator to dispose. It is said, the heir can not be put to an election unless the will

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is pro*perly executed, and that he cannot be compelled to an election of property to which he only has an inchoate right. These reasons contradict each other. As to the distinction said to exist between Hearle v. Greenbank and Boughton v. Boughton, the counsel have mistaken the doubts of the subsequent Chancellors. The doubt is, whether it was necessary to have any express condition attached to the devise, where the intention can be ascertained from the whole will. The will can not be read only in such cases where the testator was totally incompetent to make any will. If the party takes an estate, the will may be looked into to see if the party takes at all; or otherwise he could not take at all, there being no will seen; if the gift is looked to, the condition attached to it must be seen. So what becomes of Lord Roslyn's dictum, that you can not look into the will? It is perfect nonsense. Welby v. Welby, 2 Ves. & Beames, 187, was a case of implied condition.

As to the words "or any other claim," they cited Glover v. Bates, 1 Atk. 439. Read v. Snell, 2 Atk. 642. Davilla v. Davilla, 2 Vern. 725. Judd v. Pratt, 13 Ves. 173.

All the copyhold cases are most directly in point, notwithstanding what has been said. That is, a copyhold can not pass by the will unless surrendered to the use of the will, and the testator having expressed an intention to join the copyhold to another, has been held enough to put the heir to his election. Rumbold v. Rumbold, 3 Ves. 65. Frank v. Standish, 1 Bro. C. C. 508, note, was a case of copyholds brought after making the will, and the coheiresses were entitled to a provision in the will, in bar of all other claims, and they were held to the election of such lands. M'Namara v. Jones, 1 Bro. C. C. 481, was a case of implied condition. Brodie v. Barry, 2 Ves. & Beames, 36. 127, was a case of a Scotch heir. The Scotch

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heir was put to election, *though the will did not bind his property in Scotland. And Thellusson v. Woodford is also in point. All these were cases of wills read to put the heir to election. On the general principle, that the intention is to govern; it is enough that the widow should take her portion, with the condition annexed; and authority is to be produced on the other side, and it is not for us to shew that the condition was inoperative. It is argued that the testator must declare how he means the property to go, to raise a case of election. But the law presumes he meant it for the benefit of those who can take, she being out of the way. In Davilla v. Davilla, 2 Vern. 725, the wife was excluded, and the Court said the testator might forbear making a will, as he might know how his property would descend. So in Glover v. Bates, 1 Atk. 439, the wife was excluded from her distributive share, although there was no will. In Read v. Snell, 2 Atk. 642, a provision in lieu of the wife's customary share was held to put her to an election. 2 P. Wms. 526. As to the distinction between marriage settlements and wills, it only applies to contracts before marriage, and not to deeds or wills during the marriage, in lieu of the wife's claim. As she could not contract, she may elect. 1 Roper on Husband and Wife, 452. If made before marriage, it is an absolute bar; if after, she may elect. 1 Roper on Husband and Wife, 554. It is admitted here, that the wife is excluded from dower. Her distributive share is in lieu of dower. It is, in fact, a statutory jointure. And if she is barred of the one, why may she not be barred of the other? The case of Warde v. Warde, Amb. 299, is a case exactly in point, as much so as a case can be. That was a case of after acquired land, of which the widow was put to her election, though the testator could not have dis-

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posed of it by his will, *when he executed it; nor did he express any intention to dispose of it in favour of another. It is also said, that the party cannot be put to his election unless he has some inchoate right before. It is a strange supposition, entirely unfounded; and arises from confounding cases of election with cases upon condition. The cases of election are those that depend on an implied condition, and not those expressed. This is explained in a note to Judd v. Pratt, 13 Ves. 173. Stratton v. Best, 1 Ves. Jun. 523. Cavan v. Pulteney, 3 Ves. 384. Bailey v. Wright, 18 Ves. 49. Wilson v. Greenwood, 1 Swanst. 433, note. 2 Madd. 42.

The cases properly of election are attended with a compensation. But the cases of express condition have no compensation. It is sufficient that the party must take with the express condition. Newman v. Newman, 1 Bro. C. C. 186, is a strong case to explain the force of an express condition. Whistler v. Webster, 2 Ves. Jun. 367. Did the testator intend his wife to be excluded from this after purchased estate? If that was his meaning, she cannot take. The clause says, "the provision shall be taken in lieu and bar,"

&c. "or any other claim;" of course at his death. We ask again, what other meaning can be attached to the word inheritance, than property obtained under the statute of distributions? This will was written by one of the ablest lawyers in the state. He could not confound dower and inheritance.

As to the liability of the real estate descended to pay debts in exoneration of the personal. There is no such character in this country as the English heir at law. We will cite some cases to shew the reasons of the English rule, and will endeavour to shew that they are inapplicable to this country. The personal estate is rendered liable to

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favour the heir, and therefore ex*press words are required to bind the heir. But we have no feudal heir, who is thus to be favoured. A devise of the freehold to pay debts does not exempt the personal estate. Is it possible that that rule can be of force in this state? In England the real estate is not liable at all to pay personal debts, and is it possible that a rule founded on such reasons should be obligatory in this country, where the real and personal may be sold under execution to pay debts? A devise to sell or mortgage real property does not exempt the personal, though given to his daughter. 3 P. Wms, 134. This would not be law in this country. In Inchiquin v. French, Amb. 33, it is said, there is no difference between charging a real estate, and devising one to be sold. In 1 Bro. C. C. 144, the testator charged the real estate, which was held not to exonerate the personal. That is not law in this state. So of the case of Brummel v. Prothero, 2 Ves. Sen. 112. Taitt v. Lord Northwick, 4 Ves. 817. It is said that in nine cases out of ten, in England, the intention of the testator is violated. Why violated there? To favour the heir under a system not applicable to this country. Then why violate the intention in this country? It is said the act only renders the real estate liable, as lands are to specialties in England. In England, the land is liable primarily to specialties. To be sure the heir can make the executor refund, or relieve him of the responsibility; but that is upon reasons not applicable to this country. If the personal fund is bequeathed, his rights are as good in this country as the rights of the heir, and although, in such a case, the personal estate would be liable in England, yet that is not law in this state. In England, when a testator gives his personal, he knows that it must be applied first to pay debts, and therefore he is to be considered as only giving the residue; but in this state the testator knows that the lands may be sold to pay his debts. In Waise v. Whitfield, 8 Vin. Ab.

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*277, a residuary clause of personal property was held a specific legacy. 1 Roper on Legacies, 277.

The cases cited from 3 Johns. Cha. Rep. seem rather to support the positions we have laid down; so of the case of Livingston v. Livingston.

De Saussure, Chancellor. The first point in this case is, whether Mrs. Hall the widow is entitled, under the statute, to a distributive share of the real estate acquired after making the will? She will be so of course if she is not barred by the twenty-seventh clause of the will, which is in these words: "The provision made for my wife shall be, and be taken, in lieu and bar of all claims of dower, inheritance, or any other claim on her part."

Where a man is disposing of his estate by his last will, it is presumable he is making a disposition of what he actually owns, and not of what he may by possibility acquire. He provides according to the actual state of his property, and not according to imaginary hopes or fears. There is perhaps hardly any man whose devises and bequests would not be greatly varied by the anticipation of great acquisitions or great diminutions of his estate. The very strong presumption then is, that the testator believing that the provision made for his widow by his will out of the estate he then held, was an adequate one, desired that she should not have any more of his then estate. The rights of the wife, and the duties of the husband, were in his mind performed by the provision made in the then state of affairs. If his fortune had been suddenly increased ten or a hundredfold—as often happens in the wonderful mutations of human affairs—there is no reason to believe that he would have thought the provision he made an adequate one. This is proportionably true as to any material change. Now it is always a question of intention, whether, and how far a husband means to bar his wife's legal rights by a spe-

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cial *provision. It must be apparent that he meant to put her to an election between her legal rights and her rights under his will, before the Court will put her to an election. In the case we are considering, the testator purchased a large lot and made contracts for building a large house at a great expense, after he had made his last will, which is the subject of controversy. Now is it probable that in framing a clause in his will, by which he makes a liberal provision for her, and excludes her from dower and inheritance, he had in view any other property than that which he then possessed? I think not. Besides, in construing wills, the rule is, that you must look to the state of things at the time of making it. The decided cases are numerous. There are some exceptions.

The cases of election are, where the wife claims something under the will, and something which will disappoint the will. She is not permitted to take both. She must elect. But can that claim be said to disap-

point the will when the claim is made on a subsequently acquired property, which could not have been in the contemplation of the testator when framing his will, and which does not pass by the will. Maddock, in his treatise on the principles of Equity, examines the cases and states their results. He cites the early and leading cases on the subject of election. Noy v. Mordant, 2 Vern. 581. Clarke v. Guise, 2 Ves. Sen. 617. Morris v. Burroughs, 2 Atk. 629. Vincent v. Vincent, 1 Ves. Sen. 260. Frank v. Standish, 1 Bro. C. C. 588, in note; and many other cases which he enumerates;—and he then adds, the result of these appears to be, "That a person shall not claim an interest under an instrument, whether a deed or will, without giving full effect to that instrument as far as he can." See 2 Madd. Cha. pages 46 and 48, &c. He adds, "An election can only take place where a person has a decided interest before, and something is left him by

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the will. Where *there is no certain benefit before, there can be no election." 2 Madd. 52. Crosbie v. Murray, 1 Ves. Jun. 561. Even as to dower, the claim under the will and of dower must be repugnant. If there be no inconsistency in the two claims, if both may stand together, the wife is entitled. 2 Madd. Cha. 57.

In the case before us the wife is barred of dower, because she had an inchoate right of dower in the land acquired after making the will, and that expressly makes a provision for her in bar of dower. But she had no inchoate right as distributee, for the husband might dispose of the land from her. He did not dispose of it, and her right as distributee arose on his death. Her claim as distributee thus arising after his death cannot be said to disappoint the will, which did not and could not dispose of this after acquired real estate, and could never have been in the contemplation of the testator. It would be strange to say, that the claim as distributee disappointed the will of the testator in relation to a property which he could not have even had in contemplation, and which does not pass under the will.

Upon the whole I am of opinion, that Mrs. Hall is entitled to a distributive share of the after acquired real estate which did not pass by the will; which share under our statute amounts to one moiety, as there were no children.

We come now to consider the last question, out of what funds the debts of the estate are to be paid? The will of the testator is in the following words: "I desire that all my individual debts be paid out of my individual estate and the proceeds of my plantations." "It is my will and desire that all debts due by A. Hall & Co. and Halls, Kirkpatrick & Co. be paid out of the funds of said concerns before recourse be had to any other part of my estate." These are very explicit declarations of the testator's intentions on

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this subject. Now it is not a *disputable point that the will of the testator must prevail where it is distinct and intelligible. It was however argued, that the real estate acquired after making the will, not passing under the will, is the proper fund for the payment of the testator's debts. And many cases have been cited to establish this doctrine; too many indeed for minute detail. If this doctrine should be considered applicable in a case where the testator has expressed his intentions, still it is to be remarked that there is a distinct line of demarcation between his private and his copartnership debts, in which his will and the general rule of law coincide; to wit, that his private debts must be paid out of his private estate, and his copartnership debts out of the copartnership funds. This course must therefore be pursued.

The only question then which remains is, what part of the private estate of the testator is primarily liable to pay his private debts? If the property acquired after making the will had been personal, I should not have much doubt that it was primarily liable in order to exempt the devised and bequeathed estates; but it is real estate, and that raises the difficulty. The decided cases on this subject are various, complicated, and sometimes I fear discordant; arising doubtless from the very great variety of the combinations which occur in human affairs.

I feel the difficulty in the application of the numerous decided cases to the one we are considering: perhaps not the less from their number and the ingenuity of their application by the counsel in this well argued cause. There are some things however which may be laid down as certain, and will aid us in forming a correct judgment in this cause. The first is, that the personal estate is primarily applicable to the payment of the debts of the testator; next, that the statute abolishing the rights of primogeniture has not

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altered the law in that respect. There *has been some controversy on this subject, and perhaps some discordance of opinion among some of the Judges; but there has not been any clear, distinct decision, establishing a change in the rule, as to the application of the assets to the payment of debts.

By the English decisions, which have not been contradicted by our own, the following seems to be the rule, as laid down by Lord Chancellor Thurlow, and concurred in and supported by Lord Chancellor Eldon. In Harmood v. Oglander, 8 Ves. 106. 124, 5, Lord Eldon says, "My present opinion is that the descended estates are not first liable upon this ground; that, as I understand Lord Thurlow's determination and the law ever since, it is decided, that in the administration of assets ordinarily, the first fund ap-

plicable is the personal estate not specifically bequeathed; then land devised for the payment of debts (not merely charged, but devised or ordered to be sold); then descended estates; then lands charged (by the will) with payment of debts."

This is powerful authority. Now it is clear that the personal estate bequeathed by Mr. Hall's will to be divided between his wife and other legatees, except a few slaves by name given to his wife, and those obtained on his marriage, is not specifically bequeathed in any sense of that term; therefore, according to this rule, it is to be applied. Besides, the devises and bequests of the testator's real and personal estate, to be divided between his wife and others (under the 6th, 7th, 8th, and 9th clauses) is expressly subject, and postponed to the payment of debts. Again, in the case of Milnes v. Slater, 8 Ves. 295. 303, 304, Lord Eldon recognizes the doctrine above stated; and adds that the rule is where the will creates a particular fund for payment of debts, that shall be first applied in exoneration of descended estates, whether acquired after the date of the will or not. I think then, that as the testator

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did provide for the pay*ment of his debts and legacies out of the whole estate he possessed at the time of making his will (and he could speak and refer to no other), that the after acquired, descendible and distributable estate is exonerated from the payment of his debts and legacies, which must be first paid out of the estate subjected by the will to his debts and legacies.

It is charged in the bill, admitted by the answer, and supported by the exhibits, that considerable debts are due from the executors themselves to the estate of Mr. Hall, which of course will pass under the residuary clause of the will. These should be collected as soon as possible. Indeed the decided cases say that those debts are so much cash in the hands of the executors, and the Court will often order the executors to pay the debts they owe into the hands of the proper officer of the Court for the security of the parties interested. The cases were cited in the argument. It must also be added that they have no right to employ that money, or any other part of the estate of their testator, in their private transactions or speculations. Should losses occur by their doing so, they would be bound to sustain those losses.

The application of the bond of General Hampton to Mr. A. Hall, to the payment of the copartnership debt to Mr. Kirkpatrick, was a plain violation of the will of Mr. A. Hall, who forbade the application of his private estate to copartnership debts. That must be corrected.

Should Mrs. Hall, the widow, after perceiving what her interests are in the estate, and after seeing by the settlement of the affairs of the estate what her best interests require, be induced to abandon her rights under the will, and elect to take her dower and her distributive share of what was undisposed of by the will, she will be at liberty to do so.

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And she is not bound to *make that election until the affairs of the estate are so wound up, as to enable her to have a clear perception of what her interests require her to do. An election may be kept open in some cases for an indefinite and great length of time, until they who manage the estate give the widow such a complete insight into the affairs of the estate as to enable her to judge understandingly of her situation. 2 Madd. Cha. 55. Amb. 533. 1 Bro. C. C. 232.

It is therefore ordered and decreed, that Mrs. Sarah C. Hall is barred of dower in the real estate acquired after the making the will of the testator, as well as in the real estate held at the time of its execution by virtue of the 27th clause of the will, unless she chooses to abandon her rights under the will, and elects to resort to her dower.

That Mrs. Sarah C. Hall is entitled to a distributive share of the after acquired real estate which does not pass under the will of the testator, without being put to an election; but may take that distributive share as well as her rights under the will. That the fund for the payment of the private debts of Mr. Ainsley Hall is the estate devised and bequeathed to be divided among his widow and the other devisees named in his last will; and primarily the personal estate so bequeathed, except the slaves specifically bequeathed to his wife in the fourth clause, which are exempted. And that the fund for payment of Mr. Hall's proportion of the copartnership debts is his share of the copartnership funds as prescribed by his will.

That the debts due by the executors to Mr. Hall's estate in his private capacity, and to him in his copartnership capacity, are to be considered as cash funds in their hands, to pay his debts; and a reference is ordered to ascertain what is due by them, as well as all other matters of account.

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*From this decree appeals were taken up by the executors and heirs at law. All the points were again argued at length before the Court of Appeals.

Harper and Preston for the executors.
M'Cord for the heirs at law.
Gregg and O'Neall for the widow.

Curia, per COLCOCK, J. It may seem to be a work of supererogation to add any thing to the elaborate decree of the learned Chancellor in this case. But in the course of the argument some new views of the legal doctrine on which the case depends may have been presented to the view of the Court. It is said the cases arising under the doctrine

of election are susceptible of being divided into two classes; first, those of election proper, where something is given by the will to one who is entitled to some other thing disposed of by the said will to another, in which case the devisee is put to choose whether he will take that which is given, or that to which he has a claim; and secondly, those cases in which there is an express condition annexed to a devise, with which the devisee must comply or not take the property; in which case he is to elect whether he will comply with the condition or give up the property; but in which, if he does not comply with the condition, he violates none of the provisions of the will as to any other person than himself. And it is suggested that the case before us has been considered in reference to the first class of cases, when in fact it is embraced in the latter; and that the complainant, although not put to elect between two things given in the will, is restrained from taking any of the subsequently acquired property by the operation of a condition which is imposed by the will on her.

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*The distinction is a very clear one, and is certainly applicable to the case, though I think the decree in substance does embrace both views of the doctrine. But as we are satisfied that the case is not a case of election properly so called, but the case of a condition annexed to a gift, we will take a view of it as regulated by the doctrine and cases which are applicable to that state of things.

It is clear that the widow is not put to choose between two things given in the same will, and that so far as the rule, that one cannot claim under a will, and defeat at the same time any part of that will, the case is clear of difficulty, for the reasons given in the decree. In determining whether the restriction contained in the will does prevent her from taking a distributive share of the after acquired property, we are to look to the circumstances of the parties, and to the will, and to the whole will, and to any circumstances arising out of the immediate provisions of the whole will. The intention of the testator is to be carried into effect, unless he has used technical terms, which must receive their technical meaning, and which restrain the operation of such intention. When men sit down to make their wills, their purpose is to dispose of that which they possess, and it is very rare that we find a man who undertakes to dispose of that which he has not, and that which he consequently may never have, except in some few cases where an estate is expected to descend, and then we find persons making, or attempting a disposition of such expectancies. But I think, speaking generally, that it would be considered even by a man in health, and in the prime of life, as a most unnecessary and superfluous act to make any provision for that which he may hereafter acquire. Now when we advert to the circumstances of these parties, we find the testator a man of great affluence, manifesting a proper affection for

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his *wife, in a generous provision for her future welfare. Does it comport with such a spirit to make a provision by which she should be excluded from any after acquisitions, even if we could suppose that he had it in contemplation to acquire this property, a supposition which is at war with all the circumstances of the case? For when he made this will, he was in possession of a handsome house, which he gave by that will to his wife, but which he afterwards sold, as is stated by the defendants in their answer; so that it was this after act which caused him to acquire the property which is now the subject of dispute, and therefore it is impossible, that when he made the will he could have looked forward to the acquisition of a thing, which at that time he did not want, and which, to say the least of it, was a property which he never would have bought for profit, he being a merchant, and a man of great judgment and prudence. These considerations irresistibly lead me to conclude, that the testator did not intend to exclude his widow from a participation in any after acquired property. But it is said that whatever may have been his intention, he has, by the use of technical expressions, effected that. The words are, "the provision made for my wife shall be in lieu and bar of all claim of dower, inheritance, or any other claim on her part." He then concludes his will, and may have died the day after, and the possibility of such an event is in the contemplation of all men of reflection when they make wills. If he had died the next day, or the next month, to what would this restriction have applied? It could have applied to nothing else but the property contained in the will. It follows, therefore, that it was meant to apply to that, and to that only, and there is no ground to stand on except as to the technical meaning of the word inheritance, and it certainly cannot be complained of, that he who stands upon the strict law should be judged by the strict law.

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*Now who ever heard of a woman inheriting from her husband? Is this technical language? "Inheritance," saith Coke, "cometh from the ancestor: without blood none can inherit, and therefore it is, that he who hath the whole, or entire blood, shall have one inheritance before him who hath but part of the blood of his ancestor." 3d Reports, 41. It may be said, and has been said, that the testator thought it a proper word to exclude her; but his intention, it has been shewn, was not to exclude her at all. It is much more probable that he thought that dower and inheritance were convertible terms, and that he used both from abundant caution in relation to the property he then possessed; or he may have supposed that it applied to

the property which came to him by his wife, and if there was any land so acquired it was a peculiarly appropriate expression as to that. Or he may have been led into the mistake (as others have been) by the use of those words in the act of 1795, prescribing the mode of conveying lands belonging to the wife. A case has come before us in which the persons, not knowing the distinction between dower and inheritance, thought proper to use both in the deed. But so far as intention is to govern, whatever else he may have intended, he did not intend to apply the word to after acquired property: and if in its technical operation it cannot be thus applied, the claim must prevail; for it is laid down that in giving construction to such restrictions the meaning must be clear and express. The rights of the parties claiming are not to be excluded by implication, and this will be found to be the rule in all the cases referred to by the defendants themselves, though in some of them it may appear that the rule has been lost sight of. Indeed I say with the Master of the Rolls in the case of Brodie v. Barry, 2 Ves. & Beames, 129, "if it were now necessary to discuss the principles upon which the

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doctrine of election depends, it *might be difficult to reconcile to those principles, or to each other, some of the decisions which have taken place on the subject." The overwhelming and all controlling desire to protect the rights of the heir on some occasions, and to administer high Equity on others, has certainly carried the English judges to great lengths on this as well as on other subjects. But we have no such purpose to effect here. Our principle is an equal distribution where the owner has not disposed of his property; and his will, be it what it may, where he has disposed of his property. In the case of Blake v. Brumbury, 4 Bro. C. C. 23, it is said "no man is to be deprived of his property by guessing or conjecture;" and in all the cases of dower this is carried to great length. In Hearle v. Greenbank, the intention by implication cannot be doubted, but the Chancellor would not put the infant to her election. And when we turn from those cases in which the Court have refused to put the parties to their election, to those in which they have been compelled to elect, on the ground of a condition annexed to the gift, we shall perceive very clearly how this doctrine is to be understood. As in Boughton v. Boughton, 2 Ves. Sen. 12, the condition annexed is, "that if any child or children of mine, or any in their right, or any who may receive benefit by my will shall any way litigate, dispute, or controvert the whole or any part of my will or codicil, or in any wise oppose the disposition which is made in all respects, shall forfeit his or their share; and the same is given to the residuary legatees." Here there was little doubt, for it is not disputed but that a testator in disposing of his estate may annex whatever lawful conditions he pleases to his bequests. The condition was express, and therefore the parties were held to comply with it. And such is the character of the cases of express condition, or condition so strongly implied (as it is stated in some cases)

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as to amount to express *condition. I think I do not venture too much when I say, that there is but one case among the great number referred to, which is in point as to the important fact, and on that I shall comment at large hereafter, viz. Ward v. Ward, Amb. 299. I have read, and as far as time would allow, have examined the cases, and there are none of after acquired property, except the one above referred to. They are all cases in which the disputes have arisen as to the property possessed by the testator at the time of his death, in which he has been disappointed in his disposition of it by some of those rules which have been considered as applicable to the doctrine of election, as to which however it appears that the Judges have been constantly differing. Now in all such cases, although there is some analogy, there is this great difference, that the point on which the case before us turns, was completely settled in those; to wit, the intention of the testator; for where a man makes a will and disposes of his whole estate, though that will be not formal, and consequently ineffectual, yet there is no difficulty in arriving at his intention. It is obvious, and always referred to as the guide of the Court: whereas in the case at bar the very question is, what did the testator intend? The case of Ward v. Ward is as follows: Thomas Ward made his will, and, reciting that he was seised of copyhold estate—though in fact he was not—devised all his real estate, &c. He afterwards purchased a copyhold estate, and surrendered it to such uses as he by his last will and testament should appoint, and died without making any other will. Lord Hardwicke held that the copyhold did not pass by the will, first, because the surrender was to future appointments, and secondly, because the words of the will did not extend to an after purchased copyhold, but only to such as he was seised of at the time of making it. The testator, after devising it to his wife, de-

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clares in his will that what he had be*fore given her should be in full of all dower and right of dower or thirds which she may have or claim in or out of his real estate. The copyhold which he had bought was, by the custom of the manor, liable to the widow's free bench. Held, that the devise is a satisfaction of the free bench, which is a customary right nomine dotis, and so declared by Bracton, and is instead of dower. This is the whole case as it is reported, and it will not be difficult to show that it cannot be supported even on the grounds assumed in the case. That if it could, it is no more than another

case in which a widow is considered as barred of all claim to dower in her husband's lands, when a legacy is given to her in his will upon that express condition. But lastly, the grounds assumed are wholly incorrect in point of law. The first point for determination was, whether the copyhold could pass by the will. The Lord Chancellor says it cannot, because the words of the will do not extend to an after purchased copyhold. For the same reason the testator could not have intended to bar his wife of her free bench, for the will did not extend to that, unless it be embraced in the term "dower." Then it is, or it is not embraced in that term. If it is, it has nothing to do with the case before us; if it is not, surely the Chancellor's calling it dower cannot make it such, although it was a convenient mode of disposing of the case. And if we could call the right of the wife to a distributive share of her husband's after acquired property, dower, we might dispose of the case in the same short way. But let us see whether his legal position, that the claim of free bench is dower, be correct. Free bench (francus bancus, i. e. sedes libera) is that estate in copyhold lands which the wife hath, on the death of her husband, for her dower, according to the custom of the manor. But it is said the wife ought to be espoused a virgin, and is to hold the

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lands only so long as she lives sole and *continent. Fitzh. 102. Of this free bench, several manors have several customs, and Fitzherbert calls it a custom whereby in several cities the wife shall have the whole of the lands of her husband for her dower. Fitz. N. B. 150. In the manors of East and West Enbourne, in the county of Berks, and in the manor of Tone in Devonshire, and other parts in the west of England, there is a custom that when a copyhold tenant dies, his widow shall have her free bench in all his customary lands casta et sola fuerit, but if she commits incontinency she forfeits her estates, though she may redeem them again by the ridiculous penance of riding on the black ram. Now it requires but little comment to show the distinction between such an estate or interest in the husband's lands, and dower. In some places it extended to all of the lands. In all, it was held only while she remained sole and continent, and she must have been a virgin when espoused. Now there are none of these constituents in dower. But what is conclusive in my mind as to the authority of the case is, that the Chancellor puts it on the footing of satisfaction. To me it appears somewhat singular that one thing can be said to have been given in satisfaction of another which was not possessed, unless it was so expressed, that a direct reference is made to the thing which might hereafter come into possession. So that in no point of view can the case be considered as authority, except to show that where property is given in bar of dower the widow is barred of dower in after acquired property—a doctrine however to which I shall never assent. I entertain strong doubts if Lord Hardwicke ever heard of the case of Ward v. Ward, and I think it a case which supports the opinion of Lord Eldon that Ambler is no authority. Since the argument, we have been referred to a case which seems to be considered in point, and therefore shall be examined. It is the case

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of Druce v. *Dennison, 6 Ves. 385. As a preliminary remark I observe the case had no relation to after acquired property. The subject in dispute was property given by the will and afterwards revoked by a codicil, so that as to that the testator died intestate. The claim of the widow was resisted on the ground of a marriage settlement, in which the word thirds, as well as dower, was used. Now, in the first place, this was not the construction of a will. It was formerly a conceded position that jointure is in bar of all subsequent rights of a wife. It is a purchase by the husband of all her property, and that is distinction enough to show the inapplicability of the case. At first the Lord Chancellor said this settlement was a bar as to the undevised property, and he says, "as to the word thirds, the clear intention must be taken to mean her interest in case of intestacy. If the word did not occur I doubt whether the personal estate would not have been included under the word dower. The word thirds is never used accurately. It is a sort of expression in common parlance descriptive of the interest upon an intestacy." These are passing observations of the Lord Chancellor in the course of the argument, yet, notwithstanding these two strong circumstances, as he seems to think them, he decided the case in favour of the claim. He begins by saying, that he will decide the case upon a ground different from that taken in the argument, and then goes on, "as to the other points, first, whether the settlement was a purchase of the wife's fortune. Upon so much of the case as appears to me, I do not think it was. According to the modern cases it is established, that the settlement for that purpose must either express it to be in consideration of the wife's fortune, or the contents of it altogether must import, and plainly import it, as much as if expressed. That is the result of the cases upon the subject, and it is not worth the while to consider in

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what respect the older cases are *unsatisfactory, involving inquiries not easy to execute." Notwithstanding, then, the passing observations of the Lord Chancellor, the case is strong in point as far as the analogy goes to the decision which is now made; and I will, as he did, cease to examine the old and analogous cases, a most unprofitable task, and come to those in which the point has been fully, clearly, and most explicitly decided,

both here and in England. In Roper's excellent Treatise on Husband and Wife, Vol. II. p. 24, speaking of the rights of the wife under the customs of London and York, and the statute of distributions, he says, "But there is one peculiarity which must be noticed, viz. that in the instance of the widow's title under the statute of distributions, whether the husband die intestate, or dispose of his personal estate by will, which fails by lapse, if the wife be barred of her distributive share by settlement before marriage, she will be equally excluded in favour of the next of kin, as of the particular legatee. This, however, is not the case when the husband by his will makes provision for his wife, stating it to be in lieu and bar of all her claims upon his personal estate, and then disposes of his personalty, and such disposition lapses, or is void, so that the fund becomes the property of the next of kin. The bar created in favour of the legatee will not be considered as extending to the next of kin; therefore, notwithstanding the expressions in the will, the widow will be entitled to a share under the statute of distributions." He goes on to observe, that Lord Alvanley found this principle recognised by Lord Cowper in Sympson v. Hulton, and upon the authority of that case decided the case of Pickering v. Lord Stamford. Now, in the case of Sympson v. Hulton, the words are, "all which devises and bequests he declares to be in full of her dower, thirds, and other claims, in law or equity, or by any local custom, to any other part of his real or personal property." Yet, as to a part of the property bequeathed in the very same

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will, *the wife took a share under the statute of distributions. And so in the latter case, Pickering v. Stamford, the words are in satisfaction of all dower or thirds which she could have, or claim, in, out of, or to all or any part of his real or personal estate, or either of them. If upon a lapse of the property contained in the same will, the widow was allowed to take a share under the statute of distributions, how much stronger is her claim to property not mentioned in the will, and clearly not within the contemplation of the testator. I shall conclude this branch of the case with a reference to the case of Cogdell v. Cogdell, [3 Desaus. 346,] in which our own Court made the same decision as in the two foregoing cases, and the widow was allowed to take a distributive share of the lapsed property.

As to the second question which is made in the brief, it has been most unnecessarily and unprofitably raised in the case; for, in the first place, the testator has himself provided by will in what manner and out of what funds the debts due by him shall be paid, and it ought to have been shewn that they were insufficient before such a question should have been raised. And secondly, the defendants, by their own shewing, in the accounts exhibited, have proved, that there were ample funds to pay the debts. By their exhibit G, it appears that they, the executors, owe to the testator the sum of $112,900, which was a fund in their hands at once, for the payment of debts. And by exhibit No. 2 of their amended answer, they shew that there is due to the firm $353,000, and that the debts amount to $120,000, leaving a clear balance of $233,000; besides the crops of three large estates, and exclusive of the personal property in exhibits F and O, which was sold. But as the Court are of opinion, that there is no sufficient ground to disturb the old and well established rule on this subject, they do not hesitate to confirm the decree

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*of the Chancellor on that point also, but they would not be understood to say, that it is so inflexible as not to be departed from on some occasions: not however, without express authority to the executor by a competent tribunal given, or by the will. Upon the question made as to the payment of the money due by the executors into Court, the Court is not sufficiently informed to make the order required. Although the defendants shew sufficient funds for the payment of the debts, yet a report by the Commissioner is necessary; and on going before him, they may show that the debts have been paid, as far as their own debt due to the estate would go, and that they have been diligent in collecting the other debts. But if on such investigation it should be found that the affairs of the estate are still in the same situation, the Court will not hesitate to enforce any order which may be made, in conformity with the practice of the Court, for carrying into effect the will of the testator.

NOTT, J. (some of his friends being concerned) gave no opinion.

Decree affirmed.

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2 McCord, Eq. 317

MARY ROWLAND and Others v. ELIZABETH BEST Executrix of Benajah Best Deceased.

(Columbia. Jan. and May Terms, 1827.)

[*Account* ⇐15; *Estoppel* ⇐70.]

A party who lies by and suffers another to occupy and enjoy property or funds as his own under an apparent and bona fide good title which he might have brought into discussion much earlier, will be restricted in his demand for an account to the time of his demand, or to four years before the filing of his bill.

[Ed. Note.—Cited in Riddlehoover v. Kinard, 1 Hill, Eq. 381; Boyce v. Boyce, 5 Rich. Eq. 268; Scaife v. Thomson, 15 S. C. 368.

For other cases, see Account, Cent. Dig. § 72; Dec. Dig. ⇐15; Estoppel, Cent. Dig. §§ 183–187; Dec. Dig. ⇐70.]

[*Trusts* ⟸219.]

The rule for calculating interest on accounts, against persons in a fiduciary situation, is to allow interest on the annual balances, but not to be compounded.

[Ed. Note.—Cited in Huggins v. Blakely, 9 Rich. Eq. 410.

For other cases, see Trusts, Cent. Dig. § 317; Dec. Dig. ⟸219.]

[*Executors and Administrators* ⟸121.]

[Cited in Harvin v. Riggs, Rich. Eq. Cas. 291, to the point that A. proved before the ordinary a supposed nuncupative will, by which the whole estate of the deceased was given to him (A.), and took out administration c. t. a. The probate was afterwards vacated and the administration revoked. *Held* that, there having been no impediment in the way of the next of kin, A. should be charged with the income of the estate for four years only, prior to the filing of the bill against him for an account.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 493; Dec. Dig. ⟸ 121.]

[This case is also cited in Johnson v. Pelot, 24 S. C. 263, 58 Am. Rep. 253, without specific application.]

The original bill in this case, filed 23d of July 1822 against Benajah Best, stated that the complainants were the next of kin of

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Elizabeth Purvis, late of Barnwell *district, deceased. That Elizabeth Purvis was, in her life time and at the time of her death, possessed of personal estate of about the value of two thousand dollars, and some time in the year 1807 departed this life intestate, whereupon her estate became distributable among the complainants as the next of kin. That on the 22d of August 1807 Benajah Best, pretending that the said Elizabeth Purvis had made and duly published a will in his favour, made an ex parte application to, and obtained from the Ordinary of Barnwell district, letters of administration with such pretended will annexed, possessed himself of her estate; and has ever since used the same as his own property. That the complainants had made application to the said Benajah Best for an account of the estate, and for him to pay and deliver the same to them. And although the Ordinary of Barnwell district did, on the 28th of June 1823, adjudge and decree that Elizabeth Purvis died intestate, and did also by his decree revoke the said letters of administration, yet Benajah Best refused to render any account of his administration, or to pay and deliver the estate to the complainants, pretending that Elizabeth Purvis was at the time of her death insolvent, and that her debts had exhausted the estate, which pretences the complainants charged to be untrue, and prayed that the defendant might come to a fair and just account touching the estate, and pay and deliver the same to them.

On the 9th of November 1824, Benajah Best filed his answer, and admitted that Elizabeth Purvis died in July 1807; that believing she had made a valid nuncupative will bequeathing her whole estate to him, he proved the same in the Court of Ordinary soon after her death, and received letters of administration. That the administration had been revoked by the Ordinary, and Elizabeth Purvis declared to have died intestate; and that a person representing himself to be the

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agent of the com*plainants demanded a settlement; but whether the complainants were the next of kin to Elizabeth Purvis he was ignorant, and therefore refused to come to any account. The defendant also alleged that the estate was involved in debt and litigation which he was obliged to pay off and sustain. He was ready to account if complainants proved themselves the next of kin of Elizabeth Purvis; but insisted that, from all the circumstances, the account should not be carried farther back than from the time of the demand.

Benajah Best having departed this life, the case was revived against Elizabeth Best his representative; and the matters of account were referred to the Commissioner, who reported the sum of $1709.15¼ cents as due to the complainants.

To the Commissioner's report the defendant excepted.

First. Because the account ought not to have been carried back further than the filing of the bill, or at most, no farther than four years before the filing the same.

Secondly. That upon the principle on which the report of the Commissioner is founded, it gives the complainant interest upon interest; whereas the true mode of computing it was to strike an annual balance, and calculate the interest upon that balance for one year, deducting every year the credits from the principal and keeping a separate interest account, and at the end of the account add the sum total of interest to the balance of principal.

De Saussure, Chancellor. This case comes up on the report of the Commissioner, and exceptions thereto.

The first exception is because the account ought not to be carried further back than the filing of the bill, or at most no further than

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four years before the filing of the *same. This exception rests upon the ground that by a nuncupative will, established by the Ordinary in 1807, the property was decided to belong to Benajah Best, and he occupied and enjoyed it accordingly till the year 1823, when the will was set aside by the Ordinary and this bill was filed for an account. This is a hard case on the family of Benajah Best, and I am inclined to think, though not without much hesitation, that the account ought not to be carried back further than four years before the filing of the bill. It is not an uncommon case for a party, who lies by and permits another to occupy and enjoy

property or funds as his own, under an apparent good title which he might and ought to have brought into discussion much earlier, to be restricted in his demand for an account of rents and profits or interest, to the filing of the bill or four years before. In the present case the party lay by from 1807 to 1823. It would be hard on the family of Best, after his death, to carry the account for interest further back than four years before the filing of the bill, or to the death of Benajah Best. It is therefore ordered and decreed that the account be limited to the period of four years before the filing of the bill. The cases, in relation to the time when the account of rents and profits or of interest should commence, are very various and perhaps somewhat discordant. On examining them it would appear, that where the possession was not obtained or held by fraud, but fairly, on a title apparently good—afterwards found to be defective, and especially after the death of the holder, when his family may not be able to make out or substantiate the accounts by vouchers, it is not proper to carry back the account further than four years from the time of filing the bill. Indeed in Hercy v. Ballard, 4 Bro. C. C. 468, the account was restricted to six years in consideration of the application of the statute of limitations. And in Read v. Read, 5

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Ves. *744, the account of rents was confined to six years by analogy to an action for mesne profits.

The second exception relates to the mode of calculating interest on the annual balances. The rule is to allow interest on the annual balances, but not so as to allow compound interest. It is very easy to make up accounts in that way, as stated in the second exception: and it is ordered to be done accordingly.

From this decree the defendant appealed: because the complainants were barred by lapse of time, and that the account should have been restricted to the time of the demand.

The complainants also appealed, on the grounds:

First. That they were entitled to interest on the amount in the hands of the defendant or the testator, after allowing a reasonable time for the settlement of the estate.

Secondly. That the rule of law on the subject of calculating interest, is to deduct the expenditures for the first year from the funds in hand on the first day of the year, allow interest on the balance, and add it to the principal at the end of the year. On the first day of the second year deduct the disbursements of that year from the amount of principal and interest thus added together, calculate interest on the balance, and so on from year to year.

Thirdly. That wherever the trustee has used the fund, interest ought to be allowed on the annual balance of the principal and interest.

Fourthly. That by the decretal order the defendant ought to have been made liable for the costs.

Martin, for the complainants, cited 3 Johns. Cha. Rep. 190. 208. Bonny v. Ridgard, cited

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in 4 Burr. 130. *138. 17 Ves. 97. Andrews v. Wrigly, 4 Bro. Cha. Rep. 125. Beckford v. Wade, 17 Ves. 87. Kane v. Bloodgood, 7 Johns. Cha. Rep. 90. Dormer v. Fortescue, 3 Atk. 130. S. C. Cas. Temp. Hard. 183. Pettiward v. Prescott, 7 Ves. 540. Pulteney v. Warren, 6 Ves. 73. Green v. Biddle, 8 Wheat. Rep. 1. 4 Bro. C. C. 521. Harmood v. Oglander, 6 Ves. 199. 10 Ves. 466. 476. Bond v. Hopkins, 1 Sch. & Lef. 428. Hovenden v. Lord Annesly, 2 Sch. & Lef. 624. 5 Ves. 744. Costs are not subjects of appeal. Harp. Eq. Rep. 260. Eastburn v. Kirk, 2 Johns. Cha. Rep. 317. 1 Johns. Cha. Rep. 166. 1 Johns. Cha. Rep. 77. 2 Johns. Cha. Rep. 274. 4 Johns. Cha. Rep. 419. 5 Johns. Cha. Rep. 441.

Pattison, for the defendant, cited Ashburnham v. Thompson, 13 Ves. 403. Raphael v. Boehm, 13 Ves. 408. Scheiffelin v. Stewart, 1 Johns. Cha. Rep. 620. As to costs, he cited Seers v. Hind, 1 Ves. Jun. 294. Piety v. Stace, 4 Ves. 620. Roche v. Hart, 11 Ves. 60. Mosely v. Ward, 11 Ves. 581. Manning v. Manning, 1 Johns. Cha. Rep. 536.

Curia, per NOTT, J. I should have been better satisfied in this case, if interest had been allowed only from the time of the demand. But as the Chancellor had all the testimony before him, perhaps he had a better opportunity of judging of the matter. In all other respects I am satisfied with the decree. I have therefore, upon the whole, concluded to concur with the Chancellor.

Decree affirmed.

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2 McCord, Eq. *323

*ROBERT HENRY and Wife v. ABRAM FELDER.

(Columbia, Jan. and May Terms, 1827.)

[*Perpetuities* ⇐4; *Wills* ⇐610.]

Where personal property is given by will to the first taker in words which would give an estate tail or a fee conditional at common law in lands, and is then limited over by way of executory devise to a person in esse, the limitation over is too remote and is void, and the first legatee takes an unlimited estate.

[Ed. Note.—Cited in Brummet v. Barber, 2 Hill, 553; Cox v. Buck, 5 Rich. 606; Lyon v. Walker, 8 Rich. 309; Stevens v. Patterson, Bailey, Eq. 44; Hinson v. Pickett, 1 Hill, Eq. 39; Cordes v. Ardrian, 1 Hill, Eq. 156; Hill v. Hill, Dud. Eq. 79; Addison v. Addison, 9 Rich. Eq. 68; Mendenhall v. Mower, 16 S. C. 313; Dunlap v. Garlington, 17 S. C. 572.

For other cases, see Perpetuities, Cent. Dig. § 23; Dec. Dig. ⇐4; Wills, Cent. Dig. § 1381; Dec. Dig. ⇐610.]

[*Perpetuities* ⟸4.]

Property in South Carolina cannot be limited over beyond lives in being and twenty-one years and nine months.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4–44; Dec. Dig. ⟸4.]

[*Wills* ⟸603.]

A fee conditional may be created of an annuity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351–1359; Dec. Dig. ⟸603.]

[*Perpetuities* ⟸4.]

The rule that a limitation over after words which would create an estate tail in the first takers is void, is applicable, though the property be of a perishable nature, as negroes, &c.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 23; Dec. Dig. ⟸4.]

[*Perpetuities* ⟸4.]

Neither the limitation to one in esse, nor the nature of the property so limited by will, can render it valid where it is given after an estate to the first taker, and the heirs of his body.

[Ed. Note.—Cited in Brummet v. Barber, 2 Hill, 553; Cox v. Buck, 5 Rich. 606; Lyon v. Walker, 8 Rich. 309; Stevens v. Patterson, Bailey, Eq. 44; Hinson v. Pickett, 1 Hill, Eq. 39; Cordes v. Ardrian, 1 Hill, Eq. 156; Hill v. Hill, Dud. Eq. 79; Addison v. Addison, 9 Rich. Eq. 68; Mendenhall v. Mower, 16 S. C. 313.

For other cases, see Perpetuities, Cent. Dig. §§ 4–44; Dec. Dig. ⟸4.]

This case arose upon a clause in the will of William M'Connico. The testator bequeathed a negro slave to Elizabeth Conlietle, with a limitation over to Mrs. Henry, who was the eldest child of the testator's daughter Nancy Connors, and the niece of Miss Conlietle, the late wife of the defendant Abram Felder. The complainant's wife was two or three years old at the execution of the will. The words of the will were as follows: "I give and bequeath to Elizabeth Conlietle a negro girl named Dinah, the child of Patt, to be to her and the heirs of her body, lawfully begotton, forever, but on failure of issue, to go to the eldest child of my daughter Nancy Connors."

Chancellor Thompson held the limitation too remote. "The words 'heirs of the body' in a devise of real estate create an estate in fee tail, and in the executory limitations of personalty are on contingencies too remote, and the whole property goes to the first taker; for whatever words would directly or constructively give an estate tail in lands, will give the absolute property in personal estate."

The complainant appealed.

M'Cord, for the appellant. I am well aware of the case of Guerry v. Vernon, 1 Nott & M'Cord, 69. That case was decided in conformity with the English rule, and if that rule be applicable to this country, there is no doubt that the limitation in this case is too remote and void. Intention was to prevail,

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if the inten*tion is to do an act consistent with law. All the cases of this class in England failed, because the intention of testators there was either actually to give an estate tail in personal property, from their habit of giving such estates in real property, thereby attempting to do an act contrary to law, or to give personal property jointly with real property in the same clause without any distinct idea of the law on the subject; and having used technical words to convey a certain description of estates existing in that country, they are not allowed to deny to those words the force which their law gives them. But why should intention be so trammelled here? We have no estates tail. They never existed in this state. The New York cases do not apply, because estates tail, which existed in that state until their act of 1786, are by that act converted into estates in fee simple; and words that would give an estate tail are expressly declared to give thereafter a fee simple. Wilkes v. Lion, 2 Cowen's Rep. 387. "Wills are individual." 3 Brod. & Bing. 85, per Dallas, C. J. "The nonsense of one man is not the sense of another." Smith v. Coffin, 2 H. Black. 444. "The Courts decide on the will of the man and not of other men." Id. per Buller. "Hardly any words are to be found of so stubborn and inflexible a meaning as not to bend to the plain sense of the context." 13 East, 509, per Ellenborough. The same words were used in 16 East, 220. "Cases in the books upon wills may serve to guide us with respect to general rules in the construction of devises in wills; but unless a case cited be in every respect directly in point and agree in every circumstance with that in question, it will have little or no weight with the Court, who always look upon the intention of the testator as the polar star directing them in the construction of wills." Per Wilmot, C. J. 3 Wilson, 142. The same words were used by Lord Hardwicke, in

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Lethieullier v. Tracy, 3 Atk. 782. "Par*ticular cases serve rather to obscure and confound than to illumine questions of this kind; and no case in the books exactly tallies with the present. Therefore the gentlemen who have argued this case have acted very properly in mentioning only a few; and have rightly put it on the intention of the testator." Per Wilmot, in Baddeley v. Leffingwell, 3 Burr. 1541. S. P. in Long v. Laming, 2 Burr. 1112. "Wills must be construed according to the particular words. The circumstances and views of the testator, everything bearing on the subject, must be taken together." 1 Ball & Beatty, 264. 5 Barn. & Ald. 18. 64. "The state of the family at the time of the execution is to be attended to." 3 Dow's P. C. 68. "The object of the Court is always to comprehend as many as by fair construction of the will could fall within it." Id. 74. See Cowp. 841. In Jenkins v. Herries, 4 Madd. the Vice Chancellor supplied

the words "without issue" to complete the intention. Vaughan v. Ferrars, 2 Ves. 186. Ventris, 373. "If he should so long live" were supplied in Coryton v. Hellier, 2 Ves. Sen. 295, by Lord Hardwicke. "The Court will read the will according to the intention." 4 Ves. 316. "You need not cite cases: it is a principle." Per Lord Mansfield, in Morgan v. Jones, Loft's Rep. 165. In Campbell v. Vaughan, Loft, 268, Lord Mansfield stopped the counsel citing cases, and asked if they were in the same words—"if they are, you have great luck; if not, you had better confine yourself to the general argument; for it depends on the precise words." The able counsel in that case in the very next page admitted that every ignorant man, where he uses the words "heirs male or issue male, means the same as sons and no more." So the words issue and heir sometimes have been held to mean child or children. In Luddington v. Kime, a leading case, 1 Ld. Raym. 206, the Court says, Then in common speech, when a man has a son, it is said that he

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*hath issue; so that it is almost the same thing as if he had said, if Abers Armyn shall have a son. And this is not a strained construction, considering all the circumstances of the case; for in Burchet v. Durdant, 2 Ventr. 311, the Court expounded the words [heir then living] to be all the one as the word "son." Let us then read the words of this will according to the intention, and what would they be? "I give, &c. to Elizabeth Conlietle a negro girl named Dinah, &c. to her for life, and at her death to her children, but if she have no children to go to the eldest child of my daughter Nancy Connors." This evidently was the intention of the testator, because he aimed to give something to Mrs. Henry who was then in esse, the eldest child of Nancy Connors, and of course known to her grandfather, for whom it must be supposed her grandfather did intend an individual benefit. The rule as to intention was better laid down by Judge Blackstone in Perrin v. Blake, than any where else. Hargrave's L. T. 589. 595. That intention cannot prevail against established law or fundamental principles of the government, as for instance, to create a perpetuity, &c. which the learned Judge distinguished from a supposed rule, that the intention must be consistent with decided cases; for the testator might use words intending differently from a decided case, and yet not violate a fundamental principle of law.

It is said by the Chancellor that as the words, if applied to lands, would give a fee tail, they would give a fee simple in personal property. But the Chancellor was wrong in his predicate. For the words, instead of giving an estate tail in real property, would give in this state a fee conditional at common law. Cruger v. Heyward, 2 Desaus. Rep. 422. Murrell v. Mathews, 2 Bay's Rep. 398. Jones v. Postell, Harp. Law Rep. 94. Issue at common law was always construed a word of purchase; but having been used in the stat-

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ute *de donis to describe an estate tail, after that statute in the English cases it is confined, at least prima facie, to import word of limitation. As that statute was never of force here, this word must, in our jurisprudence, maintain its common law meaning. 16 Johns. Rep. 405. At an early period we are told, not to have issue was understood not to have children, and that confined to the time of the death; as in Sonday's case, 9 Coke, 127, where, "if he have no issue male were held the same as if the will had said if he die without issue male." If, previous to the statute, it meant the same as these latter words, then Forth v. Chapman, 1 P. Wms, 668, was an authority to show that these words, if he die without issue, would give a good executory devise of personal property. 3 Atk. Rep. 288. 2 Ves. Sen. 610. 180. 125. Cowp. 410. 9 Ves. 197. 203. Timberlake v. Graves, 6 Munf. Rep. 174. Gresham v. Gresham, 6 Munf. Rep. 187. James v. M'Williams, 6 Munf. Rep. 301. Cordles v. Cordles, 6 Munf. Rep. 455. 2 Call's Rep. 313. 2 Munf. Rep. 425. 1 Gilmer, 109.

But to effectuate the intention in Forth v. Chapman, the same clause, comprehending real and personal property, was held to mean one thing as to the real and another thing as to the personal property. Although the words did give an estate tail in the real property, yet the Court held that they gave but a life estate, with an executory devise over as to the personal, merely to prevent the intention being defeated. And after this case, are we to be told of the rule in Fearne and Blackstone, that where the words would give an estate tail in lands, it defeats the intention of the testator as to the personal, on account of his attempting to create an estate tail of that kind of property, by using words which would give such an estate in lands? Clearly, Forth v. Chapman shews that, even in England, where estates tail do

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ex*ist, that rule will be controlled by intention. But here, where the rule never existed—where estates tail were never heard of—where the testator could not make an estate tail if he tried, the intention of half the testators of the country are to be defeated, in consequence of a supposed intention to do an illegal act, which act it was impossible for him to do; and to prevent the consequences of an impossibility, his will is declared void and inoperative. He is presumed to have intended to create a perpetuity, which he could not create to save his life, and being supposed to intend such impossibility, it avoids his will. But what is worse: to find out this intention they look to a law of a foreign country, which was never of force here, and they first presume that he knew all about such law, and intending to

comply with it, expressed himself in the language of such law, and thereby destroyed his will. Such another non sequitur was never dreamed of, but in the Common Law Courts. Previous to the statute de donis, personal property was but of little value in England, and no rule can be shown to have existed on this subject in relation to personal property anterior to that time. It follows generally as an incident to real property, under the same words and conditions. The law of personal property, when it has no rule of its own, follows the law of real property. 2 Kames's Eq. 333, 334. It was upon this principle that the English rule of construction originated, and whatever would give an estate tail in real, was held to vest a fee simple in the first taker, because as an estate tail could not be created of personal property, the limitations were void, and therefore the first taker took the whole. It seems undeniable sense that all decisions growing out of a statute never of force in the country fall under the head of cases that are inapplicable to our laws. The statute of 1734, Grimke's Executors, 71, does not leave us altogether

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without a rule. *It expressly preserves the fee conditional of the common law. Lay aside, then, all the English cases since the statute de donis, which take their character from the law of estates tail, and refer back to the common law, and let us see what operation it would have upon this will. It is a mistake to suppose that the right to alienate lands did not exist before the statute of fines in Henry VII., which is said to be a mere copy of a statute of Richard III. 1 Hallam's Const. Hist. 12. Indeed the statute de donis was made to protect the issue from the alienation of the ancestor, and would not have been necessary if the right of alienation, under the fee conditional at common law, did not exist. If the right of alienation existed, then there could have been no fear of a perpetuity, which was the true foundation of the rule assumed by the Chancellor, deduced by the English from their statute de donis conditionalibus, which precluded all alienation, until the unauthorised decision in the case of Taltarum, in the reign of Edward IV. Devises were allowed in England at a much earlier period than is generally stated in the orthodox writers on the subject. As early as Henry III. property of all kinds could be acquired by gifts, succession, or will. In Reeves's History of the Common Law, 217, a conditional gift is described. A freehold and a fee could be raised by a condition out of the same estate: after the freehold or life estate the fee simple commenced. Reev. Hist. Com. Law, 218. The statute de donis was passed, because the Judges nipped these conditional fees. Reev. Hist. Com. Law, 400, quarto edit. But before the statute of wills of Henry VIII. it is said, "If one devise by custom [for the fact is the country was governed by various customs as in France to a late date] the common law accepted his intention without requiring particular words of limitation, and as it was in devises before the statute, there is the

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same reason *why it should be so since." Bridgwater v. Bolton, 1 Salk. 237. S. P. Stephens v. Stephens, Select Cases, 173. And no case can be produced previous to the statute de donis, which construed the limitations of real and personal property differently. And as these limitations were allowed in wills, if wills were not permitted of real property until the statute of wills, they must have been limitations or conditional gifts of personal property. What the law had been as to real propery had been already shewn. The nature of a fee conditional does not tend to a perpetuity. The first taker takes a life estate if he has no issue. If he has issue, the condition is performed, and he takes a fee subject to alienation. If he takes no fee, it reverts. In Britton, 93, a devise to a man and his wife, and to the issue begotten by them in lawful matrimony, it is said, nothing would accrue to the purchaser, but a freehold for life, and a fee to their issue. Reeve, 411. There can be no doubt, that if the devise is so worded that the issue take by purchase, and there are none, that the limitation over is good under that class of cases called contingencies with a double aspect; as in Fonnereau v. Fonnereau, Doug. 509. Baldwin v. Karver, Cowp. 313. Gulliver v. Wickett, 1 Wils. Rep. 105. In Jones v. Morgan, Lord Mansfield said he knew of no case of a remainder or conditional limitation over of a real estate, whether the first limitation were by way of particular estate, so as to leave a proper remainder, or to defeat a prior absolute fee by a conditional limitation, but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place. Preston on Cross Remainders, 71. Avelyn v. Ward, 1 Ves. Sen. 423. Baldwin v. Karver, and Fonnereau v. Fonnereau held the rule applicable to personal property. The rule should apply in all cases where the words

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were such that, if applied to lands, *they would give a fee conditional. As to the contingency with a double aspect it is nothing more than the contingency upon which the fee conditional is given. It is given to the first taker in fee, upon condition that he have issue, and if not it goes over by way of executory devise, at the death of the first taker, to the eldest child of Nancy Connors, if any body should be in esse at the time to take in that character. Instead, therefore, of saying that the words would give an estate tail in lands, and therefore the will is void as to personal property, it should be held,

that as they give a fee conditional in real property in this state, that if the contingencies of that estate must happen within lives in being, that then, as to personal property the words are such as will give a valid executory devise to the eldest child of Nancy Connors. This would be preserving analogy in our law.

In Jones v. Postel, the words of the devise to William Snipes were "to him and the heirs of his body for ever." "If," says the Court, "in the interpretation of this devise, we were to apply the broad rule, that the intention of the testator, to be collected from the plain and obvious meaning of the words, should prevail, the mind would not hesitate in the conclusion. Indeed the import of the terms is so pointed, that it is difficult to render it more clear by the substitution of others. It is a clear expression of the will of the testator that the son, William Snipes, should take only a life estate, and that the heirs of his body should take an unconditional fee, and in default of these, that the land should revert to the heirs general of the testator." In fees conditional, the issue only take upon the death of the first devisee. But if there are no issue to take, the freehold, upon which the fee was to have been built (as has been cited from Reeves's Hist. 219), determines, and that fee not vesting, the subsequent fee, limited by way of executory devise, would immediately vest, and there-

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fore it would not *be too remote; and whether a case exactly of a double aspect or not, it would be a valid executory devise. Suppose this had been a devise of lands. Miss Conlietle would have taken a fee conditional, and, upon her dying without issue, the devise over to Nancy Connors's eldest child (Mrs Henry) would have been good, because Miss Conlietle would have taken but a life estate, and the limitation over being to take place upon a failure of issue, it would be construed a failure of issue at her death, or in other words, upon condition if she have children, then to them in fee; if she have none, to Mrs. Henry; as in the case of Wellington v. Wellington, 4 Burr. 2165, and Fonnereau v. Fonnereau. Then suppose the clause comprehended real and personal property, would it be said to be good for one and void for the other, upon a principle directly the reverse of Forth v. Chapman; to defeat rather than effect the intention. See Reeves's Dom. Rel. 482, 483, 485. In Long v. Laming, 2 Burr. 1106, 1112, the Court construed the word issue to mean children to effectuate the intention: and the devise here might be construed upon failure of children, which would mean, if she have no children, then over to Nancy Connors's eldest child; but if she have a child or children, then to them in fee.

Lord Mansfield, in Long v. Laming, says the rules of construing limitations are different, as to gavelkind lands, from ordinary cases, and that heirs in such cases may mean words of purchase. From this authority it is to be inferred that the rule in Shelley's case did not apply to gavelkind lands, supposing that it applied in any other cases than estates tail, which would not now be mooted: yet it was very questionable if the rule would apply to lands in this state since our abolition of the laws of primogeniture; our tenures being altogether allodial.

Another class of cases is, where the limitation over is to a person in being, it is re-

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stricted to the death of the *first taker. It can never be a perpetuity while limited to a person in being, because the intention is that the executory devise should vest in the life time of the devisee, and it is for these reasons that executory devises were first allowed. Gore v. Gore, 2 Barnard. Rep. 209. Stephens v. Stephens, Select Ca. 171. The word survivor has been sufficient in some cases. Anderson v. Jackson, 16 Johns. Rep. 398, where lawful issue was held to mean children. Pells v. Brown, Cro. Jac. 590. Porter v. Bradley, 3 Term Rep. 146. Keating v. Reynolds, 1 Bay's Rep. 80. Massey v. Hudson, 2 Meriv. Rep. 133. In Keely v. Fowler, Fearne, 488, the limitation over was supported, because it was to come back to executors, persons in esse, and it was considered personal as to them. This case is thought to be exactly in point (Lyde v. Lyde, 1 Durn. & East's Rep. 593); for if Nancy Connors's eldest child was not in esse at the time, nobody else could take, and therefore it must happen during the life of Nancy Connors's eldest child, who was in esse when the will was made, and so stated in the bill. If any body answering to the character of eldest child could take, then the limitation would be void, as it might not happen for eighty or ninety years after Nancy Connors's death. For in the case of West v. The Primate of Ireland, 2 Cox's Rep. 258, where a legacy was left to a person's seventh child, it was held, that the seventh child having died before the period of payment, the eighth, then being the seventh, could not take. And although in Anderson v. Jackson, 16 Johns. Rep. 398, the legacy was considered a vested legacy, yet the word survivor was held sufficient to show it was intended as a personal benefit to take place during the life of the person to whom the benefit was individually intended. In Jee v. Audley, 1 Cox's Rep. 324, the legacy was in default of issue of H. to be equally divided between the daugh-

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ters then living of my kinsman *John Jee. The Master of the Rolls said that these words intended to take in after born daughters; it was not to a daughter living at the time of his death, but to any daughters he

might have living when the issue failed, which might not happen for fifty years. He then says, 'if it had been given to a daughter, living at the time of the testator's death, it would have been very good." Now, according to the case of West v. The Primate, nobody could take as the seventh child or the youngest, but such as were bona fide the seventh or youngest. If that case was law, then none but Mrs Henry could take, as she was living when the will was made and at the death of the testator, and an afterborn child could not take as eldest.

Another class of cases supported the limitation, when the nature of the property was not suitable to a supposition of an indefinite failure of issue. In Keely v. Fowler, Fearne, 482, 483, the words were restricted to dying without issue living, from the fact of the property being cows, horses, &c. "He said that giving chattels, such as cows, horses, &c. was not suitable to a supposition of an indefinite failure of issue." In Richardson v. Noyes, 2 Mass. Rep. 63, the Court say to the supposition that the testator meant an indefinite failure of issue, as to negroes, &c. "an event which might not take place for a century." A period when neither the negroes nor the husbandry tools could be in existence? The supposition is absurd. This view of the subject shows clearly that the event contemplated by the testator, which was to give a right by survivorship was to happen within the lives of the immediate devisees; and therefore it cannot be considered as an estate tail, where the estate continues until there is an indefinite failure of issue." So in limitations of a term for a life or lives in being. Fearne, 488. In the testator's will no words of inheritance are

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attached to the devise over to Mrs Hen*ry: a circumstance to show that it was intended for the individual. The Court, in Richardson v. Noyes, say, "in construing language, the customs, manners, habits, or laws relative to the subject matter of it are to be taken into consideration." Where the words have two meanings, that should be given to it which is most reconcileable to the nature of the property. Target v. Grant, Gilb. Eq. Rep. 149. 16 Johns. Rep. 402. And as to personal property, the words are to be taken in the vulgar sense. 16 Johns. Rep. 430. Cowp. 410.

Chappell, for Felder, submitted the case without argument.

Curia, per COLCOCK, J. This case has been kept under advisement for some months, not because the Court entertained any doubt on the subject, but because a deep interest seemed to have been taken in the case which had led both the counsel and the party into an elaborate discussion of the subject, and on the part of the former, a bold and direct attack upon what he admits has been the long established doctrine on the subject. In the course of this discussion, much learning and research have been displayed. But similar efforts have been repeatedly made in cases, in all their important particulars, like the case before us.

We cannot pretend to be more wise than our predecessors, and we consider ourselves as bound by the authority of decided cases; and more imperiously bound by the principles established from the earliest system of jurisprudence. If we adhere to these, the case can admit of no doubt.

The words of the will under which the complainant claims are, "I give and bequeath to Elizabeth Conlietle a negro girl named Dinah, the child of Patt, to be to her, and the heirs

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of her body lawfully begotten, for *ever; but on failure of issue, to go to the eldest child of my daughter Nancy Connors." And the complainant sets forth, that he intermarried with the said Nancy Connors, who was alive at the time of the making of the will, and the death of the testator.

On the part of the complainant it is contended, first, that it is clear the testator meant, if Elizabeth Conlietle died without issue alive at the time of her death, that Nancy Connors's eldest child should take, and that the intention of the testator is to prevail against all technical construction. Secondly, as she intended a benefit to a person in esse, it is clear that she did not mean to erect a perpetuity by which she must have been excluded from any benefit, and that such intention should restrict the operation of the generality of the words, "heirs of her body forever." Thirdly, that the doctrine, that where an estate tail would be created in a personalty, it shall vest in the first taker, has been built on another doctrine not known to our law, and therefore, the first taker ought not to take absolutely, but only a life estate. Fourthly, that as the property was in its nature perishable, the testatrix could never have intended to create a perpetuity.

To this it was replied on the part of the defendant.

First. That the limitation over was too remote, and consequently void, it being after an indefinite failure of issue.

Second. That whatever the testatrix may have intended, she had by her will created a perpetuity.

Third. That it has been uniformly decided, that where the words were such as would create an estate tail in real property, that when applied to the property so devised, it should vest absolutely in the first taker.

I shall not observe the order which has been pursued in the course of the argument, for though it may have been the best for that

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purpose, I do not think it the best *for decision. It is not our duty to say what the

law ought to be, or how it could be amended; but to declare what it is. It is not a difficult task to present strong objections to many of the rules of law, but when we take the whole as a science, it will be found dangerous to lend too ready an ear to plausible objections to particular parts of it. There is no science without its arbitrary rules, for such are all first principles; and that which is so loudly complained of in this case will be found to be based on public policy, which must be permitted at all times to prevail over individual convenience.

The law abhors perpetuities, as having a tendency to tie up property in the hands of particular families, and prevent it from producing those beneficial effects which would result from a free circulation of it. It has therefore declared, that where personal property is limited over upon any contingency beyond a life or lives in being and twenty-one years, that such limitation shall be void. And to this effect is the first rule laid down by that admirable writer Fearne in p. 444 (7th Lond. Edit.), to which has been added, as a useful and valuable introduction to the subject, an extract from Lord Hardwicke's argument in Wicker v. Mitford. After laying down the rule, that whenever an executory devise is limited to take effect after a dying without heirs or without issue subject to no other restriction, the limitation is void; he proceeds, "when executory devises were first permitted, it was foreseen that entails made in that form could not be barred by fines and recoveries. If they were of real estate, the executory devise could not be barred by fine, because the title of the executory devise is not through, or as privy to the immediate taker, but quite independent of him; nor could the executory devisee be affected by a recovery, it being long settled that the recompense which in the supposition of law is the ground of barring the issue in tail and those

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in remainder and reversion, *doth not extend to an executory devise. If they were personal estate, whether chattels real or personal, from the nature of the property they could not be the subject of either fine or recovery. Entails by executory devise being thus exempt from any legal mode of barring them, it became necessary to prescribe bounds and limits to this new species of settlement, lest otherwise entails should obtain a longer duration, through the irregular and rarely permitted medium of executory devise, than the law endures where the entail commences in the regular way by creating estates for life and estates tail with remainder over. Hence originated the rule both in Law and Equity, that the contingency on which executory devises depend, should be confined to a stated period. And by analogy to the case of strict entails which cannot be protected from fines and recoveries longer than the life of the tenant for life in possession and the attainment of twenty-one years by the first issue in tail, it was at length settled that the longest period for vesting of an executory devise, should be any life or lives in being and twenty-one years after; to which may be added a few months more to the case of a posthumous child. Therefore every contingency which is not such that if it ever happens it must necessarily be within the period so described, is too remote for an executory devise. The consequence is, that it is not lawful to limit an executory devise on a general and indefinite failure of issue; namely a failure of issue of the person named whenever it happens, be the time of the event ever so distant. It is equally a consequence of the rule that if the failure of issue is restrained to the death of any person or persons actually living, or to a period not beyond a life and lives in being and twenty-one years (with a few months beyond), then the contingency is good and the executory devise has its full effect. Perhaps if the doctrine of executory devises were res

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inte*gra and now to be settled, it might be thought a sufficient and more just check of them to hold, that they should be good as far as the given period, whether the contingency was too largely and widely expressed or not. But our ancestors have not left us a choice, it having been long a fixed rule, that if the contingency is too remote the executory devise dependent upon it shall not be merely void so far as it exceeds the line prescribed, but shall wholly fail." I have made this long extract with a view to prevent the necessity of referring to other authorities, as herein is to be found the essence and the origin of the rule.

But in addition to the rule that a limitation over after an indefinite failure of issue is void, is another equally imperative, which operates against the complainant's claim, that neither a fee conditional at common law nor an estate tail can be created out of a term for years in any personal chattel (except in the instance of annuity). 1 Bro. 273. Hargrave's Co. Litt. 20, and Fearne, 345. In referring to Fearne it will be found that in addition to the case of Stratton v. Payne, 3 Bro. Parl. Ca. 257, he refers to Pelham v. Gregory, 5 Bro. Parl. Ca. 435, and the Duke of Montagu v. Lord Beaulieu, 6 Bro. Parl. Ca. 255. And he succinctly lays down the rule, "that the limitation of personal estate to one in tail vests the whole in him, is proved by many cases," and refers to those above mentioned. With equal accuracy, but descending more into particulars, this rule is thus expressed by Roper in his treatise on the Law of Legacies, 2d edit. p. 393. "If personal estate be given by testament to A. and the heirs of his body; as such words would create an express estate tail in the freehold lands, if applied to them, so in personal estate, if applied to it, such words will

have the effect to vest the absolute interest, because such property cannot be entailed, i. e. the first taker will have the absolute inter-

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est in the bequest; and the remainder *or executory limitation to the heirs of the body, and the subsequent limitations, if any, depending upon the failure of them, will be of no effect. It will make no difference in regard to the construction, that the interests or profits only are given to the first taker, and the principal to his heirs." The cases are all collected by Roper, but I shall refer to only two of those mentioned by Fearne. Seale v. Seale, 1 P. Wms, 290, where one devised that all his money in the government funds should be laid out in the purchase of lands, and settled on his eldest son A. and the heirs male of his body, remainder over in the same manner, the Lord Chancellor said, that the personal estate, viz. the residue, after what was to be laid out in the purchase of lands, could not be entailed, but the whole vested in the eldest son. So in the case of Butterfield v. Butterfield, 1 Ves. Sen. 133, the testator by his will devised, that £400 should be put out on good security for his son T., that he might have the interest of it for his life and for the lawful heirs of his body; and if it should so happen that he should die without heirs, it should go to his (testator's) youngest son, J. B. Lord Hardwicke decreed, that the whole vested in the first taker, and the limitation over was too remote. A case which is in point to its very letter.

But it is said, that, notwithstanding these rules of law, the intention of the testator is the polar star by which the Judges are to direct their course, and such intention shall ride over all the rules of law. And the words of Lord Hardwicke, in Cowper v. Cowper, 2 P. Wms, 748, are relied on in support of this position. Much has been said on this point, and it must be admitted that much of what has been said has been, to say the least of it, most injudiciously applied. To extract the language of a Judge in reference to one law, and apply it to another which is materially different, is to pervert the meaning of Judges, and to abuse common sense.

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Now, Lord *Hardwicke does say, in Cowper v. Cowper, that the intention of the testator must determine the effect of the limitation, especially in wills, where the intent overrules the legal import of the words, be they never so express and determinate. But this language was applied to certain restrictive words, which he said controlled the meaning of the preceding words; and that although, with regard to them, if standing alone, such a rule of law could operate, yet, that such rule of law could not operate to restrain the manifest intention of the testator, expressed by the subsequent words. And in this he was certainly correct. Now, if there were any restrictive words in this will, the complainant would be entitled to the benefit of Lord Hardwicke's opinion. But Lord Hardwicke never said, that a man, by his will, could create a perpetuity, or limit an estate after an indefinite failure of issue, or create an estate tail in personal property. Lord Hardwicke decided the case of Butterfield v. Butterfield, and if he had thought the language used in Cowper v. Cowper applicable, would no doubt have applied it. There is something so apparently absurd in the idea, that a man, by his will, shall overturn the established doctrines of law, that it does seem to be an unnecessary expenditure of time and labour to enter into any refutation of it: and it is saying but little on the subject, to introduce the opinions of Judges in particular cases (as has been done in the written argument),[1] unless the cases themselves bore some analogy to the case before us. If a testator give to one in such words as would create a fee, but immediately after by other words shew that he did not mean to give such estate; although the words might have carried a fee, yet the subsequent words

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may, and sometimes do, control their *operation: and it is in such cases only, that the expression is applicable, that the intention overrules the law. And I here admit, what has been forcibly urged, that the Court will always lay hold of any subsequent restrictive words to carry the intention into effect—in other words, will suffer the intention to prevail, if it be not contrary to law.

If the testator had used any words indicative of an intention that the property should go over at the death of the first taker without heirs, it might so have passed; for then the general words "heirs of her body forever" would have been understood to mean heirs of her body at her death, and not to a perpetual succession. It is contended that this intention is implied from two circumstances, and that it is as sufficient as if it had been expressed. As I do not wish to enter further into the field of controversy on this difficult doctrine of the law than I am compelled to do, I will say nothing about that sort of implication which is to be considered as equivalent to an express intention, but shew that the two circumstances relied on cannot, and do not, operate to control the generality of the words in the first part of the clause. The first circumstance is, that the property limited is of a perishable nature. But although it is of a perishable nature, it is also of a productive nature, and there may be an increase which would keep pace with the heirs of the first taker. But suppose the property given had been a man,

[1] An argument furnished by the complainant himself (Professor Henry) on the force of intention, relying principally on Cowper v. Cowper.

yet he may have lived for a longer time than a life or lives in being and twenty-one years.

The second circumstance relied on is, that the limitation is to one in esse, and that the testatrix, therefore, meant a present interest, an interest to take place at the death of the first taker. But the remainder woman may live sixty years, and then the heirs of the first taker might be extinct, and she would

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then take if the limita*tion be supported. So that the limitation to one in esse or the nature of the property do not restrict the operation of the generality of the words "heirs of her body," so as to bring them within the case of Cowper v. Cowper. But what must be conclusive on the subject is, that the case put in all the books to illustrate the rule, is of a limitation over to one in esse.

I shall conclude the case with a reference to some of our own decisions on the points. The case of Guery v. Vernon, 1 Nott & M'Cord, 69, in which the opinion of the Court was delivered by Mr. Justice Cheves, settles the case before us, and nothing but respect to the parties, and a consideration that such cases seldom occur, would have led me into any further or other observations than those contained in that case. I have considered the case in reference to the two rules, which are distinct, and they are so expressly stated by Fearne, in page 460 (7th Lond. Edit.), where he lays it down as the third rule, that an estate tail cannot be created in personal property, and he discusses at length, as connected with the subject of executory estates limited on a failure of heirs or issue. The counsel in his argument complained of the rule, as having arisen from the doctrine of estates tail, which he said was never the law here. But he is mistaken in this idea, for the rule was known to the common law long before the statute de donis.

The case may have been decided without any reference to it. For whether the estate given by the will to the first taker be given for life, or absolutely, if the bequest is limited over through an indefinite failure of issue, the consequence is the same.

Decree affirmed.

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2 McCord, Eq. *344

*PRESIDENT AND DIRECTORS OF THE BRANCH BANK AT COLUMBIA, and Others v. JOHN BLACK and WILLIAM HALL.

(Columbia. Jan. and May Terms, 1827.)

[*Judgment* ⟸780.]

A. mortgaged his house and lot to B., to pay a debt of $1500. On foreclosure and sale by the Commissioner, C. at the request of A. bid off the premises at $4500, paid the $1500, was discharged from the balance by A. and took title, with an understanding between A. and C. that upon C.'s repaying the $1500, the property should be reconveyed to A. The judgment creditors of A. filed their bill against C. to compel him to pay into the hands of the Commissioner the balance of the bid of $4500, to be applied to the judgments. *Held* that the judgment creditors had no right to enforce the bid, and the property decreed to be sold, first to repay C. and the balance to be applied to the creditors of A. according to their legal priorities.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1345; Dec. Dig. ⟸780.]

[*Equity* ⟸339.]

The answer replying to the allegation that the defendant was indebted to A. the balance of the bid, stating all the circumstances of the understanding between A. and C. and denying that C. owed A. any thing, was held conclusive, until rebutted by evidence on the part of the complainants.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 685; Dec. Dig. ⟸339.]

The complainants stated in their bill that they were judgment creditors of Dr. B. F. Harris, and that Harris owned a house and lot in Columbia, which had been mortgaged to one Goss. That Goss filed his bill to foreclose the same, and obtained an order to sell the premises. The mortgage had been given for the purchase money previous to the judgments obtained by the complainants. The premises were sold by the Commissioner in obedience to the order, and the bill stated that the defendants, Black and Hall, became the purchasers, at the price of $4,200, and that they paid to the Commissioner $1,569, the amount of the decree under the mortgage for which it was sold, and that the balance of $2,631, remained unpaid by the defendants to the said Benjamin F. Harris, and that the said Harris was much involved: that should he procure payment of the said balance from the defendants, their judgments would not be paid. The bill then prayed that the defendants should be compelled to pay this balance to their judgments, and that they should be enjoined from paying it over to said Benjamin F. Harris, until there was a final hearing of the cause; and that the Court would grant such other relief as it should deem proper.

The defendant William Hall stated in his answer, that he was ignorant of all the allegations contained in the bill except as to the fact of his becoming a joint purchaser with Black of the house and lot mentioned in the bill, at the request of one Andrew Wallace and the defendant John Black, for the benefit of the said Harris, to prevent the same

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from being sacrificed by a forced *sale, and thereby to enable Harris to sell it at private sale and give a credit, by which means it was supposed he could obtain a fair price for it. It was also proposed that the property should be held as security for the discharge of the mortgage and costs, until Harris should make a final disposition of it. With this understanding Black bid off the land for himself and Hall at the price stated in the bill; but it was never supposed or intended that an ab-

solute purchase was made, or that the property was bid in for the defendants: on the contrary that it was publicly understood, that it was bid in for Harris, and that no more was to be paid than sufficient to satisfy the mortgage. And he, Hall, distinctly considered himself as assuming the situation of the mortgagee; and in furtherance of that intention, took an assignment of the mortgage and paid the money: and so far from supposing that he was indebted to Harris, he had been urging Harris to take measures to pay him the debt he owed him. He by no means admitted that he had a balance in his hands due to Harris, or that he was the owner of the property, further than his lien for the sum advanced as above stated. The title made by the Commissioner to Black and this defendant was executed without his knowledge whilst absent in England: but he always understood and believed that it was executed merely as a security for the money paid by the defendant, for one half of which Black was liable to him. That he was willing to reconvey, or comply with any directions of the Court, upon the money he had advanced being repaid him.

Black, in his answer, said he knew nothing of the judgments and debts claimed by the complainants. He then stated the facts in relation to the sale of the house and lot in question, and that he was induced to become a joint purchaser with William Hall at the earnest request of Dr. Harris, who represent-

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ed his case as one of great *distress, and that a forced sale of his property would necessarily be at a great sacrifice and would utterly ruin him; that if it was bought in for him he could make an advantageous private sale on a credit; and that he would appropriate the proceeds to pay his creditors; and as an inducement to this defendant, he promised to apply a part to the satisfaction of an execution this defendant had against him. That he and Hall agreed to buy the premises for Harris, to pay the mortgage, and to wait with him a reasonable time to re-imburse their expenditures; the property still remaining as a security to them for such advances. This defendant paid the costs of the suit of Goss, and had since paid the taxes and some repairs. He was offered a title by the Commissioner, while Hall was absent, for the premises, which he accepted; as he was not aware that that circumstance could, in any way, affect the agreement between the parties: but on the contrary thought it the best plan of securing their lien upon the property, for the money advanced to relieve it from the incumbrance. He further stated, that to discharge the defendants from any supposed liability to the said Harris for the amount of their bid beyond the amount of their mortgage and costs, Harris went to the Commissioner and ordered the title to be made to these defendants; and as a final discharge from the balance of the bid, Harris, after consulting with the Commissioner for that purpose, gave a receipt which was considered by all the parties as a final settlement of that matter. This defendant claimed a lien on the premises for the sums he had advanced, and for as much as would satisfy his execution against Harris.

This case came on to be heard before Chancellor Thompson, upon the bill and answer. It was understood that what both sides stated was true; and the only question was, whether Hall and Black were liable to the complainants for the balance of the bid over

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the sum *due, under the decree upon the mortgage; and when some little difficulty was raised about the facts, the defendants offered to produce the witnesses to prove them, when the Chancellor himself declined it: under this impression the case was argued.

Chancellor Thompson ordered the defendants to pay the complainants the amount of the purchase money with interest from the time it became payable, after deducting therefrom the sum of $1,569, paid to satisfy the decree under which the premises were sold: and should there be any legal liens having a preference to the claims of the complainants, they were also to be deducted and paid to the Commissioner to be distributed according to their priority. The costs to be paid by the defendants.

M'Cord and Preston, for the appellants. The facts made by the bill and answer show clearly that the complainants have no lien on any bid made by the defendants for Harris's property, under the decree to foreclose the mortgage. There is no privity of contract or interest which can entitle the complainants to enforce a contract for Dr. Harris, which he Harris could not enforce. The understanding between Harris and the defendants has been strictly complied with by the defendants in every respect, and they never were bound by their agreement to pay more upon the purchase than sufficient to satisfy the lien under which it was sold. The complainants with a full knowledge of all the transactions looked on and never interfered, until all matters between Dr. Harris and the defendants were settled. The complainants can not be known in the transaction, and have sustained no damage by it; as they are in the same situation they were in before the bid, and should not reap an advantage from

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the loss of the de*fendants. The defendants only claim to be reimbursed the value they put upon the premises by relieving it of a debt then pressing. 1 Kames's Eq. Sec. 2, Art. 1, p. 137, 156. 1 Domat, B. I. tit. 13, Sec. 1, nemo debet locupletari aliena jactura. The defendants are therefore entitled to a lien on the premises to the amount of the incumbrances they have removed, the repairs, taxes, &c. The Chancellor thought

the answers were not evidence; that they did not meet the allegations of the bill. That as the bill did not interrogate the defendants as to the circumstances, their answers, stating the whole case, were uncalled for, and afforded no evidence in favour of the defendants, and as they produced no evidence, the complainants must have a decree. But in this state the rule of Court has abolished interrogatories, and an allegation is tantamount to an interrogatory, and must be answered as such. 1 Desaus. Rep. 150. The defendants could be compelled to answer as to the bid alone, without giving a statement of the circumstances under which they made the purchase. Nothing is stated in avoidance, for the defendants never rendered themselves liable to the complainants. The defendants could only be liable to them through Dr. Harris, to whom they were not liable. There is no legal remedy, and Equity will assist them but so far as Dr. Harris's rights go. If one demands Equity he must do Equity. The complainants may have the premises sold, but the defendants must be first paid. The case of Hart v. Ten Eyck, 2 Johns. Cha. Rep. 86, was a case of accounts, and it was held that where a person charges himself he cannot discharge himself. He can not charge himself with $100 and say afterwards that it was given to him. So he can not set up a discount to reduce his admissions, not being the same transactions; but he is compelled to prove his own account, though he has admitted the other. The case cited was one of a fraudulent ad-

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*ministrator. When the facts are distinct, the defendant must prove the fact he sets up in avoidance. An avoidance which is required to be proved must be something subsequent, and dehors that which is admitted or alleged; as if a debt be acknowledged, but it be added "you released it, or I paid it, there the release or payment must be proved." See note to Hart v. Ten Eyck, 2 Johns. Cha. Rep. 93. 1 Johns. Cha. Rep. 582. 1 Starkie on Evid. 292.

M'Clintoch, contra. The defendants are bound by the deed of conveyance they received, which states the sum they bid. Parol evidence is inadmissible, though in the shape of an answer, to rebut the deed. 1 Desaus. Rep. 155, 333. 2 Desaus. Rep. 145, 570. He also cited 2 Johns. Cha. Rep. 296, 565. 5 Johns. Cha. Rep. 235, 280. A judgment creditor is in Equity entitled to attach a judgment debt in favour of the debtor. 7 Johns. Cha. Rep. 208.

Curia, per JOHNSON, J. The case concisely stated is this. Benjamin F. Harris mortgaged a house and lot in the town of Columbia to James Dillet, then Commissioner in Equity for Richland district, to secure the payment of $1569 due to William Goss. This debt being unpaid, a bill was filed in the Court of Equity to foreclose the mortgage; and in the end a decree was made, ordering the sale of the premises in satisfaction of the mortgage. The defendants were the purchasers at this sale at the sum of $4200, and in their answer they state expressly that they became the purchasers at the request and entreaties of Harris, and on his account, to prevent a sacrifice of the property; that it was agreed on between them, that they should hold it as a security for the money to be advanced by them in satisfaction of the mortgage; and that con-

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formably to this agreement they *paid the Commissioner the said sum of $1569; that Harris gave a discharge to the Commissioner for the balance; and that titles were executed to them by the Commissioner and delivered to the defendant Black, in the absence of Hall his co-defendant.

Pending those proceedings and before the sale of the house and lot, the complainants had recovered judgments against the said Benjamin F. Harris to a large amount; and they expressly allege in their bill, after reciting the sale and purchase by the defendants, that $2631, "the balance of the amount bid, with the interest, was due to the said B. F. Harris by the said William Hall and John Black, and is still in their hands and unpaid to the said B. F. Harris:" to which the defendants answer, accounting for it in the manner before mentioned. And the prayer of the bill is, that the defendants may be enjoined from paying over the amount to Harris until the hearing of the cause, and for relief, &c.

In remarking on the defence, the Chancellor observes that "no discovery is sought in the bill; there is no allegation calling for or requiring an answer, and that the facts set forth in the answer are altogether gratuitous. It therefore became necessary for the defendants to substantiate these facts by proof, which they have failed to do." This circumstance is made the foundation of the decree against the defendants: and taking this as our guide, these questions necessarily follow.

1. How far the answer in this case is to be regarded as evidence?

2. Whether the complainants are entitled to relief in the case made by the bill and answer, according to the facts properly in evidence?

First. This is a bill for relief and not for discovery, with respect to which it may be admitted, that the answer would not be evidence for the defendants; but it may safely be affirmed that there is no case in Law or

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*Equity, in which he who alleges an affirmative that is denied is not bound to prove it. Although in Equity an answer to a bill for relief is not evidence for the defendant, yet if he deny the facts stated in the bill, it is

incumbent on the complainant to prove them.

Let us apply the rule to the case. The complainants allege that the defendants have in their hands a sum of money belonging to Benjamin F. Harris still due and unpaid; and out of this fund they claim to be satisfied for a debt which the said Harris owes them. The defendants deny in express terms, that they are in possession of any such fund; and they go on to state minutely the circumstances, from which they conclude that they have not been and are not bound to pay the demand of complainants. Now here are the affirmative and negative; and according to the rule, the defendant's answer must stand for proof, unless it is contradicted by evidence which it was incumbent on the complainants to produce.

Second. The question then arises, whether the circumstances disclosed by the answer, and on which the defendants rely, as showing that they had no funds in their hands to which the complainants were legally or equitably entitled, support this conclusion.

It is assumed, that the contract between the defendants and Harris operated as a fraud upon creditors; inasmuch as if the whole purchase money had been actually paid into the hands of the Commissioner it would have been subject to their respective liens. Whatever lien the complainants had on the house and lot before the sale by the Commissioner, was abrogated by that sale; and the excess would have been so much money in the hands of the Commissioner, on which it could not legally attach. The complainants' judgments were in the Common Pleas; and neither themselves nor the officer of that

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Court could lay hold of it as a repri*sal. The only remedy was by an application to that Court in whose possession it was, if indeed the complainants had a right to it; but until that application was made Harris must have had unlimited control over it. The demand upon him there was satisfied; and without the interposition of any other claim the Commissioner could not withhold the fund from him. He might have given it away or made any other disposition of it that his caprice might have suggested. The complainants were, in the mean time, slumbering on their rights, and suffered the defendants to enter into this arrangement; and without imputing to them any such design, the charge of intention to defraud may be fairly retorted on them.

Divesting the case of the technical rules with which it appears to me to have been unnecessarily fettered, and viewing it in the plain dress of common honesty, all difficulties are I think removed. At the request of Harris the defendants purchased a prior incumbrance on his house and lot with a view to prevent a sacrifice; and it was agreed between them that they shall hold the property as a security for the amount advanced. A creditor who had a subsequent lien, claims to be paid the amount of its value, and the defendants reply, there is the property, dispose of it; pay us the money that we have advanced, and take the balance to yourself. Where, let it be asked, is the injustice done to them? It is replied, that by the acceptance of the deed from the Commissioner, they had consummated the contract for the purchase, and they must be bound by it. But it must be recollected, that Harris had at the time unlimited control over this fund, and a right to stipulate about it as he pleased. And whether the contract between himself and defendants would have been fulfilled in good faith or not, the complainants were not, nor could they be interested in it, as long as their

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rights were unaffected *by it. The accidental destruction of the house by fire, and the consequent deterioration of the value of the property, may furnish a clue to the foundation of this controversy, and will probably prove equally unfortunate for both parties; but that circumstance cannot change the principle. The defendants having purchased, according to their own showing, as the friends and agents of Harris, the title still remained in him, subject in the first instance to their lien, and afterwards to the liens of other creditors in their order of priority. Black must stand on the same footing with other creditors with respect to the debt due to him by Harris. The expenses for repairs and taxes are a charge upon the premises, and ought to be first paid. Decreed accordingly.

Decree reversed.

CHANCERY CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

IN FEBRUARY TERM, 1827.

JUDGES PRESENT.

HON. ABRAHAM NOTT, Presiding Judge.
C. J. COLCOCK.
DAVID JOHNSON.

2 McCord, Eq. *354

*JOHN STENT v. The Executors of N. M'LEOD and the Heirs of PAUL HAMILTON.

(Charleston. Feb. Term, 1827.)

[*Descent and Distribution* ⟸5, 43.]
Where an intestate dies leaving no nearer relations than nephews and nieces, they take per capita and not per stirpes. As to personal property the law of the intestate's domicil prevails.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 19, 121; Dec. Dig. ⟸5, 43.]

[*Descent and Distribution* ⟸4.]
Real estate descends according to the law where the land lies.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 18; Dec. Dig. ⟸4.]

Paul Hamilton of Pentonville, in the parish of Clerkenwell, in the kingdom of Great Britain, made his last will and testament on the 30th of May 1797, and shortly after died. The testator had been an inhabitant of South Carolina prior to the American revolution, but left this state about the time of the declaration of independence, and resided from that time until his death in England. By his will he devised his estates in South Carolina to his nephew Norman M'Leod for life. His will contained no residuary clause. Norman M'Leod died some time before this suit was

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brought, and Paul *Hamilton, as to all the questions made by the parties in this cause, was considered as having died intestate, leaving a considerable real and personal estate, and no nearer relation alive than a nephew, Paul Hamilton, the late governor of South Carolina, the son of a deceased brother, and four nephews and nieces, the children of a deceased sister, Mrs. M'Leod. The question made was, how partition should be made among these nephews and nieces, whether per stirpes or per capita. The heirs of Paul Hamilton, Jun. contended that by the statutes of South Carolina of 1791 and 1794, regulating descents, the nephews and nieces, the children of the intestate's brother and sister, took the shares their respective parents would have been entitled to if alive. On the other hand it was argued, that the nephews and nieces took per capita and not per stirpes, both as to the real and personal estate, and that as to the personal estate there could be no doubt of it, as distribution was to be made according to the laws of England, the place of the intestate's domicil.

De Saussure, Chancellor. The real estate will descend according to the law of this state, in which the land lies. The provisions of the statute of the 19th of February 1791, abolishing the rights of primogeniture, and the construction put upon it by the Court must guide us in forming an opinion in this case. On examining the provisions of that statute, we do not find that there is any distinct substantive clause providing generally for the single case of an intestate's dying without wife or child, father or mother, brother or sister (either of the whole or half blood), but leaving several nephews and nieces, the children of the deceased brothers and sisters, unequal in number, as in the case we are considering. The fourth section, however, provides for the case of an intestate leaving a widow and brothers and sisters of the

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*whole blood, giving one moiety to the wid-

ow, and the other moiety to the brothers and sisters, and then proceeds broadly and unqualifiedly to enact, that the children of a deceased brother or sister shall take among them the share which their respective ancestors would have been entitled to, had they survived the intestate. Was this intended as a distinct or substantive provision? or was it merely intended to be a qualification of the preceding provisions of the same clause? I am induced to think not the latter, for it is really not a qualification of the preceding clause, but a substantive provision applicable to the case stated in that clause, and at the same time applicable to all other cases of a similar description. Even then the enactment is complete, as it does not distinguish between the case where some of the brothers and sisters are living, and others are dead leaving children, and the case where all the brothers and sisters are dead, leaving children. By the English statute that distinction is made, and in the former case the children of the deceased brothers and sisters take per stirpes, in the latter per capita. The words of our statute of 1791 are materially different from the English statute of distribution. In the latter, when there is no widow and no children, or their representatives, the personal estate is to be distributed among the next of kin, in equal degrees, and their representatives; but no representatives are admitted among collaterals further than the children of the intestate's brothers and sisters; and it is on this provision of the British statute that Judge Blackstone puts it, "That when all the brothers and sisters of an intestate die before him, the children take per capita. Now in our statute there is no such provision: an attempt is made to provide for every specific case, and there is no general clause providing for the next of kin, eo nomine, but in the seventh clause, and that is, after the failure of several lineal descend-

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ants *and ascendants, brothers and sisters, of the whole blood, and their children, and the brothers and sisters of the half blood. But there is one part of a clause (the fourth) in which it is enacted that the children of a deceased brother or sister shall take among them, respectively, the share which the respective ancestors would have been entitled to had they survived the intestate.

The late Judge Brevard was of opinion, that the provision of the last sentence in the fourth clause of our statute is general in its expression and its operation, (see his note in 1 Brev. Dig. 427), when commenting on this statute, where he considers this a departure from the provisions of the English statute of distributions. It is said that the late Judge Grimke agreed in opinion with Judge Brevard. I am not aware of any decision in our Courts on this precise point. On the best consideration I have been able to give the statute, I am inclined to think, that the construction given by the Judges Brevard and Grimke is right, and I would be disposed, if I doubted more than I really do, to concur with those Judges from deference to their authority. This opinion is strengthened by the fact, that there is no distinct provision in any part of the statute which directs that children of deceased brothers and sisters should, in any case, take per capita, which it is probable would have been enacted, had it been intended; and in two cases (act of 1791, sec. 4, and act of 1794, sec. 1) where the law speaks of the children of deceased brothers and sisters, it is enacted that they shall take among them respectively the share which their respective ancestors would have been entitled to, had they survived the intestate. My opinion is further strengthened by observing, that in lineal descendants it is provided by the second clause of the statute, that lineal descendants of the intestate shall represent their respective parents, and be entitled to receive and divide equally

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among *them the shares to which the parents would have been entitled had they survived the ancestor. Now there does not seem to be any good reason for making a difference in this respect between lineals and collaterals, and as the statute does not plainly make such distinction, I will not make it by construction. The English statutes did make the difference, and therefore made the law on that point. In a question of this kind, however, I am not disposed to be positive, and therefore wished the question to be carried up to the Court of Appeals to have the law settled. This case furnishes a salutary lesson as to the difficulty of legislating on important subjects. The statute in question was drawn up with great care by the late Mr. Edward Rutledge (afterwards governor of this state), whose head was as clear as his breast was benevolent and his tongue eloquent, and he had the aid of the revision of his bill by the late eminent lawyer and distinguished citizen, General C. C. Pinckney, as well as several other learned lawyers. It is well drawn, and it is wonderful that so few questions of difficulty have arisen out of a statute containing so many enactments of very wide extent and operation. Still, the human mind, however enlightened, cannot foresee and provide for all the cases which may grow out of extensive legislation. The statute of frauds, 29th of Charles II, was drawn by very able men, and yet hundreds of decisions have been required to explain its meaning and clear up the doubts springing out of it. Upon the whole, I am of opinion, that Mr. Paul Hamilton, the nephew, was entitled at the death of his uncle, the testator, to take, jure representationis, one moiety of the real estate in question, and the four nephews and nieces of the intestate (children of his sister Mrs. M'Leod), were entitled to take the other moiety of the real estate, to

be divided among them equally and their representatives.

We come now to the consideration of the

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rights of *the parties as to the personal estate of Paul Hamilton, the intestate. If Mr. Hamilton had been domiciliated in this country at the time of his death, the decision would have, of course, been the same in relation to the personal as to the real estate, in South Carolina, under the 12th clause of the act of 1791; but he had been long settled and domiciliated in England, and he died there, in 1797, completely domiciliated there. This makes an important difference in the question. I am bound to consider if any, and what difference, is made by the fact above stated, as to the distribution of the personal estate. In general, every nation legislates for itself, and most cases in every country depend upon the municipal regulations of that country. The great intercourse of mankind, however, compels the adoption of certain principles of international law among civilized nations. Hence the lex loci contractus often governs in our tribunals. Foreign interest, larger than allowed by our laws, is permitted to be recovered in our Courts on foreign contracts. Hence England recognises the unceremonious marriages entered into by her own subjects in Scotland, though none of the requisites of her rigid statutes are complied with. A multitude of other examples might be given of this mutual respect of nations for the laws of other nations, even operating upon the subjects of the former and its property. The subject is of wide extent, and is very well treated by Huberus, who was treated with contempt as a mere Dutch schoolmaster by an English jurist, who was himself far inferior to this profound writer. A branch of his able work was translated (for the use of the bar in Philadelphia), in a cause of some importance in the Supreme Court of the United States in 1797. The late Mr. Dallas favoured the public with the translation, which is attached as a note to page 370, &c. of the third volume of his Reports. The provinces which formed the Dutch republic were so small

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*and so contiguous, and the inhabitants had such a general intercourse, that a great number of questions grew out of the relative situations respecting contracts, marriages, wills, and even intestacies. A treatise was writtten, entitled "De conflictu legum;" and it became a system to provide for the harmony of the discordant materials of the different states. Speaking of successions to an intestate's estates, Huberus says, That if the deceased was a father of a family whose property was in different provinces, as far as respects the real estate, it would descend according to the law of the places where situated; for the lex loci situ governs in relation to territorial rights, but with respect to personal property it would go according to the law of the place where the intestate lived, and of which he was an inhabitant. See the last clause except one of the note of Mr. Dallas, Vol. III. p. 375, of his Reports. Nor is this the doctrine of a mere civilian writing in his closet. Every civilized nation in Europe has adopted and acted on this principle, on various and most interesting subjects. On the question immediately before us, the English and American decisions are quite clear. As early as the time of Lord Chancellor Hardwicke (and indeed earlier) the subject was before him, and he decided this point. It is unnecessary to go at large into the cases, it will be sufficient to cite a few of them to show how clearly the principle of the lex loci domicile of an intestate governs in the distribution of his personal property. In Pippin v. Pippin, decided by Lord Hardwicke, reported in Ambler, p. 25, that great Master of Equity said, "if I was to go into the general question, the personal estate follows the person and becomes distributable according to the law or custom of the place where the intestate resided. So in Home v. Watkins, 2 Ves. Sen. 36, the same principle is laid down. The principal case is that of Somerville v. Somerville, 5 Ves. 750. That is one

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of the *best argued cases in the English books of reports. The case decided, and the principles laid down are ably stated. The Master of the Rolls in his judgment, p. 786, states the rule to be, that the succession to the personal estate of an intestate is to be regulated by the laws of the country in which he was a domiciliated inhabitant at the time of his death, without any regard whatsoever to the place of the birth or death, or the situation of the property at that time. This principle has been considered and adopted in this Court in a case tried some years ago, and has not been, to my knowledge, controverted at any time.

The result is, that Paul Hamilton, the intestate, being domiciliated in England at the time of his death, his personal estate, wheresoever it is, must be distributed according to the English law. That law (the statute of distributions) decides, that when an intestate leaves neither father nor mother, wife nor child, brothers nor sisters, but only children of the deceased brothers and sisters, they take per capita. Mr. Paul Hamilton and his representatives are entitled then only to a fifth part of the personal estate of the intestate, and the four children of Mr. M'Leod and their representatives are entitled to the other four-fifths, to be equally distributed among them.

It is therefore ordered and decreed, that the real estate of the late Paul Hamilton, the elder, be divided into two equal parts; one half of which shall be allotted to the representatives of the late Paul Hamilton the younger, and the other half among the heirs of Mrs.

M'Leod. And the personal estate of the intestate shall be divided into five equal parts, one of which shall be allotted to the representatives of Paul Hamilton the younger, and the other four-fifths shall be allotted among the four children of the late Mrs. M'Leod and their representatives. The costs to be paid out of the estate.

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*From this decree an appeal was taken up by the children of Mrs. M'Leod, on the ground that the real estate in South Carolina should have been decided per capita and not per stirpes.

Toomer, for the appellants, cited Poaug v. Gadsden, 2 Bay's Rep. 293, where it was decided that representation could not take place beyond children of brothers and sisters. Among collaterals personal equality is the principle of the statute of intestacy, and the period at which the equality is to be fixed is the death of the intestate. A division per capita is certainly most equal. Where, at the death of the intestate, all persons having claim to the estate are in the same degree, the representative principle is not necessary to a division. All may take in equal proportions "as next of kin in equal degree." This was within the spirit and letter of the act. To set up the principle of representation where it is not necessary, the party must show an express provision in the law. The act makes a marked distinction between the right of representation among lineals and collaterals. Among collaterals the principle of representation is never to take place, except when at the death of the intestate a brother or sister is alive, who, but for the especial provision of our statute, would exclude the nephews and nieces, and therefore the act restricts the taking per stirpes to such a case. In the second clause of the act of 1791, representation is expressly provided for cases of lineal descents, and by not providing for it in any other case, it shows that it was not intended to operate in cases of collaterals. Expressio unius exclusio est alterius. So in the fourth section of the act, where a brother or sister survives and children of a deceased brother, it provides that the children of the deceased brother should come in, of course per stirpes, otherwise it would be unequal.

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This *was only to prevent an entire exclusion of the children. Judge Brevard admits, that the rule, as he understood it, differed from the former constructions. Where there exists no necessity for the rule of representation, to prevent the exclusion of children, the English rule ought to prevail. 2 Black. Comm. 517.

Gadsden, same side. The constitution, by providing for the law, shows an intention to have an equal distribution. Before our statute, personal property was distributable under the 22 & 23 Charles II. c. 10. But our act puts personal and real property on the same footing as to descents. The provisions of our statute are founded on the statute of Charles. Where our statute treats on the same subject as that of Charles, and it is obscure, light may be received from the other. The English statute was written by Sir Walter Walker, a famous civilian, and except in some instances mentioned in the statute, it is, says Sir Joseph Jekyll, to be governed and construed by the civil law. In the same light Dr. Harris held the three first chapters of Justinian's Novel. 4 Burn's Ecc. Law, 345. Harris's Justinian. To all these laws then we may look for light on this subject. He cited Prec. in Chan. 54. Vinn. Quest. Jur. Select. ch. 30, p. 333, (utrum fratrum filii, quando soli sunt, in stirpes an in capita succedunt.) Ano. D. C. Nov. 118. Cooper's Justinian, 551, notes, and in the text 399. 3 Eq. Ca. Ab. 249.

Where our state provides for representation, it is always where the children would not otherwise take at all. To extend the rule further would be contrary to the statute abolishing the laws of primogeniture.

J. E. Holmes, contra. As to real estate, the rule, before our statute of 1791, was always that the representation should be per stirpes

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and not per capita; and *in this respect that act has not altered the old rule. If A. died leaving real estate, and no brothers or sisters, but leaving, as heirs or next of kin, six nieces, three by one brother or sister, and two by another, and one by a third, his estate would be divisible only into three parts, and distributable per stirpes: thus one-third to the children of each brother or sister. 2 Black. Comm. 217. This rule was in force in South Carolina until the act of 1791. By that act the representation per stirpes was—so far from being changed—most expressly confirmed. The primary object of the act of 1791 was to give an equitable distribution of real estate; and personal estate, only as a secondary object, is ordered to be distributed in the same manner as real. 1 Faust. 23. Suppose the act had only abolished the laws of primogeniture, and had made no further provision for the descent of estates, it is clear the estate in question would then descend as in cases of females in England, where the laws of primogeniture did not apply, as in the case he had stated. Should not the rule operate until altered by statute? The act no where provides for their taking per capita. No argument could be inferred from the statute of Charles, as real estate, by our act, is not put upon the same footing as personal property, but rules are made for real property, and then the act orders personal property to be distributed in the same way. The rules of real property then are to prevail, and if there occurs a case for which the act has not provided, then the English rules as to the

descent of real property among females must apply. If there had been a widow, the nephews and nieces would have taken per stirpes, and taking away the widow, why should the rule be altered? If there had been another of the half blood and nephews and nieces of a nephew of the whole blood, the half brother would have taken a moiety. 1 Mod. 209. 1 Vent. 316. 1 Vern. 437. 2 Vern. 124. S. P. Crooke v. Watt, in the House of Lords after

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great *argument. Show. P. C. 108. 1 Eq. Ca. 249. Even under the statute of Charles, no provision is made for representation among collaterals, further than among the children of the intestate's brothers and sisters, and that the personal estate is to be distributed among the next of kin in equal degrees, which is the reason of their deciding that nephews and nieces take per capita. Brothers and sisters under our act take by name and not as "next of kin," which is not the case under the English statute. Our act then says the shares of children shall be the same as their parents would have taken.

Grimke, same side. The rule per stirpes is the most natural. It is in analogy to the case of grandchildren who take in the place of their parents, whether any child be living or not. If grandchildren never take but per stirpes, whether there be children or not living, why should not nephews and nieces always take per stirpes, in like manner, whether there be brothers and sisters living or not? That it was thought the natural course of descent, he referred to the Code Napoleon, 13, tit. 1, sect. 2, no. 742, which expressly provides that nephews and nieces shall never take by representation. He also referred to Swift's System, Vol. I. 288. The civil law does not admit of the principle of representation. Before the 118th Novel of Justinian, the brother of the deceased excluded nephews and nieces, but when nephews and nieces claim they all share alike. Cooper's Justinian, 544. When the 118th Novel was adopted, it was limited to the class of cases till then unprovided for, viz. the concurrence of brothers and sisters with nephews and nieces. It therefore received a strict construction, as in Lawson v. Perdriaux, 1 M'Cord's Rep. 456. Wren v. Carns, 4 Desaus. Rep. 405. The emendatory law being only intended for the mixed class of brothers, nephews, and nieces,

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and not for the simple *class already provided for, the construction was confined to that class alone.

But there is authority for the construction contended for; that of Judge Brevard in the first volume of his Digest, 427, No. 8, and that of the author of the Law of Executors (Judge Grimke), who, in page 297, after quoting the case of Walsh v. Walsh, recognises the equality of rights between nephews and nieces, when no brother or sister claims; and he cites the second clause of the fourth section of the act of 1791, which is decisive that his opinion coincided with that of Judge Brevard. Judge Reeves, in his Law of Descents, 501, adopts Judge Brevard's construction, as the proper view of our statute. This case is either not provided for at all, or it is provided for in common with the mixed class of cases, by virtue of the second clause of the fourth section.

Hunt, in reply. The act of 1791 certainly intended to provide the same rule for real and personal property. To divide the estate equally among all promotes the great policy of the law: besides complying with the general course of affections. When the brothers and sisters are all dead, the nephews and nieces all stand equally near and dear. The fourth clause, giving specifically a representation where there are brothers or sisters living, excludes the presumption of the principle of representation in other cases. By the fifth clause the descent is not per jure parentis. This case turns on the fifth clause. There is no disposition per stirpes—they take from propinquity of blood alone. Representation only applies to lineal descendants. 2 Black. Comm. 217. And it is thought a brother of the half blood would take per capita with the children of brothers of the whole

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blood; and if there be none of *the half blood, of course the children of the whole blood must still take equally, per capita. As to the general principles he cited 3 Ves. 257, 383.

Curia, per NOTT, J. The Court concur in opinion with the Chancellor in this case. The first question has been considered as settled for many years by the case of Matthewes v. Matthewes, and Brevard v. Matthewes, and a great many estates, it is said, have been settled in conformity with those decisions. The Chancellor, without being aware of these decisions, has, after a very full investigation of the question, given the act the same construction, and we do not feel at liberty to call in question a principle so long decided and so long received as law. This opinion has been delayed under the expectation that the counsel would have argued the second ground made in the brief, as to the law of the domicil in relation to the personal property. But as they have declined doing so, the Court proceed to express their concurrence with the Chancellor on that question also. The decree is therefore affirmed.

Decree affirmed.

2 McCord, Eq. *368

*JACOB DURR Surviving Executor of John Durr, and JOSIAH PENDARVIS v. WILLIAM BOWYER Administrator of Jacob Durr, and HENRY RHODES and Wife, and Others.

(Charleston. Feb. Term, 1827.)

[*Husband and Wife* ⇐12.]

The wife's equity will not be suffered to be removed from the reach of the Court, until an adequate provision is made for her, or on her personal examination she waives it.

[Ed. Note.—Cited in Myers v. Myers, Bailey, Eq. 31, 32; Bouknight v. Elting, 11 S. C. 77; Clark v. Smith, 13 S. C. 595.

For other cases, see Husband and Wife, Cent. Dig. § 60; Dec. Dig. ⇐12.]

[*Husband and Wife* ⇐12.]

The rule applies to creditors claiming through the husband either by voluntary assignment or by bankruptcy.

[Ed. Note.—Cited in Heath v. Heath, 2 Hill, Eq. 107.

For other cases, see Husband and Wife, Cent. Dig. § 60; Dec. Dig. ⇐12.]

[*Husband and Wife* ⇐12.]

The Court will take care of the wife's interest, no matter by whom the application is interposed in her behalf.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 58; Dec. Dig. ⇐12.]

[*Husband and Wife* ⇐12.]

Her equity may be superseded by a sufficient provision made out of another fund.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 58, 60; Dec. Dig. ⇐12.]

[*Husband and Wife* ⇐12.]

The wife must surrender her equity upon private examination, and voluntarily.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 58–67, 396; Dec. Dig. ⇐12.]

[*Creditors' Suit* ⇐20.]

A bill will not lie by a surety to an absent administrator (from the state) against a debtor of the absent administrator to recover such debt in payment for what the surety had been compelled to pay.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 90, 91; Dec. Dig. ⇐20.]

[*Creditors' Suit* ⇐20.]

A creditor cannot pursue the debtor of his debtor for satisfaction of his demand.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. § 90; Dec. Dig. ⇐20.]

Henry Rhodes administered on the estate of Jacob Rhodes who died intestate, and Josiah Pendarvis one of the complainants, and Jacob Durr the intestate of the other complainant, were sureties to his administration bond. Henry Rhodes committed a devastavit on the estate of Jacob Rhodes, and the complainants his sureties were sued at law, and judgment obtained against them for the deficiency in that administration. Henry Rhodes intermarried with Mrs. Durr, the widow and administratrix of Jacob Durr, and removed with her to the western country, without having received her portion of her former husband's estate; upon which her administration on the estate of Jacob Durr was revoked, and administration de bonis non granted to the defendant Bowyer.

The bill prayed a discovery of the distributive share of the present Mrs. Rhodes in her late husband Jacob Durr's estate, now in the hands of the defendant, and insisted that the marital rights of her husband had attached, and prayed that the Court would order it to be paid over to the relief of the complainants.

The answer admitted all these facts, but alleged that the marital rights had not attached, and insisted that if the complainants were entitled to relief, it could only be after an account had been taken of Mrs. Rhodes's administration, and that provision should be made by way of settlement for her benefit. The answer also stated that the defendants

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had had notice of an assignment of this *interest by Rhodes and wife to one Carr. This notice had been given them since filing the bill.

Thompson, Chancellor. I am of opinion that the complainants are entitled to relief. Their claim is a just one in law, and much favoured in this Court. The marital rights have so far attached as to render the property liable for the debts of the husband; and whatever might have been the question, if the wife or husband were dead, as to how far those rights had attached or vested, that question is not now presented, nor forms any obstacle to the relief prayed. A settlement or provision for the wife is not a matter of absolute right. Yet it is one that is generally regarded where a husband is claiming the portion of a wife, whom he married when a minor, or when he is asking the aid of this Court to place him in possession of a legacy, or right accruing after marriage; but neither is the case in this instance. It is therefore ordered and decreed, that the defendant Bowyer do account before the Commissioner for his administration, so as to ascertain the distributive share of Henry Rhodes and wife in his hands, after deducting what may be found due to that estate for her administration. And it is further ordered, that the Commissioner do report the moneys paid by, or for which complainants are liable as sureties of Henry Rhodes. And that the defendant do pay over to the complainant that amount if it does not exceed the proportion of Henry Rhodes and wife in his hands.

The defendants appealed on the ground that the marital rights of Henry Rhodes had not so far attached as to preclude the wife's equity from being settled on her, and that his Honour should have ordered such a provision.

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*W. H. De Saussure, for the appellants. Henry Rhodes had not reduced the interest of his wife in the estate of her husband into possession. It was a thing still in action,

and the principle is clear, that the wife's equity still remained, and the Court will not permit the fund to pass into the hands of the husband, or those claiming through him without providing for her. 2 Nott & M'Cord, 147. 3 Desaus. Rep. 135. Ex parte Elms, 3 Des. 155. Clancy's Rights of Married Women, 190. The Court of Equity is so tenacious of this right of the wife, that even in case of a commission of bankruptcy, which subjects the property in right of the wife to payment of debts, without providing for the wife, Clancy, 229, 236, 250, if the husband voluntarily assign this interest, the Court will not aid the assignee to obtain possession of the fund without a provision for the wife, although he paid a full and valuable consideration. Clancy, 260. Light v. Beresford, 3 Ves. 506. 1 Mad. Cha. 385. 4 Bro. C. C. 138. The same doctrine is laid down in the New York authorities. Kenney v. Udal, 5 Johns. Cha. Rep. 464. In the case of M'Pike v. Hughes, decided by the Court of Appeals in 1817, the Court provided for the wife in opposition to an assignment by the husband for a full and valuable consideration. This however is an application at the suit of a creditor who has no assignment or lien, and it is very clear that he has no right to be relieved, and in the case of Forbes v. Phipps, 1 Eden's Rep. 506, Clancy, 287, Lord Northington dismissed a bill at the suit of a creditor.

Martin, contra. The case cited from Eden is not analogous. That was an application on the part of a creditor of the husband to be paid out of a fund settled on the wife. The general rule, that the Court will not aid the husband, or those claiming through him, in getting possession of the wife's fortune with-

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out providing *for her, is admitted; but it is apprehended that the rule is applicable only to certain cases of peculiar equitable cognizance. In this case, a resort to Equity was only necessary in consequence of the accidental circumstance that Rhodes and his wife had removed from the state. A conclusive answer to the whole argument is, that this is not a right now claimed by the wife. Neither she nor her husband have answered. The administrator Bowyer volunteered this claim, and for any thing that appears she is already provided for. She asks nothing from the Court. The whole of this doctrine is opposed to the feelings and habits of the people of this country; and however the Court may feel bound to give effect to the established rule, they will not be disposed to extend it. A husband may sell or assign his wife's interest in property not reduced to possession, or assign her choses in action; and sureties are always as much to be favoured as any other class of creditors. 10 Mad. 163. Toller on Ex. 83.

De Saussure, in reply. The case from Eden was not, as the counsel supposes, a claim to charge the estate settled on the wife, but to get possession of a sum due to the wife by bond, before marriage. It is not indispensable that the wife herself should interpose her claim. An executor, trustee, or any one else, may interpose and the Court will aid her in whatever way the Court may get possession of the fund. Clancy, 197. Kenney v. Udal, 5 Johns. Cha. Rep. 464.

Curia, per JOHNSON, J. The defendant Henry Rhodes became indebted to complainant in the manner which has been stated. His wife, the defendant Mrs. Rhodes, is entitled to a distributive share of the personal estate of her deceased husband Jacob Durr, and the object of this bill is to charge this

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fund in the hands of William *Bowyer his administrator with the payment of that demand.

By the common law all the chattels which belonged to the wife before marriage, or to which she becomes entitled in her own right, are vested in the husband absolutely, with respect to things in possession, and he may dispose of them as he pleases; but with respect to things in action, although the right to reduce them into possession is by law vested in him, the Courts of Equity have built up a system founded in good sense and common justice, which is intended to secure to the wife a suitable provision for her support and sustenance. The interest which the wife has in choses in action which belonged to her at the marriage, constitutes what is technically called the wife's equity; with respect to which it may be laid down as a general rule that if it be within the reach of the Court, as if it is vested in trustees, or has been paid into Court, or in any other situation which brings it within the control of the Court, it will not be permitted to be removed out of that jurisdiction until an adequate provision is made for the wife, unless she has been already sufficiently provided for, or on her personal examination she thinks proper to waive the benefit of this protection. M'Cauley v. Phillips, 4 Ves. 17. Clancy's Rights of Married Women, 188, 9.

The same protection is afforded to the wife in opposition to others claiming through the husband, whether their claims arise by operation of law, as in cases of bankruptcy or insolvency, Mitford v. Mitford, 9 Ves. 87, or under the voluntary assignment of the husband, and that for a valuable consideration. M'Cauley v. Phillips, 4 Ves. 17. Kenney v. Udal, 5 Johns. Cha. Rep. 464. M'Pike v. Hughes, decided in the Court of Appeals at Charleston in 1817.

For the purposes of the case under consideration, it might then be conceded that the

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complainants have all *the right which the husband could confer in this fund, and yet it does not follow that they have a right to

have their demand satisfied out of it. The fund is by their bill brought into the jurisdiction of the Court. The wife's equity is unimpaired, and the Court will not assist the complainants until the wife is provided for.

But the case itself is much stronger. The husband has never reduced this interest into his possession, nor has he done any other act by which he has acquired an absolute dominion over it. The complainants have no lien on, or interest in it, either in fact or in law; and if, as has been shewn, the wife's equity is held so sacred that the husband himself will not be aided to deprive her of it, a stranger will not.

These positions and the conclusion drawn from them have not been controverted in the argument; but it is said that they are inapplicable, because this claim is not now set up by Mrs. Rhodes herself, but is volunteered by the defendant Bowyer, and that the Court cannot know but that she is already sufficiently provided for, and in that event her equity would not attach. Here it may be necessary to remark, that although Rhodes and wife are parties, defendants to the bill, they reside without the state, and have never been served with process, and for any thing that appears are in fact ignorant of these proceedings, and reasoning a priori it would be subversive of the rule itself, if the Court should dispose of her rights without having previously ascertained that she was otherwise provided for, as the constraint which the husband has it in his power to impose on her might wholly defeat it.

But it is very clear that the Court will take care of the wife's interest by whomsoever the application may be made, or by whatever means it is brought to the view of the Court, whether by her trustee, executor

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or prochein *ami, or any other person in her behalf. Clancy, 179. Kenney v. Udal, 5 Johns. Cha. Rep. 464.

A married woman may, it is true, waive or surrender her equity; and there is no doubt that it may be superseded by a sufficient provision made for her by the husband out of another fund; but it is incumbent on those claiming the benefit of such a state of things to show it; for it will not be assumed by the Court, whose duty it is to guard against constrained and hasty relinquishments of this right. Clancy, in his Treatise on the Rights of Married Women, p. 324, 5, remarks, that the Courts of Equity have found it expedient to interpose certain forms, and that it is the unvarying practice, that whenever the consent of the wife is required to waive this right, she must undergo a private examination, separate and apart from her husband, and that the Court will not act upon it until it is by these means ascertained that the surrender is on her part perfectly voluntary.

Now there is in this case not only an entire want of the consent of Mrs. Rhodes to the appropriation of this fund to the object sought by the bill, but we have her dissent so far as Bowyer was competent to express it. Nor is there the slightest circumstance from which it can be inferred that she is otherwise provided for; and the Court would be wanting in that care which it professes to cherish over the rights of persons thus situated, if the complainant should be aided in getting possession of the fund.

The claims of the complainants have heretofore been considered as founded on a right in themselves derived through the husband, and it has already been shown that even then they would not be entitled to relief. But in point of fact their real situation is not so favourable. They are strangers, creditors to the husband, who seek to have their demand paid out of the wife's equity. They have in law no lien on this fund, nor is it

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given by con*tract; and it is difficult to conceive on what principle their claim proceeds. None, I apprehend, exists in Law; and if it be a mere equity, it is opposed by the higher equity of the wife, and they cannot be relieved. The case of Mason v. Masters, cited by Lord Northington in Forbes v. Phipps, 1 Eden, 506, was exactly this case, and then Lord Northington dismissed the bill for want of Equity. But let it be assumed, as the decree of the Chancellor would seem to imply, that the legal right of the husband Rhodes had attached, and that the choses in action in the hands of the defendant Bowyer had absolutely vested in him, and yet I think the plaintiffs could not be relieved. In that case the claim presented would be that of a creditor pursuing the debtor of his debtor for satisfaction of his demand. To this it might be sufficient to reply, that no case has been cited and none is furnished by the books, so far as I have been able to discover, where Equity has relieved in such a case; and on principle I think it ought not, at least as a ground of Equity jurisdiction. In cases originating at Law, such a fund might be reached without the aid of the Court of Equity, by final process against the person, by which the defendant is compelled to surrender all his property, whether in possession or in action, to his creditor; and so he might by the final process out of Chancery in a case originating there. On the ground of jurisdiction, therefore, Equity would not entertain such a cause. In any possible view of this case the complainants are not entitled to the relief sought. Their bill is therefore dismissed with costs.

NOTT, J. I concur in this opinion on the last ground; but I am not prepared to say, that where a married woman is a party to a bill, and does not express any wish that the Court should settle her property on her-

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self, that *it ought to be withheld from the creditors of the husband upon the application of a stranger, without any inquiry being made whether it is by her authority or desire.

Decree reversed.

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2 McCord, Eq. 376

MARGARET STOCK v. CHARLES PARKER and Others, Administrators of B. B. Smith.

(Charleston. Feb. Term, 1827.)

[*Life Estates* ⇐⇒4.]

When a tenant for life of slaves dies after the first of March, the slaves employed on the plantation to make the crop, must so continue until the crop is made, which becomes assets in the hands of the executor of the tenant for life, without payment of hire to the remainderman.

[Ed. Note.—Cited in Gillam v. Caldwell, 11 Rich. Eq. 81.

For other cases, see Life Estates, Cent. Dig. § 6; Dec. Dig. ⇐⇒4.]

[*Dower* ⇐⇒95.]

The right of dower is a charge upon the lands and not upon the general funds of the estate of the husband; and where the Commissioners assessed the widow's dower at $500, which the administrator paid, the item was not allowed in his account.

[Ed. Note.—Cited in Klinck v. Keckley, 2 Hill, Eq. 256; Gibson v. Marshall, 5 Rich. Eq. 260; Williamson v. Gasque, 24 S. C. 104; Elder v. McIntosh, 88 S. C. 290, 70 S. E. 807.

For other cases, see Dower, Cent. Dig. § 340; Dec. Dig. ⇐⇒95.]

[*Usury* ⇐⇒133.]

A note or bond made for the purpose of being sent into the market, and without any consideration, is usurious, even in the hands of an innocent holder, if discounted in the first instance at an usurious rate of interest; but strict proof of the fact is required as to an innocent holder. In absence of proof the bond implies a consideration, and the mere fact that it was sent into market by the drawer will not raise the presumption of usury, when it was in the power of the creditor raising the objection to have made a witness of the obligee, who had assigned the bond.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 413; Dec. Dig. ⇐⇒133.]

[*Executors and Administrators* ⇐⇒211.]

Moneys received by an executor or trustee on bonds, and not paid over, cannot be charged by his cestui que trust against his estate, upon the death of the trustee, as a bond debt. A breach of trust only forms a simple contract debt.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 746; Dec. Dig. ⇐⇒211.]

This was a bill against the administrator of B. B. Smith to marshal the assets among the creditors. In the examination of the administrator's accounts several questions arose, which were decided by his Honour, Chancellor De Saussure, as follows:

By a marriage settlement, executed before marriage, certain negroes were conveyed to trustees, in trust for the use of B. B. Smith, during the joint lives of himself and his wife, and on the death of either, to the survivor. Mr. Smith died on the 2d of June 1823. The administrators, by the advice of counsel, paid Mrs. Smith for the hire of her negroes from the time of Mr. Smith's death to the end of the year. This payment was rejected by Mr. Elliott the Commissioner, and on exceptions, his report in this particular was confirmed; the act of 1789, expressly providing, that if a tenant for life of negroes die after the 1st of March, such negroes as were employed on the plantation to make the crop, should continue until the crop is finished, and such crop shall be assets in the hands of the executor of the tenant for life. Pub. Laws, 494.[1]

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*Mr. John Louden offered to prove a bond of the intestate, conditioned for $3,000. The bond was opposed as usurious. The evidence was, that the bond was carried by the intestate to a broker, to sell and raise money. The broker sold it, and received $2,700. The bond on the face of it was payable to Thomas R. Smith, in one year, with interest from the date, and assigned by him. The Commissioner rejected this bond as usurious. An exception was taken by Louden, who it was admitted was a bona fide holder, and his Honour sustained the objection, and directed the Commissioner to receive the proof and admit the bond.

Ann Downes Smith, widow, another creditor, in her life time, put a number of negoes into the hands of a broker, to be sold on her account. On the day of sale she died, and appointed B. B. Smith executor, who proved her will, completed the contracts of sale, by executing bills of sale to the purchasers, and taking their bonds to him as executor. He received the money afterwards, and died without accounting to the legatees of Mrs. Smith, who were minors. Mr. Elliott, on the authority of Gadsden v. Lord, 1 Desaus. Rep. 208, admitted the legatees of Mrs. Smith to prove the sums that the intestate owed them, on account of bonds which he had thus collected, as a bond debt against his estate. An exception was taken to the report on this point, and sustained by his Honour, who directed the accounts to be stated over, and this debt to come in as a debt by simple contract only.

From this decree Mrs. Smith the widow, and the administrators, appealed, because his Honour refused to allow to the administrators the sum of $1,500, which they paid to her for the hire of her negroes, from the death of Mr. Smith to the end of the year.

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[1] Vide ante, p. 84, the case of Leverett v. Leverett, S. P.

Richard D. Smith, administrator, with the

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will annex*ed of Ann Downes Smith, appealed, on the ground that he was not allowed to prove as a bond debt the sums that Smith the intestate had received on bonds, as trustee for the legatees of his testatrix. And the administrators appealed on the ground, that the decree admitted the bond produced by Louden, which, from the evidence, was usurious, to be proved as a good debt against the estate.

Another point in the case was this. The intestate, B. B. Smith, sold a tract of land to the complainant Stock, on which his wife had not renounced her dower, and the intestate gave Stock a bond of indemnity against her claim. This bond was allowed by the Commissioner, and an exception on that ground taken up to the Chancellor. His Honour confirmed the report of the Commissioner, and allowed the bond for $500, so much having been paid to Mrs. Smith, for her claim, to come in as a simple contract debt, Toller's Ex. 282, on the ground that a bond to save harmless stood as a simple contract debt.

From this part of the decree, Thomas R. Smith, a creditor, appealed, on the ground that his Honour was wrong in allowing this payment of $500 out of the general funds of the intestate's estate, as Mrs. Smith's claim was only a special charge on the land, and not on the general funds of the estate.

Petigru, as to the hire of the negroes, contended, that the act of assembly did not apply in this case. Here the right of Mrs. Smith to the negroes, on the death of Mr. Smith, was secured by contract, which would control the operation of the Act. Co. Litt. 55 b. note, 363. If two are jointly seised, and one die, the emblements go to the survivor. Com. Dig. Biens, G. Y. The effect of the marriage settlement entitles Mrs. Smith to the survivorship, which took effect eo in-

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stanti of the death *of Mr. Smith. Admit that by the terms of the act the executor was entitled to the possession of the negroes, it did not follow that they would not be bound to pay for their hire, as in the case provided for in the act.

As to Louden's bond, the question was the same as in the case of Fleming v. Mulligan, 2 M'Cord's Rep. 173.

Frost, as to the trust funds received by B. B. Smith. The devastavit committed on the estate of Mrs. Ann Downes Smith was the same as in the case of Gadsden v. Lord, and that case has been regarded as law from the establishment of the Court of Equity up to the formation of the present Court of Appeals. 1 Desaus. Rep. 208. 3 Desaus. Rep. 116. The principle on which that case proceeded, is that the parties in interest were minors, and the debts collected specialties; and all these circumstances entered into the present case. The objection to the principle in that case was, that equity regarded the breach of trust as a simple contract debt, and all the authorities refer to the case of Vernon v. Vaudry, 2 Atk. 119, and that was a mere dictum. That rule does not always hold. Equity will follow the trust fund, in whatever it may be vested, in favor of the cestui que trust. 2 Mad. Cha. 147. 2 Atk. 59. 2 Meriv. 131. Cooper, 146.

As to the negro hire, the marriage settlement gave Mr. Smith a life estate in the negroes, and it was the very case provided for by the act, and the executor was entitled to the emblements.

Grimke. The act of 1789 obviously intended to put negroes on the same footing with real estate in England. There, whether the estate is created by the act of the party or by operation of law, if the tenant for life die after the beginning of the year, the remainder of that year goes to his executor.

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without any further compen*sation. A contract for a life estate must be understood in reference to the law, and the construction will control the otherwise apparent intention of the parties expressed in the contract.

As to the dower, the act concerning the admeasurement of dower creates a charge on the heir at law for the dower of the wife, so that the payment by the administrator to Stock was a devastavit, and that credit ought to be struck out of the account.

With respect to Louden's bond, although he came in with the other creditors as a quasi defendant, yet he was in effect a complainant, and according to Fleming v. Mulligan he was not entitled to recover.

King, for Louden. It did not in fact appear that Louden's bond was usurious. The fact of usury ought to be clearly proved, especially as it is now in the hands of a bona fide holder without notice. Mairs, the witness, did not state what the consideration of the bond was. It was a mere matter of conjecture that it was originally usurious. Prima facie, a consideration will be presumed. The intestate carried his bond into the market, holding it out as being founded on a sufficient consideration, and he received on it, in a fair course of speculation, $2,700; and will he be permitted to take advantage of his own fraud, and discharge himself from liability? Again, this objection was not raised by the representatives of Smith, but by his creditors, and according to the case of Moffatt v. M'Dowall & Black, 1 M'Cord's Cha. Rep. 441, they will not be permitted to do so. 2 Mad. Cha. 490. Purchasing a note at a discount is not usurious, nor

will the defence of usury avail in opposition to a bona fide purchaser without notice. 2 Munf. Rep. 36. Gilmer's Rep. 16.

Harper, in reply. The decree rejecting
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the charge *for negro hire is founded on a narrow and literal construction of the act. It is a general rule, that laws are to be construed in reference to the existing laws, and the rights of the parties under them. On general principles, if one use the property of others he is bound to pay for such use. And if the act be construed in reference to this right, it will follow, that although the executor of the tenant for life is entitled to hold to the end of the year, he will be bound to pay reasonable hire. The provision made by the act in the case of a sub-tenant favours this construction. All the right which the executor of the tenant for life has is the right to enter and take away the growing emblements. Toller, 149. 2 Black. Com. 122. 2 Com. Dig. 290. Bien. G. 2. Coke Litt. 55 b. If the tenant for life die before the time that the rent falls due from the under tenant, the under tenant was not bound to pay either. Neither could sue. The statute of 11th Geo. II. Ch. 14, p. 14, provided for this evil, and it was obvious that the provision of our act was intended to remedy the evil here.

Curia, per JOHNSON, J. This Court concur with the very learned Chancellor, who tried this cause, in all his conclusions on the questions growing out of this case, except that which allows to the defendants a credit of $500 in their accounts with the estate of their intestate for so much paid by them to Mrs. Smith, the widow, on account of her dower in the Green Savanna plantation. As explained in the argument, it appears that Mrs. Smith had instituted proceedings to obtain her dower in the lands, and the Commissioners finding it impracticable to lay off the dower in the land itself, without doing injustice to the parties, assessed the sum mentioned in lieu thereof, and the defendants paid her the amount out of the general funds of the estate, and the land still remains undisposed of. The objection now is that this
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assess*ment is a charge upon the land itself, and not on the general funds of the estate, and that the payment was a devastavit, and ought not to have been allowed.

The right of dower consists of a property in the soil itself, and although the act of the legislature regulating the admeasurement has, under particular circumstances, authorised the substitution or assessment of a sum of money in lieu of it; yet the character of the right is unchanged, and it operates as a charge upon the land itself, and not on the general funds of the estate. It is not perceived how this question can materially affect the rights of these parties, if the lands are worth the sum assessed; but cases might arise in which it would be important, and in settling principles we ought to look to all the consequences. Let us suppose, for instance, that a particular creditor has a specific lien on Green Savanna for the payment or his debt, and that there were other debts of superior degree sufficient to cover the whole residue of the estate real and personal. Now it is obvious in such a case the payment of the sum assessed, in lieu of dower, out of the general fund would in effect transfer so much from the creditors of the last description to the first, in direct violation of the act regulating the distribution of assets. Many other examples of the same sort might be put, and it is very clear that in point of principle this payment was improperly made. In this respect therefore the decree must be reformed, and this item expunged from the account.

There are two other points in the case, as to which the Court deem it necessary to state, in a concise way, the reasons on which its concurrence with the Chancellor is founded. The first of these relates to the bond purchased by Mr. Galluchat, and by him transferred to Mr. Louden, who has exhibited it as a demand against the estate of the defendant's intestate.

The case of Fleming v. Mulligan [2 McCord,
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173, 13 Am. Dec. 707] has established *the doctrine, if any doubt about it ever existed before, that a note made for the purpose of being sent into the market and without any consideration is usurious and void even in the hands of an innocent holder, if discounted in the first instance at an usurious rate of interest; and the doctrine applies with all its force to bonds similarly situated. But in that case the fact was clearly and distinctly proved; and I apprehend that according to principle strict proof would be required in all cases operating as a forfeiture on innocent holders. Let us then examine the evidence adduced in this case, and inquire whether the facts be proved.

In the first place, the bond itself being a contract under seal presupposes a consideration; and in the next there is no direct evidence of a want of consideration. It is attempted to be inferred, however, from the evidence of the witness Mairs, who negociated the sale to Galluchat, who supposed that it was made without consideration in the first instance, and intended to raise money; but he furnishes no fact from which this conclusion can be drawn, except that it was put into his hands to be sold. Now, although it is notorious that these means are often resorted to for the purpose of raising money, it is equally certain that individuals frequently find it to their interest to send notes, bonds, and other securities into market to be discounted, although they are founded on adequate considerations, and such paper is clearly the subject of legitimate traffic. The

chances then are equal whether this bond was or was not founded on a consideration, and the presumption in its favour must prevail. Again, conclusive proof of the fact was in the power of the defendants, if in truth it existed. Thomas R. Smith, one of the parties, is under the act a competent witness; he was within the process of the Court, and might have been required to give evidence; and although the omission to do so is not con-

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*clusive against the defendants, it may be taken into the account in weighing the evidence.

The remaining question which the Court deem it necessary to notice, is that arising out of the claim made to charge the devastavit committed by the intestate B. B. Smith, executor of Mrs. Ann Downes Smith, as a bond debt against his estate. The act of 1789, directing the mode in which debts due by an estate shall be paid, provides first for the funeral and other expenses of the last sickness, and the expenses of administration; next debts due to the public; next judgments, mortgages, and executions, the oldest first; next rent; then bonds and other obligations; and last of all, debts due on open accounts. The question then arises to which of these classes does this demand belong? Now I take it, that it is impossible by any subtilty or refinement to transform it into judgment, mortgage, execution, bond or other obligations; and of necessity it must fall within the last, and be postponed until all the preceding are paid. The case of Gadsden's Ex. v. Lord's Ex. 1 Desaus. Rep. 208, has been relied on as conclusive of the rights of the parties to have this demand placed on the footing of a bond debt, and the analogy between them is certainly very striking. It will be difficult, however, to maintain that case on principle, and its authority as a precedent is shaken by the refusal of the Court to adopt the principle in any subsequent case; for without laying the axe to the root, they have evidently been labouring to get rid of it by carving out exception after exception (vide [Mason's Ex'rs v. Man's Ex'rs] 3 Desaus. Rep. 116); therefore without saying more of it, I will refer to the opinion of this Court in the case of Rolain v. Darby, 1 M'Cord's Eq. Rep. 472, as overruling its authority.

Neither the wisdom nor the policy of the discrimination made in the payment of debts

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of different grades *out of an insolvent estate is readily perceived when applied to the state of things in this country, and if I were now permitted to make a law on the subject it might be otherwise, but to us belongs the exposition of the law only, and on this subject we find the rule prescribed in terms that are not to be misconceived, and so strong that we are unable to bend it to subserve even the cause of the orphan.

Decree affirmed.

2 McCord, Eq. 385

SIMON VERDIER v. SAMUEL SIMONS Executor of Montague Simons, and ORRAN BYRD Executor of Samuel B. Simons.

(Charleston. Feb. Term, 1827.)

[*Trusts* ⟸232.]

If one concerts with another standing in a fiduciary relation, to commit a fraud on his cestui que trust, he will be answerable at least to the extent that he has been benefited by it.

[Ed. Note.—Cited in McSwain v. Atlantic Coast Lumber Corp., 96 S. C. 173, 80 S. E. 87.

For other cases, see Trusts, Cent. Dig. §§ 337, 338; Dec. Dig. ⟸232.]

[*Champerty and Maintenance* ⟸6, 7.]

Champerty does not apply to a bona fide purchaser of any right, in possession or action.

[Ed. Note.—Cited in Cooke v. Pool, 25 S. C. 598.

For other cases, see Champerty and Maintenance, Cent. Dig. §§ 5, 54, 92; Dec. Dig. ⟸ 6, 7.]

[*Executors and Administrators* ⟸87.]

[Where an administrator entered into a compromise of a suit relative to the estate, in order to prevent a purchaser of the widow's distributive share from deriving any advantage from his purchase, the settlement was set aside.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 384; Dec. Dig. ⟸ 87.]

This bill was filed to compel the defendants to account for, and pay over to the complainant, a debt which had been established by an award made by arbitrators pending a suit, and finally confirmed by the Court, to be due by the late Montague Simons to Mrs. Rebecca Simons, the widow of S. B. Simons, now Mrs. Wilson. The award decided that a certain deed of release obtained from Rebecca Simons, the widow of Samuel B. Simons, should be considered as a void instrument, and that Montague Simons, the executor of Samuel B. Simons, should pay out of the funds of Montague Simons's estate into the hands of the complainants, the amount of a bond given by Montague Simons on account of a horse and chair, watch, and furniture, belonging to the estate of Samuel B. Simons; and also to pay two thousand dol-

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lars in full of all demands by *complainants on account of the estate of Samuel B. Simons's claims against the estate of Montague Simons. Subsequent to the award Samuel Simons the executor of Montague Simons, and Orran Byrd the executor of Samuel B. Simons, came to a settlement, and the former paid to the latter four thousand five hundred dollars in full of all demands, and a release and acquittal was given. The complainants insisted that the settlement was improperly made.

First. Because it was made before the expiration of the thirty days after the decree, during which no execution could have been issued.

Second. That the settlement was an unjust one, in which Samuel Simons obtained

a gain of one thousand five hundred dollars as a douceur from Orran Byrd. In other words he paid a debt of six thousand dollars, with four thousand five hundred dollars, to an administrator who gave up one thousand five hundred dollars as a douceur to S. Simons for paying him the cash.

Third. That when this settlement was made, it was with the express notice that Mrs. Rebecca Simons (now Mrs. Wilson) had sold and assigned her share of the estate of her deceased husband to the present complainant Simon Verdier, for a valuable consideration, before the settlement with Byrd.

De Saussure, Chancellor. In considering the first point, it does not appear to me that there is any weight in it. The representative of Montague Simons's estate was not bound to wait for an execution to settle the debt, and if he were willing to pay those who were entitled to receive it, he was not bound to issue an execution at all, but might receive it at any time. The real question turns upon the fairness and propriety of the settlement. It does not appear to me that there is any difficulty in pronouncing that this set-

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tlement was an *unjust one. The administrator had no right to make a compromise and to give up one-fourth, at least, of a just and safe debt, in order to obtain the payment of a part of the debt to himself. I do not say, that there is no case where an executor or an administrator may not be justified in compromising a debt, and giving up a part to save the remainder; but it must be in a clear case of necessity, where great risk would be run of losing all or a great part, unless a compromise be made. There does not appear to have been any risk in this case. It was clearly a sacrifice of part, in order to obtain the immediate payment of the balance to the administrator for his own convenience and purposes, and to defeat the rights of others. This leads us to the third question. The evidence is very distinct and positive by three witnesses, "that notice was given before the settlement to Simons, that Mrs. Simons (now Wilson) had sold and assigned her rights in her husband's estate to the present complainant," and it cannot be doubted that notice was given to Byrd himself of the assignment prior to his settlement. This seems to have been so well settled, that the counsel for Simons cautioned him not to settle and make the payment, which he did immediately before it took place. Against the force of these facts, it was insisted for the defendants, that Mr. and Mrs. Wilson sold and assigned, or otherwise transferred to Orran Byrd their moiety of the estate of Samuel B. Simons, on which he was entitled to make the settlement and to receive the moiety, and give the discharge to Samuel Simons; and also that the complainant Verdier was not a fair purchaser for a valuable consideration from Mrs. Simons, the widow (now Mrs. Wilson), but had purchased a suit then pending for an uncertain right, which was champerty, and for a very inadequate price, which was fraudulent. With respect to the assignment or transfer by Mr. and Mrs. Wilson of her rights and powers to Orran Byrd, the evi-

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dence does *seem to me to establish, that this was obtained by fraud and misrepresentation, subsequent to the sale and conveyance of Mrs. Wilson's rights to the complainant Verdier, with the full notice of such an assignment to Byrd, with an express view to defeat that assignment, nothing being paid by Byrd to Mrs. Wilson. With respect to the purchase by Verdier from Mrs. Wilson, there is no evidence impeaching the fairness of that transaction. As to champerty, contracts of this kind, if made fairly, have not been considered in modern times to be champerty. At any rate it is for the party aggrieved, and not for strangers, to take advantage of these objections. From this view of the whole case it appears, that Samuel Simons paid the money to Orran Byrd in his own wrong. The mind cannot resist the conclusion, that this settlement was hastily made expressly to evade the rights of Verdier: Byrd to get the money for his own use, and Simons to secure the advantage of one thousand five hundred dollars.

It is therefore ordered and decreed, that the exeçutor of Samuel Simons, executor of Montague Simons, do pay from his estate to the complainants the amount decreed to be paid in the former suit in this Court, wherein Orran Byrd and others were complainants and the executor of Montague Simons and others were defendants, and that the costs be paid out of the estate of Samuel Simons.

From this decree the defendant J. C. Levy, executor of Samuel Simons, appealed.

First. Because the release pleaded was in bar.

Secondly. That the decree pointed out the mode of settlement, and the same was complied with; the administrator and J. S. Wilson and wife having full power to discharge the defendant.

Thirdly. That this was a case of champerty, and there was no equity for relief on behalf of complainant.

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*Fourthly. That the decree, at all events, should only be for the balance.

Petigru, Attorney General, for the appellant. It may be admitted, that Byrd had notice of complainant's purchase from Wilson and wife, and that his receipt of the money from the defendant was intended as a fraud on him. Byrd was the administrator of J. B. Simons, and was authorised to sue and receive the money. Wilson and wife, as the next of kin, might have been entitled to the

fund, and they had the power to make an assignment of it; but they had no power to prevent or control the payment of it to Byrd. Regularly, it was obliged to pass through his hands.

2. The award directs that the money should be paid to their joint receipt. This could not have been performed by payment to the plaintiff, under the order of Wilson.

The payment of a debt due on account to the person to whom it is due is good after notice of an assignment. 2 Const. Rep. (Treadw. Ed.) 498. On this principle the payment would be good, although the release would be void as to the balance of the debt of $6,000. If deeds be set aside for want of a sufficient consideration, the universal rule in equity is, that what has been paid shall be returned. Murray v. Palmer, 2 Sch. & Lef. 474. Wharton v. May, 5 Ves. 27. Fanning v. Dunham, 5 Johns. Cha. Rep. 123. Butler v. Haskell, 4 Desaus. Rep. 486. On this principle it is held, that if an executor dispose of the property of his testator, with the intention to appropriate it to his own use, which is known to the purchaser, the contract is, notwithstanding, good. 4 Term. Rep. 625. 2 Mad. Cha. 289. 3 Atk. 235. 17 Ves. 153. The principle on which these cases go, is, that the Courts cannot distinguish between the testator and the executor.

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*The contract between the complainant and Wilson and wife was champerty, and void. It was buying a thing in suit, in the very terms of the statute. Pub. Laws, 30. If a contract be against the policy of the law, the Court will not lend its aid to inforce it. And there is no distinction between those that are mala prohibita and malum in se. If the contract is prohibited by law, it is void, although not declared to be so. 13 Ves. 542. 2 Com. Contr. 38. This is a contract within the statute against champerty, and is therefore void. 2 Atk. 224. 5 Johns. Cha. Rep. 48. 8 Johns. Rep. 479. 13 Johns. Rep. 289. 20 Johns. Rep. 386.

W. H. De Saussure, contra. The definition of champerty is, when one contracts to have part of the thing in dispute, in consideration of maintaining the suit. 1 Bac. 575, tit. Champerty. 4 Com. Dig. 207, tit. Main. Co. Litt. 368. Fitzh. 172. There is nothing in the cases or in the principle which operates to exclude one from fairly purchasing a legal demand. Strangers cannot take advantage of it. 2 Bridg. Ind. 288. 2 Desaus. Rep. 636. All the cases referred to by the appellant's counsel relate to contracts made by persons standing in the relation of agent. By several acts of the legislature, bonds, notes, judgments, and decrees, are made assignable at law. These matters were always assignable in equity. So are contingent interests; and equity will protect the purchaser. Nor do they amount to champerty. 1 Fonb. 214. 1 Swanston, 56. The Courts of Law as well as the Courts of Equity will take notice of and protect the rights of assignees to choses in action. 3 Johns. Cha. Rep. 425. 2 P. Wms. 608. If one purchase with notice of another's right, paying a consideration will not avail him. He throws away his money, voluntarily. Mead v. Oring, 3 Atk. 238. The object in ordering that the money should be paid on

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the joint *receipt of Byrd and Wilson was to prevent Byrd's practising a fraud on Wilson. The defendant was trustee for Byrd and wife, and for their assignee the complainant, and he could do nothing to affect the interest of his cestui que trust. The defendant Simons knew these circumstances, and having united with Byrd to defraud him, he was answerable for all the consequences. Simons, moreover, participated in the spoil by which he gained an unconscientious advantage to the amount of $1,600, equal to twenty-six or twenty-seven per cent in the payment of his own debt. If one concerts with an executor to get the estate of the testator at an inadequate price or fraudulent under-value, contrary to the duty of the executor, he shall be answerable for the full value. The objection as to the inadmissibility of Wilson and wife cannot prevail. Releases were executed.

Grimke, in reply. By the terms of the decree, Wilson and wife and Byrd were jointly entitled to receive the money from the defendant Simons. In law Byrd alone was entitled to receive it, and unless the complainant had done something to change their rights. He remained silent, and he is bound by the confidence reposed in them. As to the objection, that Simons only paid a part, it was only the case of one paying a part for the whole before it is due, and is legitimate. The complainant's purchase was champerty, and he could take nothing by it. It was one of the stipulations that Wilson was to have $200 in the event of a recovery, and falls within the counsel's own definition. It is said that a contract founded in champerty is only void as between the parties. But the very object of the statute was to protect others from oppressive and legal persecution.

Curia, per JOHNSON, J. This case pre-

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sents two ques*tions. First. Whether the assignment made by Rebecca Simons (now Wilson) to the complainant of her interest in the estate of her deceased husband, Samuel B. Simons, pending a suit in Chancery to recover it, was or was not void, as constituting what is called champerty.

Secondly. How far the release subsequently executed by Orran Byrd and Wilson and wife (late Rebecca Simons) to Samuel Simons, operates as a bar to the complainant's rights under the assignment to him? In re-

lation to the first of these questions it may be necessary to premise, that the complainant paid to Mrs. Wilson, as a consideration for the assignment made to him in the first instance, twelve hundred dollars, and that he afterwards voluntarily superadded about two hundred dollars more, making in the whole about $1400.

Judge Blackstone (4 Comm. 135) derives the term "champerty" from the words campi partitio, and if we take the literal interpretation of these terms, as descriptive of the offence, it will, I think, follow that it consists in promoting law suits, by furnishing the means of carrying them on, and speculating in the result, by sharing the profits, and never was intended to apply to a bona fide purchaser of any right whether in possession or in action. It is according to Lord Coke, the most odious species of maintenance. Bacon's Ab. tit. Maintenance A. 2.: and is punished in all actions, real, personal, or mixed. But it will not be champerty if A contracts with B for a manor, for which B is afterwards impleaded, and pendente lite B conveys it to A (Id. A. 3). So if a stranger purchase bona fide, pendente lite, it is no maintenance (Id. A. 5).

The complainants in this case did purchase, for a consideration agreed upon with Mrs. Wilson, her whole interest in this estate. It was not, therefore, a speculation on the probable result, or a sharing of the profits,

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but a *bona fide sale for a valuable consideration; and whatever might have been the consequences of an act of champerty on the rights of these parties, they do not attach, as the offence has not been consummated.

The remaining question is one of more difficulty. Orran Byrd, as the administrator of Samuel B. Simons, had in law the exclusive right to receive all moneys which belonged to that estate, from whomsoever due, or on whatever account. By the terms too of the award, which by its confirmation became the judgment of the Court, Samuel Simons was directed to pay the amount to the joint receipts of Byrd and Mrs. Wilson, and under it the decree could not have been satisfied without his receipt. He had a right, therefore, to stipulate as to the terms on which he would give his receipt, at least so far as a moiety of the demand. He was clothed too with the authority of Wilson and wife to receive the whole. It is said, however, and the proof is very satisfactory, that there was a combination between Samuel Simons and Byrd to defraud the plaintiff, and that Simons entered into the compromise with the avowed determination of preventing the complainant from deriving any benefit from his contract, and that the means resorted to was, by paying over the money to Byrd, who was irresponsible on account of his insolvency. The equitable rights of the complainant are opposed by the direct legal right of Byrd to receive the money, and it appears to me, that no contract or combination of circumstances to which Byrd himself was not a party, could divest him of that right; for it was one with which the law had clothed him. So far, therefore, as relates to the money actually received, the complainant must be regarded as concluded.

The amount of the decree against Samuel Simons was something upwards of $6,000, and by the compromise entered into with

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Byrd, he paid it off with $4,500: *and if the release is to be considered as conclusive, Samuel Simons would pocket, as the fruits of his iniquity, more than $1,500, upwards of twenty-five per cent on the amount of his debt. Let it be asked, on the broad principles of equity and natural justice, is he entitled to retain it? I think not. There was no consideration for the release beyond the sum paid. The debt was then due and owing, and although, by the forms of law, the complainant in that case could not then have taken out process against the defendant on the decree, the obligation on him was the same. In point of law, therefore, it might well be questioned, whether the release was binding. But again, Byrd in making this compromise acted in the double character of administrator of Samuel B. Simons, and as agent of Wilson and wife. He had no authority from them to make it. It was, therefore, a fraud upon them, and Samuel Simons, being a particeps criminis, is clearly liable, except so far as he is protected by the positive rules of law.

The rights of the complainant, under and by virtue of the assignment made to him by Mrs. Wilson, although not strictly legal, are such as the law recognizes. The Courts of Law, in some instances, and the Courts of Equity, will always protect them. And I think it has been well maintained by the cases cited in the argument, that if one concerts with him who stands in a fiduciary relation to commit a fraud on the person beneficially interested in the subject matter, that he is answerable at least to the extent that he is benefited by it. 3 Johns. 425. 2 P. Wms. 608. 1 Mad. 256. 17 Ves. 167.

It is therefore ordered, that the defendant, Jacob C. Levy, do pay to the complainant, out of the estate of his testator, Samuel Simons, the amount of the decree obtained against him at the suit of Orran Byrd, administrator of Samuel B. Simons and Re-

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becca Simons, *deducting therefrom the sum of $4,500, paid by him to the said Orran Byrd, on account thereof, with interest thereon and costs of this suit.

Decree affirmed.

2 McCord, Eq. 395

HEYWARD v. GLOVER.

(Charleston. Feb. Term, 1827.)

[*Wills* ⟸832.]

The testator first gave pecuniary legacies to be paid out of his estate in three years after his death, without interest. He then divides his estates, bonds, notes, &c. between a sister and a brother's (William) children; to each bequest the condition was attached, "after paying their proportion of my debts." He then gives the residue of his estate to his sister. By a codicil he leaves twenty-five negroes to the children of another brother, Josias, his "executor, to employ the labour of the said slaves during their minority and apply the profits of the same to their benefit." *Held* that the pecuniary legacies were a charge upon the whole estate, except as to the negroes given to the children of Josias. Also *held*, that his sister and the children of his brother William were chargeable with the legacies and debts in proportion to the shares of the estate which they received.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2153; Dec. Dig. ⟸832.]

[*Wills* ⟸836.]

The word "proportion" indicates that each of the two great devisees were to pay according to the amount devised to them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2139, 2140, 2150–2155; Dec. Dig. ⟸836.]

[*Wills* ⟸820.]

Legacy charged on the whole estate, except that part given to Josias's children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114–2119, 2121; Dec. Dig. ⟸820.]

The case referred to ascertain if there was any residuary estate to pay the pecuniary legacies; and whether the executors had retained the estate in their hands longer than necessary to pay the legacies.

John Heyward, Esq. by his last will bearing date the 5th of February 1814, among other things, gave as follows: "I give to my niece Ann Heyward, and my nephews James, Thomas, John and George, children of General Cuthbert, the sum of £1000 each, to be paid out of my estate, in three years after my decease, free of interest. Also, I give to my brother Josias Heyward twenty-five negroes, to be drawn by lot, in families, out of the gang I got by my father's estate," and directs, in order to prevent families from being separated, that if he drew more than twenty-five, he should make compensation for the surplus.

The testator then gave to his sister Mrs. Glover several plantations, all the negroes which were given to him by his cousin John Heyward, all his horses, carriages, furniture and plate, and all his moveables at Trickton. "Also I give and bequeath to my said sister, the crop now on hand at the Fisher's Hill plantation (one of the plantations devised to her) after payment of her proportion of my debts, together with all bonds, notes and accounts due and owing to me, and all my ready money."

The testator then gives to his niece Ann Heyward, and his nephews William, Thomas,

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John and Daniel, *several other plantations, and all "the rest and residue of the negro slaves which I got by my father's estate, equally between them, share and share alike, with limitations over in case of their dying under age; also the crops now on hand at the Walnut Grove plantation (one of the plantations devised to them) I give and bequeath to my niece Ann, and to my nephews William, Thomas, John and Daniel, the children of my brother William Heyward as aforesaid, after paying their proportion of my debts, equally between them;" and as to any other estate which he might die possessed of, he gave the same to his sister Mrs. Glover. No crops were on hand when he died but cotton at Fisher's Hill, worth about $1600. He had sold what he had when he made the will. He had given the crop at Walnut Grove to Josias Heyward in his life time. The legacies were finally paid off in 1825.

By a codicil dated 30th of September 1819, the testator taking notice of the death of his brother Josias, gave the twenty-five negro slaves (given by the will to Josias) to the children of the said Josias,—Charlotte, Daniel, Thomas and Joanna; and in case of the death of any one or more of them under twenty-one, or marriage, to the survivors. "And I do request and enjoin my executors that they do, with their best discretion, employ the labour of the said slaves during the minority of the said children of the said Josias Heyward, and apply the profits of the same to the benefit and advantage of the said Charlotte, Daniel, Thomas and Joanna."

The testator died in 1820, possessed of a considerable estate, and owing little or nothing.

Upon a bill filed in 1825 by the children of William Heyward, the children of Josias Heyward, by their next friend, claimed the negroes bequeathed to them, and an account of their labour. The executors by their answers set forth that there was no residuary estate; that they had paid the legacy to the

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Cuthberts by the *crops of the estate, in which the negroes bequeathed to the children of Josias Heyward were employed as well as all the other negroes, and insisted that they had a right to do so.

De Saussure, Chancellor. The general rule is, that property specifically devised does not contribute to the payment of debts until the failure of the devised residuary estate. But the testator has an absolute control over this subject. He is the giver of the legacies, and may attach what conditions he pleases. Thus he may, if he choose, fix the debt on the specific legacies. It is always a question of intention. If no intent appears then the rule of law applies.

In the case before us, the testator appears desirous not to die intestate as to any

part of his estate; for after many specific devises and bequests, he gives all his bonds, notes and accounts, and all his ready money to his sister Mrs. Glover, and then superadds a general residuary clause in favour of his said sister, as to any other estate real or personal which he might die possessed of, and not otherwise particularly devised or bequeathed. It is said there is no undisposed residuary estate; but of that the complainants would be entitled to an inquiry before the Commissioner, if the existence of such a fund would entitle them to an exemption from contribution to the debts. The will must be examined, to find out if it furnishes any indicia of an intent out of what funds the debts are to be paid. The testator having made large devises and bequests to his most favoured relative Mrs. Glover, bequeathed her the crops on hand at the Fisher's Hill plantation, after payment of her proportion of his debts, with bonds, notes, accounts and ready money. So after large devises to his nephews and niece, children of his brother William, he bequeathed the then crop on hand at the Walnut Grove plan-

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tation, after paying their *just proportion of debts, equally between them. These clauses manifest pretty plainly his intention, that these large devisees and legatees should bear the burden of his debts proportionably.

That he did not intend the property bequeathed to his brother Josias Heyward (and afterwards by his codicil to his children) to bear any part of the burden of the debts, is pretty obvious from his avoiding to direct them to pay any proportion, as he did in the other clauses, and by his actual direction that the executors should employ the labour of the slaves bequeathed most beneficially during the minority of the children of the said Josias Heyward, and apply the profit to their use. To this it might be added, that the postponement of the payment of the five legacies of £1000 to each of the five children of General Cuthbert for three years without interest, seems to have been made to give time to the legatees charged with the debts to pay them from the income.

Upon the whole, I have come to the conclusion that the intention of the testator is sufficiently apparent, that the debts were to be paid by Mrs. Glover and the children of William Heyward, to whom he devised and bequeathed the great bulk of a great fortune, with an express declaration that it should be after they paid their proportions of his debts, which obligation he does not attach to the other and smaller devises and bequests.

I apprehend too, that the word "proportion" indicates that each of these two great devisees, Mrs. Glover and the heirs of William Heyward, should pay according to the value and amount devised to each respectively.

It is therefore ordered and decreed, that the defendants do account with the complainants, and that in accounting the executors of Mr. John Heyward do charge Mrs. Glover with such proportion of the debts of the testator as the whole value of the estates de-

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vised and *bequeathed to her bears to the whole value of the estates devised and bequeathed to the children of William Heyward, and the remainder of the debt to be charged to the said heirs of William Heyward deceased. The children of Josias Heyward, being entirely exempted from contributing to the payment of the debts, are to receive the whole amount of the proceeds of the labour of the slaves bequeathed to them according to the will of the testator. The costs to be paid out of the estate.

From this decree, Petigru, for the executors of J. Cuthbert appealed, on the ground that the legacy of £5000 was a charge on the negroes bequeathed to the complainants, as well as on all other negroes and lands of the testator.

Martin, for J. Cuthbert and wife (the daughter of William Heyward), appealed from the decree, on the grounds: that the legacy of £5000 was not chargeable on the proportion of negroes given to them; or if chargeable at all, the payment attached only to the services of those negroes for three years, and that after that time the executors were bound to account for their hire. And that under any circumstances the decree should have required the defendant to account; to the end that it might be ascertained whether there were not funds to pay the legacies at the expiration of three years from the testator's death.

Petigru. The payment of debts does not enter into the case; they were trifling and have all been paid, and there is no dispute about it. It is admitted, that the debts were to be, and were in fact paid out of the crops bequeathed to Mrs. Glover and William Heyward's children. The testator, so far as it

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appears, left no resi*duary estate. He has devised and bequeathed the whole of his estate specifically, and in a pecuniary legacy of £5000, and the question is, out of what fund are these legacies to be paid? Legacies are general, demonstrative, or specific. The legacy to Mrs. Glover is specific. Those to Josias and William Heyward demonstrative. There can then be no doubt that if Mrs. Glover, whose legacy is specific, be bound to contribute, those bequeathed to Josias and William must of course. A specific legacy identifies the thing given, by a particular designation by name or description, and is what Lord Hardwicke calls an individual legacy, and belongs to the first class. Demonstrative legacies constitute a second class, also specific, as where the thing given is described in general terms, and both are equally bound to contribute. 2 Fonbl.

369. 2 Madd. Cha. 7. The crops are equally specific, and the same rule applies. When there are no funds out of which a pecuniary legacy can be paid, without breaking in on the specific legacies of personal estate, they must all contribute. Sayer v. Sayer, Precedents in Chancery, 392. Gilb. For. Roman. 328. It would mock the pecuniary legatee to say that he should take nothing. But in this case the legacy of £5000 is directed to be paid out of his estate after three years from his death, and is a charge upon the whole personal estate. The provision that it should be paid after three years shows that it should be paid out of the profits, and not by sale of the estate.

Martin, contra. The rule is, when there are no funds out of which to pay pecuniary legacies, that specific legacies must contribute; and the only question is, whether this will has not exempted the legacy to the children of William Heyward from this contribution, by the last clause of the codicil.

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Ennis v. Johnson, 4 *Ves. 568, 751. The rule laid down in Ennis v. Johnson is, that you must look through the whole will to see what the intention is. The last clause of this codicil directs, that the property bequeathed to them should be employed to the best advantage for their benefit during their minority, without any restriction or limitation as to time or circumstance. The will gives to Mrs. Glover at least three fourths of his estate, and all taken together shows the intention to exempt the legacy to the children of William Heyward from contribution. In any event a reference ought to be had to ascertain whether there was or not any residuary estate.

Curia, per COLCOCK, J. In this case we are informed that the question intended to have been submitted to the Chancellor was, whether the property given by the testator to the children of his brother Josias Heyward was made chargeable with the payment of a portion of the pecuniary legacies given in the first clause of the will to the testator's niece and nephews, and not whether it was chargeable with the payment of the debts. I think the Chancellor has in effect decided the question, as it is clear to my mind, that the testator means to say, that the negroes left by him to the children of Josias Heyward are left free of all incumbrance, and he most clearly says, that the pecuniary legacies are to be paid by those who are charged with the payment of the debts, either considering the legacies as debts or supposing that the testator meant them so to be considered. In the result, however, we concur with the Chancellor. For the words used in the first clause of the will are certainly sufficient to charge his estate generally with the payment of the pecuniary legacies, independently of the words used in the subsequent clauses as to the payment of the debts. The only question then would be, are the words used in the codicil in relation to the

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*bequest to Josias Heyward's children such as to exempt their legacy from the operation of the general words used in the first clause; and this I think was the intention of the testator. His estate was a very large one, and the bequest to Josias's children (in comparison to the whole) a mere pittance. Sensible of this, and no doubt well recollecting the charge which he had made on his whole estate for the payment of the five thousand pounds to his nephews and niece in the first clause, and also of the infant state of these children, he says, "I do request and enjoin upon my executors named in my will aforesaid, that they do with their best discretion employ the labour of the said negroes during the minority of the said children of the said Josias Heyward and apply the profits of the same to the benefit and advantage of the said Charlotte, Daniel, Thomas, and Joanna Heyward." Now here is an express application of the profits of the labour of these negroes which is utterly inconsistent with the general charge made on the whole estate to pay the £5,000, and being found in the last of the will must be considered as intended to exempt this legacy from contributing in any degree to the payment of that sum. The decree is affirmed, and the defendants ordered to account to the children of Josias Heyward for the whole amount of the proceeds of the labour of the slaves bequeathed to them. But it has been further contended in behalf of the children of William Heyward, that if there be any residuary estate, that estate is subject to the payment of the pecuniary legacies, because the devise and legacy to the children of William is specific. And also that they are entitled to an account in order to enable them to decide on the propriety of the executors having kept the estate five years for the payment of the pecuniary legacies, when it is clear that the testator thought they might be paid in three. The Court are of opinion, that it is proper

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these *matters be referred to the Commissioner to report upon. If there be a residuum, it is liable to the payment of these pecuniary legacies, and if there be none, and the income of the estate for three years was sufficient to pay them, then the executors should account to the children of William Heyward for the rents and profits of their portion of the estate for the two last years.

Decree affirmed.

2 McCord, Eq. 403

BENJAMIN TRAPP and Wife (formerly Billings) and SAMUEL BILLINGS, an Infant by His Next Friend, Children of Samuel Billings Deceased, Who was Brother of J. Billings v. SARAH BILLINGS Widow, and MRS. BILLINGS Mother of John Billings Deceased.

(Charleston, Feb. Term, 1827.)

[*Descent and Distribution* ⟸30, 57.]

Where an intestate leaves a mother and widow, as well as brothers and sisters, the widow is entitled to one moiety and the mother to the other moiety.

[Ed. Note.—Cited in Pell v. Ball, Cheves, Eq. 111.

For other cases, see Descent and Distribution, Cent. Dig. §§ 84, 145; Dec. Dig. ⟸30, 57.]

[*Descent and Distribution* ⟸33.]

The act of 1797 does not let in brothers and sisters with a father or mother, where the intestate leaves a widow.

[Ed. Note.—Cited in Pell v. Ball, Cheves, Eq. 111.

For other cases, see Descent and Distribution, Cent. Dig. §§ 93–96; Dec. Dig. ⟸33.]

The bill in this case stated that John Billings died intestate without issue, leaving a mother and a widow the defendants, and leaving also brothers and sisters, and the complainants who were children of a deceased brother of the whole blood. John Billings, the intestate, was possessed of real and personal estate, and complainants claimed in behalf of themselves and the next of kin a distribution of the estate, one half to the widow, and the other half to be equally divided between the mother and brothers and sisters, and the complainants children of a deceased brother. But the defendants insisted that they were entitled to the whole. The bill prayed an account, a sale of the real estate, and an inquiry as to the next

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of kin. The defendants demand on *the ground that by the act of assembly of 1791 the whole estate was vested in them in moieties.

De Saussure, Chancellor. This case depends on the construction of the statute of 1791, entitled an act for the abolition of the rights of primogeniture and for giving an equitable distribution of the real estate of intestates and for other purposes therein mentioned. Among those other purposes, the personal estates of intestates were made distributable as real estates. By the third clause of the first section of the statute, it is enacted, that if the intestate shall not leave a child or lineal descendant, but shall leave a widow and a father or mother, the widow shall be entitled to one moiety, and the father, or if he be dead the mother, the other moiety. This is the very case stated in the bill. The intestate died leaving no lineal descendants, but leaving alive a widow and a mother. They will therefore be entitled exclusively to the whole estate, unless some alteration has been made in the law. It is alleged by the complainants that an alteration has been made by the statute of 1797, by which it was enacted, that in all cases in which any person shall die intestate, leaving neither wife, child or children or lineal descendant, but leaving a father or mother and brothers and sisters (one or more) that the estate, real and personal, of such intestate shall be equally divided amongst the father (or if he be dead the mother) and such brothers and sisters as may be living at the time of the death of such intestate: so that such father or mother as the case may be, and each brother or sister, so left living by the intestate, shall each take an equal share of his estate real and personal, provided that the issue of any deceased brother or sister shall take among themselves the same share which their father or mother if living would have taken. It appears to me obvious that the provision in the act amending the

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for*mer act is confined to one single case. That where the intestate left no wife or child or lineal descendants, and then only, the father or mother and the brothers and sisters and the issue of the deceased brothers and sisters are to take under the new act, which materially alters the eighth clause of the first section of the act of 1791. The preamble to the statute of 1797, and the enacting clause both speak the same language. I think that the case cannot be made plainer by construction than it is by the very words of the two statutes. As the intestate in this case left a widow, the amendatory act of 1797 does not apply, but leaves the case to the operation of the act of 1791, which gives the estate of the intestate who dies leaving no lineal descendant wholly between the widow and the father, or if he be dead the mother. The widow and the mother are the defendants in this case, and are entitled to the whole property. The counsel cited the eighth clause of the first section, but it does not appear to me that that clause applies to this question; for it provides for the case where the intestate leaves no widow; but in our case there is a widow, and the third clause of the first section applies to it. It is ordered and decreed that the demurrer be sustained and the bill dismissed.

From this decree there was an appeal, but the decree was unanimously affirmed.

Decree affirmed.

2 McCord, Eq. *406

*REBECCA SMITH Administratrix of Samuel Smith v. JOSEPH S. BOSSARD Executor of John Bossard Executor of Benjamin Screven and Others.

(Charleston. Feb. Term, 1827.)

[*Attorney and Client* ⇐83.]

The appointment of an attorney to prosecute or defend a case confers on him all the powers necessary to the forms and usages of the Court in which it is depending. And it is the practice of the Courts of Equity to refer matters of accounts to special commissioners, assistant commissioners, accountants, &c. The consent to such a reference by a solicitor is binding on his client.

[Ed. Note.—Cited in Brown v. McDonald, 1 Hill, Eq. 301; Perry v. Nixon, 1 Hill, Eq. 336; Kennedy v. Simons, Dud. Eq. 144; Eno v. Calder, 14 Rich. Eq. 155; Ex parte Jones, 47 S. C. 396, 25 S. E. 285.

For other cases, see Attorney and Client, Cent. Dig. § 152; Dec. Dig. ⇐83.]

[*Equity* ⇐446.]

It seems, if a solicitor compromits the rights of his client by any unauthorized act, it will constitute a sufficient ground for a bill of review.

[Ed. Note.—Cited in Brown v. McDonald, 1 Hill, Eq. 301; Perry v. Nixon, 1 Hill, Eq. 336; Kennedy v. Simons, Dud. Eq. 144; Eno v. Calder, 14 Rich. Eq. 155; Ex parte Jones, 47 S. C. 396, 25 S. E. 285.

For other cases, see Equity, Cent. Dig. § 1087; Dec. Dig. ⇐446.]

The defendant filed her bill against John Magrant the surviving executor of Benjamin Screven, Jun. and against William Lester and Mary E. Inglesby administrator and administratrix of John Screven and Joseph S. Bossard executor of John Bossard, the said John Screven and John Bossard having also been executors of the said Benjamin Screven, Jun. The object of this bill was to have an account and settlement of the accounts of Samuel Smith the intestate with the estate of Benjamin Screven, Sen. of which the said Samuel Smith was the executor. These accounts were referred to the Commissioner of the Court, who, in January 1824, reported a balance against the defendants of £———. In this account the Commissioner amongst other things refused to allow the defendants a credit for the commissions to which Samuel Smith would have been entitled as executor, because as was stated in the report, he did not appear to have made his regular annual returns to the Ordinary's office.

On the coming in of this report exceptions were filed on the part of the present defendants; but before they came on to be argued before the Court, the following order was made, viz. "The Commissioner's report, and the exceptions thereto being presented to the Court, it is ordered by the consent of all parties, that the said report and exceptions be referred to three accountants to examine and report thereon to the next sitting of this Court; one of the said accountants to be nominated by the complainants, one by the defendants, and the third

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*by the Commissioner. Under this order Peter Cuttino, A. Marvin and John Taylor were nominated, and at ——— term they reported, that having taken upon themselves the consideration and adjustment of the report and exceptions mentioned in the foregoing order, "and having heard and duly considered the allegations, vouchers and exceptions, did thereby award, adjudge and declare respecting the same as follows," &c. and in conclusion reported a balance of about £640, besides interest, due to the present defendants, in which was included one item of £459 18s. the commissions of Samuel Smith on the estate of Benjamin Screven, Sen. at two and a half per cent, but without interest.

On the coming in of this report it was confirmed without opposition, and with the consent of Mr. Carr the defendant's solicitor, and in effect obtained the force of a decree, under which a writ of fi. fa. issued, on which the complainants William Lester and Mary E. Inglesby paid to the Sheriff of Georgetown district one third part of the whole amount, being the amount supposed by them to be due on this account from the estate of their testator John Screven.

The present was a bill to restrain the Sheriff from paying over the money so received to the defendant, and for a review of the decree founded on the report of the accountants. There were two grounds relied on for a bill of review, but the only ground decided on by the Court was, that the order of reference to the accountants was made by the complainants' solicitor without their knowledge, consent or approbation, which they contended was not within the scope of his general powers and therefore not obligatory on them.

The bill was filed under the order of Chancellor DeSaussure, who at the same time made an order directing the Sheriff to retain the money received until the further order of the Court; and this was a motion to set

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*aside these orders and to dismiss the complainants' bill on the ground that the reference of the report of the Commissioner and the exceptions to persons denominated accountants, was within the general powers of the complainants' solicitor and obligatory on them.

Dunkin and Gadsden, for the appellants.
Wilson and King, contra.

Curia, per JOHNSON, J. The ground for a review places the reference made under the Court to the accountants on the footing of a reference to arbitration by the solicitor

without the consent of his clients, and the case of Colwell v. Child, 1 Rep. in Chan. 104. 1 Ca. Chan. 86, is relied on as decisive of the question. And it would seem, that the reporter does put the decision in that case on the ground of the want of authority in the attorney to consent to a reference to arbitration without the assent of his client. My confidence in that decision is, however, much shaken by the review of it by Mr. Kyd in his treatise on Awards, p. 45, 6. He shows, I think very clearly, that the judgment of the Court was sustained on quite a different ground. There the order was, that the submission should be made by bond, and he shows that the attorney was incompetent to bind his client in that way, and therefore the award was void: so that the question was not necessarily involved.

But this case is free from any of the difficulties and perplexities that may exist in relation to that question. The constitution of an attorney or solicitor for the prosecution or defence of a suit, confers on him all the powers necessary to the discharge of that duty according to the forms and usages of the Court in which it is depending. Kyd on Awards, 45. [Somers v. Balabrega] 1 Dall. 164, [1 L. Ed. 83.] [Holker v. Parker] 7 Cranch, 446, [3 L. Ed. 396.] And all the

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profession will accord that the *practice to refer matters of account particularly to persons other than the Commissioner of the Court, has prevailed since the first organization of the Court, under the various appellations of special commissioners, assistant commissioners, accountants, &c. And if the order of reference in this cause be examined it will be seen that it is a misnomer to call it a reference to arbitration. The report of the Commissioner and the exceptions thereto are referred to them, and they are directed to report thereon to the Court, and not to make an award; and it is also apparent that it was not intended, so far as the intention is to be collected from the order itself, to deprive the Court of the power of controlling their report in the same manner that they might the report of the Commissioner. At any rate there is nothing in it, either expressed or necessarily implied, from the terms of the order, which takes away that power; nor can the circumstance that the accountants have used the term "award" in their report add any thing to their own powers or detract from the power of the Court. The consent of the solicitor to such a reference was therefore within his general powers, as was also his assent to the confirmation of the report, and is obligatory on his clients. There is no doubt to my mind that if the complainants' position, that their solicitor had compromitted their interest by any act unauthorised by them and not falling within the scope of his general powers, had been maintained, it would have constituted a sufficient ground to authorise a bill of review; but the case does not in point of fact exist. It is therefore ordered that the complainant's bill be dismissed with costs; and that the order directing the Sheriff to retain in his hands the amount paid by William Lester and Mary E. Inglesby on account of their testator John Screven, be reversed.

Decree reversed.

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2 McCord, Eq. *410

*R. B. SCREVEN, Administrator of C. E. Leacraft, and J. SEABROOK v. BOSTICK and Wife, formerly E. Singleton.

(Charleston. Feb. Term, 1827.)

[*Creditors' Suit* ⇐16; *Fraudulent Conveyances* ⇐241.]

If a creditor wants relief touching the personal assets of his debtor, he must show that he has taken out execution at law, and pursued it to every available extent against the property before he can resort to equity.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. § 75; Dec. Dig. ⇐16; Fraudulent Conveyances, Cent. Dig. § 714; Dec. Dig. ⇐241.]

[*Fraudulent Conveyances* ⇐241.]

It is not enough that he has judgment and execution, he must show that his execution can not be enforced without the aid of equity.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 714; Dec. Dig. ⇐241.]

[*Executors and Administrators* ⇐3.]

Where there is no administrator or executor, suit can neither be maintained at law nor equity, against an estate. If there be no executor or administrator, the creditor may take out administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1, 3–14½; Dec. Dig. ⇐3.]

[*Executors and Administrators* ⇐3.]

If a party make himself liable as executor of his own wrong, he is as much liable at law as in equity.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 8; Dec. Dig. ⇐3.]

[*Executors and Administrators* ⇐423.]

If the defendants are not liable as executors, they are only liable to the executor or administrator, who alone can sue.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1660, 1660½; Dec. Dig. ⇐423.]

[*Executors and Administrators* ⇐85.]

Where the bill is not filed for the specific property, equity will not retain jurisdiction for a discovery of the issue of slaves, &c.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 339–358; Dec. Dig. ⇐85.]

[*Executors and Administrators* ⇐85.]

It is not sufficient to show that the subject matter is within the jurisdiction, the complainant must show his equitable right to bring the defendant into that Court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 339–358; Dec. Dig. ⇐85.]

Quære, If the statute will run before administration?

This was a bill to set aside a deed called a marriage settlement, by which the late Thomas Singleton conveyed eight slaves (by name) to R. Bostick, in trust for his wife for her life, and after her death to her children. The deed bore date 25 August 1790, and was recorded in Lincoln county in September 1790 (Lincoln county was one of the divisions of Beaufort district, under the County Court law), and in the clerk's office in April 1810. The deed was executed by Thomas Singleton, and stated, that he had promised when he married Elizabeth Roberts, that he would execute, as soon as he became of age, a marriage settlement or instrument of writing, for certain slaves, named, in favour of his wife and her children, in consideration of what he obtained by her. In pursuance of which promise, and in consideration of eighty-five pounds nineteen shillings and seven pence paid to him by John Roberts, the father of his wife, he, the said Thomas Singleton, conveyed the slaves Josey, Doll, Belinda, Nelly, Charity, Frank, Dublin, and Lucy, to R. Bostick in trust for his wife as a separate estate to maintain the family. And at her death to their children, and if no issue, to the survivor. Thomas Singleton administered on the estate of Palmer in 1807, and gave bond to the Ordinary with C. E. Leacraft and Thomas W. Seabrook as his sureties. The administrator committed a devastavit, and went off from the country and died. T. W. Seabrook died, and D. Ramsay administered on his estate. A suit was brought by the Ordinary on the bond, and a recovery had

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against *Seabrook's administrator, and (as complainant stated in his bill) against D. Rhodes the first administrator of C. E. Leacraft, and a verdict obtained against them for $5,000, and judgment entered up thereon, and that the money had been paid in equal moieties by the estates of Leacraft and Seabrook. Thomas Singleton's estate was insolvent, unless the slaves and their issue comprehended in the deed of trust were liable for his debts. There had been no administration on Singleton's estate. The complainants brought no suit at law, but filed their bill in this Court, on the 20th of March 1824, to set aside the deed in question, and to make the slaves liable to the demand. Mrs. Singleton the widow had remained constantly in possession of the slaves.

The defendants made several objections to their liability. They contended that a suit at Law should have been brought by the complainants against the proper representative of Thomas Singleton, and their demand established there before suit could be brought in Equity. The legal representative of Singleton could alone be sued. The objection that there was no administrator of that estate was not sufficient, for they might administer.

The complainants in this part argued, that the deed in question was postnuptial, voluntary, and not recorded according to law. It should have been recorded in the secretary of state's office. Boatright & Glaze v. Wingate, 2 Tread. Const. Rep. 521.

The defendants in reply contended, that the complainants knew before they became sureties that the deed existed, and therefore they were bound by it. They also relied on the lapse of time and the statute of limitations.

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*De Saussure, Chancellor. The first objection taken by the defendants was, that a suit at Law should have been brought to establish the demand. I do not think, however, that can be sustained. There has been no administration on Singleton's estate, and the decided cases shew, that where there is no legal representative of an estate, suit may be brought here against those in possession of the property. Besides, a discovery is sought as to the issue, and an account for their hire and labour. To which it may be added that the judgment at Law against the estates of Leacraft and Seabrook, in the characters of sureties for Singleton, has established the amount of the devastavit of Singleton, and the bill is to set aside the deed and clear the way to make the property liable. Admitting then the suit here to be properly brought, the question is to be tried on its own merits.

The complainants contend that the deed in question was postnuptial, voluntary, and not recorded properly.

It was certainly postnuptial; for so it states on its face: but the deed states further, that it was executed in pursuance of an agreement before marriage, but not then executed because Thomas Singleton was not of age. This taken alone might not be sufficient to protect the provisions of the deed, for the agreement must have been parol, and some other evidence of its existence might be properly required, else the statutes might easily be avoided. All postnuptial settlements are not necessarily void; they are good as between the parties, and are sometimes supported against creditors. The complainants further contend, that the deed was voluntary, and therefore void as to creditors. And the counsel cited many cases on the point, and they rely on the decision of Briggs v. Brently in this Court. I have refreshed my memory as to that case, and I found it turned on very different circumstances. It was not a provision for a family; but be-

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tween, comparatively, *strangers, and the consideration vague, and not complied with. In short, an imbecile old man was imposed upon. The reported cases are exceedingly perplexed, and some of them contradictory, and none of them come precisely up to this case.

But the defendants contend that the deed

was not voluntary. It imports a pecuniary consideration on the face, which is not contradicted by any evidence, and is corroborated by one or more of the witnesses who testify to the payment of the money by Mr. Roberts, the father, to satisfy a debt of Singleton's. The amount of the consideration is not weighed in golden scales in cases of marriage settlements. To this it should be added, that there was no evidence of Singleton's being in debt at the time of the execution of the deed. They became bound in 1807, and recovery was had from them in 1818 and 1819.

The complainants contend, that the deed was not recorded according to law. Mr. Petigru has shewn, I think, that the County Court of Lincoln, where it was recorded, was then the regular place to record such deeds. There is a great perplexity and confusion in our laws respecting the recording of deeds, which it would be desirable to have corrected: but I think this was properly recorded in 1790. There were other circumstances, and a later date in Taylor v. Herriott's case, in Georgetown, and an intermediate statute. Besides, as to the existence of the deed, the weight of evidence is, I think, with the defendant, that Mr. Leacraft and Mr. Seabrook knew of it before they became securities for Thomas Singleton, and meant to rely on his honour.

The defendants also rely on the lapse of time and the statute of limitations. The time, to be sure, is very great. It was upwards of a third of a century from the execution of the deed to the filing of the bill; and six years from the time judgment was ob-

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tained by the Or*dinary against the estates of Leacraft and Seabrook to the filing of the bill: and during all the time in which the sureties had an interest to inquire, they knew that Mrs. Singleton held and claimed the slaves as her own. Under all the circumstances stated, I am of opinion that the complainants cannot sustain their claim. It is therefore ordered and decreed, that the bill be dismissed.

From this decree the complainants appealed, and made the same grounds that they made below.

Martin, for the appellants. As to the ground, that there is no legal representative of Singleton made a party, as between these parties the defendants, if the negroes were the property of Singleton, are executors in their own wrong, and they will not be permitted to deny it. Besides, if they had sued as executors or administrators, the defendants would be entitled to insist that as such they were concluded by the deed, although it was fraudulent. Again, the complainants were entitled to a discovery as to the consideration of the deed, the increase of the slaves, and as to the yearly hire of the negroes. If some of the matters in issue were of Equity cognizance the Court would not turn them round on an incidental matter of Law cognizance. As to the statute of limitations the judgment was in 1818, but the payment was not made before 1821, and the bill was filed in 1824, so that four years had not elapsed after the payment, and until then the complainants were not bound to sue. The statute of limitations did not begin to run before administration granted. 2 Vern. 694. If it were admitted, that the defendants did not stand as executors of their own wrong, how could the complainants have proceeded at Law, there being no administrator. Rob. Fraud. Con. 642. The deed was void, not having been recorded in the secretary of

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state's *office. Cheney v. Lubbock, 1 Nott & M'Cord, 444. The evidence of notice was but equivocal, which was not enough. It must be explicit. Tait v. Crawford, 2 M'Cord, 152. Givens v. Branford, 2 M'Cord, 152. Blades v. Blades, 1 Eq. Ca. Abr. 358. If the deed was not a marriage settlement, it was void as to creditors, because the consideration was inadequate.

Petrigu, in reply. The objection that there was no administration on the estate of Singleton was insurmountable. As between the defendants and complainants, the defendants had a right to the possession of the negroes. They could not be sued as executors of their own wrong, and the first question was whether the complainants could maintain their surety against the defendant. To enable a creditor to go into equity to set aside a deed as fraudulent, he must first establish his rights at law, and show there are no funds of the debtor out of which it can be paid. Brinkerhoff v. Brown, 4 Johns. Cha. Rep. 671. 682-687. If the property was liable to Singleton's debts, the complainants were not entitled in exclusion of other creditors. The complainants should have administered. As administrators they might have filed a bill to set aside the deed on the ground of fraud. Wilson v. Wilson, 1 Desaus. Rep. 401. The consideration of £85, although inadequate, was a motion to make it; and it was a circumstance opposed to its being fraudulent. Atherley on Marriage Settlements, 185, 165. Russel v. Hammond, 1 Atk. Rep. 13. There was no pretence that Roberts practised on Singleton to obtain this deed, and if Singleton had sold his property bona fide to any other for that price, his creditors would have had no right to impeach the contract. A voluntary deed was not void as to subsequent creditors, unless it was made with a fraudu-

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lent *intent. Sexton v. Wheaton, 8 Wheat. Rep. 229. 3 Johns. Rep. 190. 5 Ves. 384.

Seventeen years intervened between the date of the deed, and Singleton's incipient liability to this demand; and it cannot be presumed that it was done with a view to

that transaction. This was not strictly a marriage settlement, and therefore need not have been recorded in the secretary of state's office. Atherley, 165, note.

Curia, per NOTT, J. This case is now submitted to this Court on the grounds which were urged in the Court below. And although the bill has been dismissed by the Chancellor, and this is a motion to reverse that decision, I shall begin with the arguments relied on by the defendants in opposition to that motion.

The principal ground relied on (to put it in the words of the decree) is that a suit at law should first have been brought to establish the demand. On that subject the rule, as laid down by Chancellor Kent in the case of Brinkerhoff v. Brown, 4 Johns. Cha. Rep. 676, as the settled rule in Chancery, is that if a person wants relief touching the personal assets of his debtor, he must show that he has taken out execution at Law, and pursued it to every available extent against the property before he can resort to Equity for relief. It is not sufficient that he has established his demand. It is not sufficient even that he has obtained judgment and issued execution, but he must show that it cannot be enforced without the aid of the Court of Equity, before that Court will afford relief, and the principle appears to be well sustained by the cases therein referred to. The Court of Equity cannot know by anticipation that an effort to obtain the debt at Law will be ineffectual. And if such an allegation is to furnish a ground of Equity jurisdiction every creditor may go at once into the Court of Equity for relief. It is contend-

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ed that the *want of administration gives jurisdiction to the Court of Equity. We have had occasion more than once to investigate that question. In the case of Farley v. Farley, in Columbia, 1 M'Cord's Eq. Rep. 506, and the case of Gregory v. Forrester, [1 McCord, Eq. 318,] during this sitting, the subject was fully examined. We then came to the conclusion, and for reasons perfectly satisfactory to my mind, that the want of administration was as good a ground of objection to entertaining a suit in Equity as at Law. If there is no executor, and no one will administer, the creditor may take the administration on himself. The ground upon which a bill may be maintained against a person in possession of the property is because by possessing himself of the property he becomes liable as executor in his own wrong; but the same intermeddling will make him equally liable in that character at Law. If the defendants are not liable as executors, then they are not liable at all except to the executor or administrator. In the case of Humphreys v. Humphreys, 3 P. Wms, 349, Lord Chancellor Talbot ruled that even the next of kin, who was entitled to the administration, should not be permitted to prosecute his bill until he administered. And in the case of Elders v. Vauters, 4 Desaus. Rep. 155, the former Court of Appeals in Equity held, that a purchaser who had been ten years in possession under a sale from the next of kin, and where it was admitted there were no debts, should not retain the property against the administrator afterwards appointed. It is contended that the complainant is seeking for a discovery of the issue of the female slaves, and an account of their labour. But it will be recollected that this is not a bill for the specific property. The question is, whether the defendants are liable as executors, and for that purpose it is not necessary to inquire into the number or names of the slaves, nor the value of their labour.

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The judgment at Law does *indeed show the amount of the devastavit committed by Singleton, but it does not show that the complainants have paid that much for him. And if it did, it would not follow that his estate was still indebted to them to that amount. And if both those facts were admitted, it would still remain to be proved that their rights might not be enforced at law. It is not sufficient to show that the subject matter of the bill is within the equity jurisdiction, it must appear that the complainant stands in relation to the defendant as will entitle him to the aid of that Court for relief.

Suppose upon the return of the subpœna in this case the defendants had come into Court and disclaimed any right to the property, and offered to deliver it up to any person who was entitled to receive it. The complainants could not have received it, for they have no right to the property, nor do they pretend to any. They have no execution against Singleton, and therefore could not have levied on it. They would then have been precisely in the situation they were in before the bill was filed, unless we are prepared to say that every creditor, when there is no administration, may go at once into the Court of Equity to recover his debt against any person in possession of the property. Without going into the merits of the case, therefore, I am of opinion that the bill was properly dismissed. But I am disposed to concur in opinion with the Chancellor, that the complainants were barred by the statute of limitations, though I have not looked so minutely into the circumstances of the case as to enable me to come to a definite opinion on that question. It appears to me that it is no answer to the plea, that there was no administration, when the only ground on which the bill can be sustained is that the defendants are executors. If the complainants had administered, it might then have become a question whether they would have been

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barred by the wrongful pos*session of the

defendants. On that question, however, I shall express no opinion at present, as I think, on the other ground, the motion must be refused.

Decree affirmed.

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2 McCord, Eq. 419

BOSSARD Executor of Bossard, Executor of Screven, v. LESTER and INGLESBY, Administrators of Screven.

(Charleston. Feb. Term, 1827.)

[*Dismissal and Nonsuit* ⟸10, 11.]

A complainant has a right to discontinue his suit at any time before there has been a decree which settles the rights of the parties.

[Ed. Note.—Cited in Bethia v. McKay, Cheves, Eq. 96, 97; Dunham v. Carson, 37 S. C. 281, 15 S. E. 960; Forrest v. City of Charleston, 65 S. C. 501, 43 S. E. 952; Shelton v. Southern Ry., 80 S. C. 75, 61 S. E. 220; Inman & Co. v. Hodges, 80 S. C. 459, 61 S. E. 958.

For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 24, 25, 26; Dec. Dig. ⟸10, 11; Equity, Cent. Dig. § 751.]

[*Equity* ⟸359.]

It is not too late after the Commissioner had made a report of the accounts and exceptions filed.

[Ed. Note.—Cited in Muldrow v. DuBose, 2 Hill, Eq. 376.

For other cases, see Equity, Cent. Dig. § 751; Dec. Dig. ⟸359.]

[*Equity* ⟸359.]

Leave to discontinue granted on payment of costs.

[Ed. Note.—Cited in Forrest v. City Council of Charleston, 65 S. C. 501, 43 S. E. 952; Shelton v. Southern Ry., 80 S. C. 75, 61 S. E. 220; Inman & Co. v. Hodges, 80 S. C. 459, 61 S. E. 958.

For other cases, see Equity, Cent. Dig. §§ 749–755; Dec. Dig. ⟸359.]

This was a bill to account. Upon the defendant's answers coming in, the Court ordered a reference of the accounts before the Commissioner. On account of indisposition the complainant could not attend the reference, and a report was made which was very dissatisfactory to him. On a statement of these facts the Chancellor sent the report back, but ordered the Commissioner to examine the accounts forthwith, and to report to the Court. Upon this hasty examination a report was made by the Commissioner, which was still dissatisfactory to him, the complainant. The defendants had filed a cross bill in the same which had not yet been answered, the rule to plead not having expired. Under this state of things the complainant's counsel moved to dismiss the bill. Chancellor De Saussure overruled the motion and ordered the case for a hearing, and thereupon decreed for the defendants. This was an appeal on the ground that the complainant had a right to dismiss his bill. The Chancellor permitted the defendants to dismiss their cross bill, but refused it in this

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case on the ground that the report of *the Commissioner was such a decree in the case as precluded the complainant from dismissing his bill.

King and Wilson, for the appellant. The Chancellor should not have dismissed one bill, and not the other. The complainant was entitled on his mere motion to dismiss his own bill at any time before the decree. Carrington v. Holly, 1 Dick. Rep. 280. Perrin v. Swan, 2 Johns. Cha. Rep. 475.

Hunt, for appellees. This was a bill to account, and where the defendant in such cases comes in, and by his answer tenders an account, it stands upon a different footing from ordinary cases. In such cases both parties become actors, and neither can recede without the consent of the other. In this case the Commissioner had made a report, to which no exceptions had been filed when the cause was called for trial, and it might be compared to a verdict rendered, after which plaintiff could not suffer a nonsuit.

King, in reply. The general rule is as laid down, and it is not for us to show that this case makes an exception to the rule. The onus is on the opposite counsel to show that this case constitutes an exception. The same rule results if it be put upon the ground of analogy to the practice of the Law Courts. A plaintiff at law may suffer a nonsuit at any time before the verdict is recorded, and all the arguments ab inconvenienti would as well apply, yet no exceptions are allowed.

Curia, per NOTT, J. It is said that when this cause was called, the complainant's solicitor moved for leave to dismiss his bill and to discontinue his suit, and that this motion was refused by the Chancellor; and that it

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ought *to have been granted, and that the counsel now claim the benefit of that motion; and further, that the defendants who had filed a cross bill for the settlement of the accounts, were permitted to withdraw their bill. Now, as a general rule, there can be no doubt that a complainant has a right to discontinue his suit, though it appears that where there has been a decree, which settles the claims of the parties, he is not permitted to do so. The question then is, whether a reference to a Commissioner is to be considered as such a decree. The case before us is calculated to illustrate the doctrine. The Commissioner made a report to which the Chancellor permitted exceptions to be filed, which are now brought before this Court; but certainly the rights of the parties cannot

be said to be decided on. If there is any foundation for these exceptions the matters of account must again be submitted to the re-examination of the Commissioner, and at all events his report may be altered by this Court. There has been some preparation for trial, but certainly nothing which has been done is definitive. In 2 Madd. Cha. 389, it is said that a defendant cannot move to dismiss a bill after publication is completely past. But a plaintiff may in any stage of the cause apply to dismiss his bill upon payment of costs, even after an issue has been directed; but not after a decree. In the case of Carrington v. Holly, 1 Dicken's Rep. 280, the same doctrine is laid down by Lord Chancellor Hardwicke. The plaintiff filed his bill to establish his rights to certain estates. Upon the hearing an issue was directed. The complainant, being advised that he had not made a case by the bill and the matter put in issue to support his claim, applied by motion, and obtained an order of course to dismiss his bill upon payment of costs. The defendant applied to discharge the order on account of irregularity, upon the ground that the cause having been regularly brought on

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to a hearing, *the bill could not be dismissed but on solemn judgment. But, said the Lord Chancellor, there hath not been any determination. The directing an issue is merely to satisfy the conscience of the Court preparatory to their giving judgment. Now what more is the reference to the Master? It is to adjust the accounts, so as to satisfy the conscience of the Court. His Lordship, in the case above referred to, said, had there been a decree it would have been otherwise; for all the parties were interested in a decree, and any party might take such steps as he might be advised, to have the effect of it. In Newland's Practice, 74, the cases are all referred to, and the same view of the subject fully supported. In this case I think it would have been peculiarly proper to grant the motion; for the defendants having filed a cross bill they would not have been delayed had they thought proper to proceed. They may have obtained an order for reference and have prosecuted their suit. If one conscientiously believes himself entitled to the aid of a Court of Justice and makes his application, and afterwards becomes convinced that he cannot support his claim, it is penalty enough to make him pay the costs. And if from malicious motive he bring another into Court, he in his turn, is subjected to a suit for such misconduct. The Court are therefore of opinion, that the motion made below by the complainant to dismiss his bill, should have been granted, and it is now ordered that he have leave to dismiss his bill on the payment of all the costs.

Decree set aside.

2 McCord, Eq. *423

*ANN PHÆLON and ANN F. BRISBANE v. G. PERMAN, Executor of Dr. J. G. Houseal, and THOMAS BARKSDALE.

(Charleston, Feb. Term, 1827.)

[*Husband and Wife* ⇐18.]

The husband is not liable for a debt of his wife's not recovered before her death, though he received an estate by her.

[Ed. Note.—Cited in Witherspoon v. DuBose, Bailey, Eq. 167.

For other cases, see Husband and Wife, Cent. Dig. §§ 112–120; Dec. Dig. ⇐18.]

[*Husband and Wife* ⇐11.]

The marital rights of a husband cannot attach on the property of a deceased wife, where there are other next of kin, until partition is made.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 52; Dec. Dig. ⇐11.]

[*Executors and Administrators* ⇐263.]

A cestui que trust has no lien on the trustee's estate for a breach of trust.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 983; Dec. Dig. ⇐263.]

[*Descent and Distribution* ⇐52.]

[Where personal property, to which a wife was entitled jointly with the next of kin of a former husband, was taken possession of, and a portion thereof disposed of by her husband during her life, and without any division between her and the next of kin, it was *held* that her distributees were entitled to so much only as remained at her death, after deducting the shares of the next of kin of the former husband.]

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 307; Dec. Dig. ⇐52.]

[*Executors and Administrators* ⇐538.]

[A husband who remained in possession, after the death of his wife, of property to which she was entitled jointly with the next of kin of her former husband, was charged as executor de son tort of his wife and her former husband, in a suit by such next of kin for an account.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2584; Dec. Dig. ⇐538.]

[*Executors and Administrators* ⇐539.]

[Where the widow of an intestate, entitled to half the property of her husband, takes possession of the whole, so much of it as she has disposed of and appropriated to her own use will be treated as received on account of her share.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2590; Dec. Dig. ⇐539.]

[This case is also cited in Harvin v. Riggs, Rich. Eq. Cas. 292, without specific application.]

Major Edward Phælon died in 1810, having made and executed a very eccentric will, under which, however, his widow and her subsequent husband, Dr Houseal, claimed the whole of his property in her right. Major Phælon left no children, nor were there any persons then known or claiming as next of kin. The widow, therefore, took possession of and remainded in the enjoyment of his whole property until her marriage with Dr Houseal in 1815, who then took the pos-

session and management of it. She died in 1816, and Dr Houseal retained the possession and use, claiming in virtue of his marital rights, as the fortune of his wife, until 1821, when the complainants, who were inhabitants of Nova Scotia, set up a claim to one half of this property, as the next of kin to Major Phælon, and filed their bill, alleging that he died intestate, and praying an account against Dr Houseal as executor in his own wrong, and asking for a partition.

In opposition to this claim Dr Houseal set up the will of Major Phælon, as bequeathing all his property to his wife, which he claimed in virtue of his marriage, and denied the relationship of the complainants.

On the trial of the cause the relationship was fully established, and by a decree of the late Court of Appeals, pronounced in March 1823, it was adjudged, (Chancellors De Saussure and James dissenting) that nothing passed under the will except a few articles of property specifically enumerated and of little value, and consequently that he died

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intestate as to the bulk of his *property, which was then supposed to consist principally of negroes, and Dr Houseal was decreed to account for their hire from the time they came into his possession on his marriage in 1815, and partition was also ordered.

Dr Houseal died shortly after the promulgation of this decree and before it was carried into execution, and this was a bill of revivor against his executor George Perman; and it was stated by way of supplement, that subsequently to the former decree, it had been discovered, that after the intermarriage of Dr Houseal with the widow of Major Phælon, and before her death, a sum of money, amounting to $3200 or $3300, which had belonged to Major Phælon, had been discovered and delivered to Dr Houseal, and the fact was satisfactorily established; so that the undevised estate of Major Phælon consisted of the negroes of which he was possessed in his own right, with some other articles of property which were enumerated in the decree of the Chancellor, and of this amount of money.

To this bill Thomas Barksdale was made a party. He claimed as the next of kin to Mrs Houseal (late Mrs Phælon) and prayed for a partition of the estate to which she was entitled, as her distributive share of the estate of Major Phælon: and founded his claim on the circumstances that no partition of that estate was made in the life time of Mrs Houseal, and therefore he contended that the marital rights of Dr Houseal did not attach, and that he only was entitled as a distributee under the act of 1791.

Chancellor De Saussure's decree, from which this appeal was made, following the decree of the late Court of Appeals, limited the liability of the defendant Perman as executor of Houseal, to account for the hire of the negroes from the time of his getting possession of them on his marriage in 1815, so far as related to the complainants, the nieces.

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But the Chancellor further di*rected an account to be taken with respect to the defendant Barksdale's claims to the hire of the negroes during the time that Mrs Phælon had them in possession, from the death of Major Phælon in 1810 to her marriage in 1815, and subjected the dividend of her estate, to which the defendant Barksdale was entitled exclusively, to any liabilities that might arise against her on account of her transactions during that period; and in conclusion the decree placed the claims of the complainants and Barksdale on the same footing with the general creditors of the estate of Dr Houseal, which it was said was insolvent, regarding this property as his general estate.

All the parties appealed.

The grounds on the part of the complainants were,

First. That the decree was erroneous so far as it goes to charge the dividend of Barksdale exclusively with the hire of the negroes from 1810 to 1815, which is deemed insufficient, and to exempt the dividend of Dr Houseal in the hands of the executor.

Second. That it was erroneous so far as it puts the complainants on the footing of creditors of the estate of Houseal, and regards the property derived from the estate of Major Phælon as belonging to his estate.

The defendant Perman appealed on the grounds,

First. Because the money received by Dr and Mrs Houseal was the debt of the wife, for which he was not liable after her death, and the decree ought not to be opened to carry his liability further.

Second. That Dr Houseal had possession of the personal estate of his wife, and was not accountable to her representatives for any thing.

Barksdale's grounds of objections were,

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that negro *hire should not have been directed to have been paid out of his share alone of Mrs Houseal's estate. That he should have been allowed a preference over the creditors of Houseal. That he should have been allowed one-fourth part of the money found among Phælon's effects; and as Dr Houseal had applied to his own use all that fund, it should be considered as a payment pro tanto of his moiety of his wife's estate. That at least the complainants' claim to this fund should be made alone on Dr Houseal's estate.

Clarke, for the complainants. As to the first of his grounds, the question of law is, whether Dr Houseal took the interest of his wife in her former husband's (Phælon's) estate as a possession or as a chose in action.

3 Desaus. Rep. 138, note. 3 Desaus. Rep. 135. Ex parte Elms, 3 Desaus. Rep. 155. There was no distribution or division of the property, and under the well settled rule in such cases, it was clear that he was only entitled as one of her representatives. His representatives are therefore bound to contribute to the debts due by the wife in equal proportions with the other distributees. On the death of the wife her choses in action pass to her representatives, and are distributable as the property of any other persons would be on their death. They do not vest in the husband ex jure mariti, unless reduced to possession in the life time of the wife. Reeve's Dom. Rel. 17. 67. 72.

As to the second ground. Dr Houseal had appropriated a considerable proportion of the estate to his own use (the cash found and some negroes sold), which was not known when the former case was tried. In equity, therefore, that amount ought to be deducted from the amount to which he was entitled, and the Court would either order a partition de novo, or set up this demand as a charge upon the property allotted to him.

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*Bailey, in behalf of Barksdale. The only question of importance to Barksdale is, as to the interest which Dr Houseal took in the claim of his wife to the estate of her former husband: for on that question depends the amount he is entitled to. On this point Ex parte Elms is conclusive. It was said that this question was concluded by the partition. Barksdale was not then a party, and therefore his rights were not compromitted by that decree. With respect to the negroes, there is no doubt Mrs Phælon was entitled to a moiety, as one of the distributees of her husband, and this not having been reduced to possession survived to her next of kin, and as such he B. was entitled to one half. The money found was in the same situation. That, like the other personal estate, remained in common until partition. The disposition of the money found by Dr Houseal must be regarded as a payment of his share, and ought to be deducted from it; or if not, that it should be a specific charge on that part of the estate allotted to him. One executor has the right to retain on account of a legacy to his co-executor for a devastavit committed by him. Sims v. Doughty, 5 Ves. 243.

Petigru, Attorney General, for the executor.

First. Was Dr Houseal liable to the next of kin of his wife, for any thing?

Secondly. Are the complainants, or Barksdale either, entitled to an account of the money found?

Thirdly. Have the complainants a right to any account against any one for the hire of the negroes, between 1810 and 1815? Do the claims of the complainants and Barksdale give a lien on Dr Houseal's share?

All the cases quoted, and all those to be found in the books proceed on the ground, that the funds were held in trust, professed-

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ly or jointly with others. But in this *case the wife was in possession, and claimed the whole in her own right, and she had the sanction of two Chancellors to three that she was so entitled, and under these circumstances Dr Houseal married her, believing that she was so entitled, and claimed it as his own; and how can he be regarded as holding it as a trustee? We apply these remarks to Barksdale's claim to a distributive share of Mrs Houseal's estate. It is immaterial to us how they held. If the complainants acquiesced in the claim of Dr Houseal to the whole estate, it constituted a reduction, in effect, to possession of the whole, and B. never could have come in, and it is not to be readily perceived how that circumstance can change the rights of the parties. It does not follow that Barksdale was entitled because the complainants were, or that because Dr Houseal was trustee to them, that he was so to Barksdale. Clinton v. Cholmondeley, 1 Jac. & Walk. 1. There is a manifest distinction between trusts created by act of the party and the operation of law. When by the act of the party it will extend to all legally entitled, but when by operation of law, only to those immediately interested. On this principle Mrs Houseal stood in the relation of trustee to the next of kin to her husband Phælon, but not as to her own next of kin. This is conclusive as to the money found. Decouche v. Savetier, 3 Johns. Cha. Rep. 190.

As to the second ground. The original decree was conclusive as to all the parties, and that determines that Phælon died intestate only as to the negroes. The claim to this fund arises out of a bill of revivor in nature of a bill of review, on account of after discovered evidence. It is admitted that a practice has existed of enlarging, abridging, and modifying the decrees of the Courts of Chancery, but it is malus usus, and ought to be abolished. But it does not appear that this item was excluded from the operation

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of the decree; non constat *that Phælon died intestate as to the fund. If it were true, that the complainants are entitled to an account of this fund, the question arises, whether it be a charge on the estate of the husband? At Law that is the rule. Cro. Car. 519. But it is different in Equity. 2 Vern. 118.

Thirdly. The decree was conclusive as to that matter. Dr Houseal was treated throughout all the proceedings and the decree as the representative of his wife, and by it he is exonerated from an account. Under circumstances, the Court will not give an account of profits from the time the right accrued. Sometimes the statute of limitations is made the rule, and again it is only allowed from the time of filing the bill,—the Courts are governed by a sound discretion. 1 Mad.

Cha. Dormer v. Fortescue, 3 Atk. 136. Green v. Biddle, 8 Wheaton, 1.

Fourthly. The general rule clearly is, that if a trustee commit waste or devastavit, the cestui que use stands only in the relation of general creditor. With respect to the rents and hire and money found, Dr Houseal had committed a devastavit, and with respect to it, the persons entitled must stand in the relation of a creditor. And so with regard to the negroes sold by Dr Houseal.

Clarke explained. All that is asked is, that what has been disposed of by Dr Houseal may be charged to him as so much of his distributive share, and that the property undisposed of by him may be appropriated to pay the interest of Barksdale and the complainants.

Petigru, in continuance. The estate of Dr Houseal is insolvent and the rights of creditors have attached, and as to the complainants, they ought to stand on an equal footing. This species of lien ought not to be favoured. The partition at the suit of the complainants put him in possession ostensibly

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in his own right, and *they are not therefore to be preferred. It is admitted that if Barksdale be entitled to a distributive share, his claim ought to be preferred.

Grimke, for the complainants, in reply. By the terms of the decree, the rights of Mrs Phælon, under the will of her husband, were limited to the articles enumerated in the will, and can not, by any terms of construction, be extended to the money found. The same consequences will follow if resort be now had to the will itself. The rule in equity clearly is, that an executor de son tort is regarded as a trustee, and persons interested may pursue the trust fund into whatever hands it may go. It was the duty of Dr Houseal to have administered, and his not doing so can not change the rights of the parties. It is no excuse, that he was ignorant as to the rights of others. He was bound to know them, and those claiming under him as creditors cannot be put on a better footing. The case of Dormer v. Fortescue does not apply to this case. There the party took possession, believing that the right was in him, and for that reason the account was limited on the principle of the statute of limitations. But here, both Dr Houseal and his wife were bound to know the rights of the others. The complainants do not claim any thing of the estate of Mrs Houseal, and whether the possession of Dr Houseal vested the title in him in virtue of his marriage is unimportant.

Curia, per JOHNSON, J. That part of the decree to which the first of the complainants' objections apply, is not so explicit as to be distinctly understood; and in remarking on it I wish to be understood as stating what is the law of the case, rather than as correcting any supposed error in the decree. The former Court of Appeals by their decree

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have limited the liability of Dr *Houseal to account for the hire of the negroes to the time of his marriage in 1815, and as between himself and the complainants that decree is conclusive. It is true, that the Court founds its opinion on the ground, that the hire accruing anterior to that time was exclusively the debt of the wife, for which the husband was not liable after her death; but I incline to think, that if even she herself, or her legal representatives, had been a party, it might well be questioned whether she was bound, under the circumstances, to render any account of the hire anterior to notice of the complainants' claim, or at any rate, that the statute of limitations would have operated as a bar to all that had accrued more than four years before the filing of the bill. It will be recollected, that it was unknown to the widow of Major Phælon, (so far as appears to the court) that there was any person entitled to take a distributive share of the estate. She took possession under a will, which in the opinion of a very respectable minority of the Court entitled her to the whole. Her subsequent husband, Dr Houseal, acted under the same impression, and used the property as his own; and after a lapse of ten years, he is surprised into an account by an unexpected claim. Now, I would put it to the conscience of any intelligent man, and ask, whether it would not be ruinous to ninety-nine slave holders out of a hundred employing and using them as their own, if they were bound to account for their hire at the rate established by the long standing rule of the Court. This view of the Court might, I think, have been maintained on principle and authority. Dormer v. Fortescue, 3 Atk. 130. Green v. Biddle, 8 Wheaton, 1, [5 L. Ed. 547.] But it is sufficient that the whole question is concluded by the former decree of the Court of Appeals. The defendant Perman was not, as executor to Houseal, liable to account for hire further back than 1815.

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There is no one now be*fore the Court representing Mrs Phælon but himself as executor of Houseal, who for the purposes of this case must be regarded as executor in his own wrong, both of the estate of Major Phælon and his own wife; Barksdale having, as will be noticed hereafter, no interest in this matter.

There can be, it appears to me, no difficulty with respect to the complainants' second objection. Under the act of 1791, the widow of Major Phælon was entitled to one half of the property of which he died intestate, to one half of which on her death her husband became entitled, as a distributee, and her next of kin to the other half. She and her subsequent husband had the possession and use of the property; and the latter has

disposed of a part, including the money which was discovered; and on the principles of the decree, his estate is bound to account for negro hire. Now it follows as a necessary consequence, that in the partition of this estate so much as has been appropriated to the use of either exclusively, whether it consisted of money, of the hire of negroes or of property sold and converted into cash, must be charged to them as so much received on account of their interest in the estate; and the specific property, or its proceeds in the hands of the executor, must be so divided, that the complainants may recover an amount out of this fund equal to that to which the widow is entitled, including the amount converted to their own use; or, in other words, the complainants must be first paid the amount received and disposed of by Dr Houseal or his wife, and then the balance, if any, must be divided between them. If the specific property or the proceeds in hand are insufficient for the purpose, of course the complainants would, for this balance, stand in relation of a general creditor to his estate.

As to the ground of the defendant Perman. There is certainly nothing in his first

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ground, if it is *correctly understood. The money found and received by Dr Houseal is as much a part of the estate of Major Phælon as any other property of which he died possessed, and the rights of the complainants and the liability of the defendant in relation to it, stand precisely on the same footing.

On the second ground the Court concur with the Chancellor for the reasons given. Mrs Houseal was entitled to the estate of her husband Major Phælon jointly with the complainants: no partition or severance had been made of their interest during her life. The marital rights therefore could not attach except so far as to entitle him to a distribution with her next kin under the act of 1791. The case Ex parte Elms [3 Desaus. 155] has always been regarded as decisive of this question. The defendant Barksdale was therefore entitled to one moiety of the interest which she had in the estate of her husband Major Phælon at the time of her death. Most of the objections which have been raised on the part of the defendant Barksdale have been disposed of by the principles before laid down. Under the existing state of things no account can be taken of the hire of negroes prior to 1815, consequently he can have no interest in it, nor can his dividend of the estate of Mrs Houseal be charged with the payment of it, and his claim must stand in relation to creditors of Dr Houseal precisely on the same footing as that of the complainants. If, after taking out the distributive share of the complainants, any thing of the specific property or its proceeds remains in the hands of the defendant Perman as executor of Dr Houseal, he will, with respect to this fund, be entitled to a precedence over the general creditors; if not, he must stand in the same situation with them. All the other objections of this defendant relate to the money found. He contends that this should be accounted for as part of the estate of Mrs Phælon, and that he is en-

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titled to a distribution *of it. That at any rate it should be set down as a payment pro tanto of the distributive share of Dr Houseal in the estate of his wife, and that the complainants, so far as regards this fund, should stand in the relation of a general creditor of the estate of Dr Houseal.

The whole of these objections may be embraced in a single view.

This defendant claims, as next of kin to Mrs Houseal, an equal dividend of the property to which she was entitled at the time of her death with her husband Dr Houseal, and which did not vest in him by virtue of the marriage. The value of the property so claimed to be divided must be ascertained, and how much she was entitled to at that time in the estate of her deceased husband Major Phælon: for the claim is confined to that fund alone. During her life she had a right to dispose of her interest in that estate as she pleased, and having ascertained to how much she was entitled at the death of Major Phælon, it will be perceived that the inquiry would necessarily arise as to the quantity which had been disposed of by herself or her husband, for in this way alone can the precise amount to which she was entitled at her death be ascertained. Among other things the cash received is wanting, and had been disposed of by the husband, and of necessity this defendant can have no interest in it. To conclude,—the defendant Barksdale is entitled to distribution only of so much of the specific property of Major Phælon or the proceeds thereof in the hands of defendant Perman as remained at the death of Mrs Houseal his widow, after a partition made with the complainants on the principles above laid down. It is therefore ordered and decreed, that an account be taken before the Commissioner, conformably to this modification of the decree of the Circuit Court.

Decree modified.

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2 McCord, Eq. *435

*THOMAS WINSTANLEY, Executor of Parsons v. W. and B. SAVAGE and Others, Devisees of E. Butler.

(Charleston, Feb. Term, 1827.)

[*Attachment* ⇐ 73.]

Nonresidents cannot be made parties, unless they have property in the state. A legacy being due to them is not sufficient, especially where

the legacy has been so long unpaid as to raise the presumption of satisfaction.

[Ed. Note.—Cited in Garden v. Hunt, Cheves, Eq. 43.

For other cases, see Attachment, Cent. Dig. § 200; Dec. Dig. ⟸73.]

[*Courts* ⟸17.]

Property gives jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 46–50, 52; Dec. Dig. ⟸17.]

[*Executors and Administrators* ⟸439.]

In some cases a creditor may join a legatee in a suit against an executor: but they cannot be sued alone, the executor must be made a party.

[Ed. Note.—Cited in Fraser & Dill v. City Council of Charleston, 19 S. C. 401.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1765–1785, 1790; Dec. Dig. 439; Descent and Distribution, Cent. Dig. § 505.]

[*Bonds* ⟸130.]

Less than twenty years, where there have been great neglect and mutations of property, will raise the presumption of payment.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 225; Dec. Dig. ⟸130.]

[*Executors and Administrators* ⟸438.]

The executor is the only proper representative of the estate of the testator, and is the party to be sued.

[Ed. Note.—Cited in Fraser & Dill v. City Council of Charleston, 19 S. C. 401.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1765–1785, 1790; Dec. Dig. ⟸438.]

Elizabeth Butler, the defendants' testator, on the 20th of May 1765, executed her bond to Robert Brisbane for £3,000, payable on the 1st day of January, 1766, with William Elliott, and James Parsons complainant's testator, as her sureties. Mrs. Butler the same day gave James Parsons a bond of indemnity against the risk of his suretyship, reciting that William Elliott was also a surety. On the 21st of November 1775, Elizabeth Butler made her will and soon after died. By her will she gave all her estates in South Carolina and Georgia to Susannah Savage, Thomas Savage and James Parsons, and her brother William Elliott, and nephews William Elliott and George Parsons, in trust, one half for the sole use of her daughter M. E. Savage, and the other half for the use of her grandchildren; and the executors were appointed trustees. At the death of Elizabeth Butler she left the defendants Thomas Savage, William Savage and Benjamin Savage her grandsons, and the defendant Elizabeth, who intermarried with the defendant Thomas Heyward, the defendants Mary and her husband Joseph Clay, Susan Parsons and her husband R. E. Elliott.

At the death of Mrs. Elizabeth Butler her bond to Brisbane had been reduced by payments to the sum of £308 1s. 5d. on the 9th of March 1778, with interest at 8 per cent on £285 14s. 4d. Suit some time after was brought by Brisbane's administrator against the complainant Parsons's executor, as surety on E. Butler's bond, whereby Parsons's executor was compelled to pay, on the 18th of

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November 1800, the balance due on the *bond, amounting to £1018 2s. 8d. The executor of Parsons thereupon applied to the defendants, the devisees and legatees of E. Butler and of the daughter Mary Elliott Savage, the defendants being the grandchildren of the said testator E. Butler the obligor, to pay or refund the sum of £1018 2s. 8d. which had been so paid. Some of the legatees and devisees declared in writing their willingness to pay their proportions of the debt so due to the estate of Parsons. Some of the defendants were entitled to legacies under the will of Parsons, which legacies they had not yet received, and they consented that the executor of Parsons should retain their legacies in part payment. The bill stated that these legacies had been accordingly retained, but that no settlement had ever been made of the balance of the debt, and prayed that the defendants might be compelled to account and pay to the complainant Parsons, executor, the balance in such proportions as the Court might direct among the defendants.

Some of the defendants being absent from and without the state, an order was published requiring them to come in, and answer or plead. Not coming in, a decree pro confesso was taken out against them on the 15th of March 1822.

One of the defendants, Mrs. Heyward, who was served with process on the 8th of November 1823, filed a plea, alleging that neither herself, nor her husband during his life time, had at any time within twenty years before the filing of the bill promised or undertook to pay any part of the money stated to be due to the complainant.

De Saussure, Chancellor. In this case it was urged on the part of most of the defendants (against whom orders to take the bill pro confesso had been made) that they were not residents of this state, and were not

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*amenable to its jurisdiction. It is very certain that non residents cannot be made amenable to suits in this Court, unless they have property in the state. 1 Atk. Rep. 19,

It is a high act of sovereignty to compel persons to obey the judicial process of the Court; and it would be very mischievous to the intercourse between nations for any of them to assume the power of calling all foreigners before their tribunals however remote their residence. It would produce a conflict of laws and jurisdictions, which would be intolerable. But it is contended for complainants that by our statute of the year 1784, creating the Court of Chancery, and prescribing its course of proceedings, non residents may be made parties to suits in equity in this state. That act did not mean to introduce so new and dangerous a principle as the one contended for. It merely

meant to regulate the proceedings in cases where non residents could be made amenable to the jurisdiction of the country by holding property within it, which does, undoubtedly, give jurisdiction both at law and in equity:—at law, by the attachment of the property of the foreign debtor—in equity by the mode prescribed by the statute of 1784.

It is, however, urged that these defendants really have property within this state, which makes them amenable to this suit. As to that fact I have very great doubts. It is not alleged to be lands or slaves or any visible or tangible property, but certain legacies under the wills of Mrs. Susannah Parsons and of Mrs. Elizabeth Butler. Now, these legacies have either been paid and the parties have carried away the proceeds with them; or they have not been paid, and certainly can not reasonably be expected to be paid after the lapse of so many years. At least such a remote chance of being paid legacies, now barred by very great lapse of

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time, ought not to be *made the basis of a supposed right of property, which should subject the parties to such an onerous responsibility. They might renounce the legacies rather than be made so liable. I think, therefore, that the non resident defendants are entitled to have the orders pro confesso set aside, and their names stricken out of the bill; and it is ordered accordingly.

The question then is reduced to the inquiry, whether Mrs. Heyward, the remaining defendant, is properly sued, and is liable to the demand of the complainant?

It is difficult to ascertain in what character Mrs. Heyward is made a party to this suit. The object of this suit is to make Mrs. Elizabeth Butler's estates liable for a debt due by her to the representatives of Robert Brisbane, but which the estate of Mr. Parsons, her security, has been obliged to pay. Mrs. Heyward is not an executrix of the will and estate of Mrs. Butler. She is therefore sued as a devisee or legatee of Mrs. Butler to oblige her to account for that estate, and to refund what she may have received in that character. But that is going too far. The remedy lies against the executors of Mrs. Butler in the first instance: and they might then within a reasonable time recover against the legatees who were improperly paid. In some cases the creditor may unite the executor and the legatees in the same suit, but it would be too hard on legatees to make them liable to such suits alone, after an enormous lapse of time, without the means of defence, or the power of showing that the debt had been paid as executors might do. On that ground I think the bill cannot be sustained.

It is perhaps better to decide on the merits, and put an end to the litigation.

Mrs. Butler executed her bond on the 20th of May 1765 to Robert Brisbane, conditioned to pay £3000 of the then currency of the colony on or before the first day of January

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1766, with William Elliott and James *Parsons as her sureties. Mrs. Butler executed on the same day a bond of indemnity to Mr. James Parsons for the faithful payment of the debt to Mr. Brisbane when the same should become due. The debt was not paid by Mrs. Butler when it fell due (in January 1766), but various payments were made by the hands of Mr. Parsons and Mr. Savage down to the 9th of March 1778. Now the right to have sued Mrs. Elizabeth Butler on the bond of indemnity occurred on the failure of payment on the bond in January 1766, and no suit was brought from that time till the year 1820, a period of fifty-five years. That is doubly too long for such transactions to stand out. There would be no end to litigation. But the complainant contends that the calculation of time should be made from the time of the payment of the balance of the debt to Brisbane's representatives in February 1801, and that it is not quite twenty years between that period and the filing of the bill in this case. It wants four months to complete that period.

The Court is not exact as to twenty years. It is not a statutory provision, but an equitable application of the principle to cases long delayed. And if there have been great neglect and lapse of time and great mutations of the property, the Court will not lend itself to support such stale claims.

It is therefore ordered and decreed that the complainant's bill be dismissed with costs.

Winstanley and Cross for complainants.
Petigru for defendants.

The cause was taken to the Court of Appeals. That Court confirmed the decree of

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the Chancellor for the *reasons assigned by the Chancellor, "and for the further reasons that the estate of Mrs. Butler is not properly represented," the executor, not the legatees and devisees, being the proper representative.

Decree affirmed.

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2 McCord, Eq. 440

MARY SWINTON and Others v. MARY LEGARE and Others.

(Charleston. Feb. Term, 1827.)

[*Wills* ⟸522, 524.]

Where a legacy is given to a class of individuals, it will take in all who answer the description at the time the gift, shall take effect. And though it be expressed in the plural, yet if there be but one, he will take the whole.

[Ed. Note.—Cited in Clark v. Clark, 19 S. C. 350; Gourdin v. Deas, 27 S. C. 485, 4 S. E. 64.

For other cases, see Wills, Cent. Dig. §§ 1114, 1122; Dec. Dig. ⟸522, 524.]

[*Wills* ⟸524.]

Legacy to A. for life, and after her death to be divided among her surviving children: none but those alive at her death can take.

[Ed. Note.—Cited in Bryson v. Nickols, 2 Hill, Eq. 120; Selman v. Robertson, 46 S. C. 273, 24 S. E. 187; Tindal v. Neal, 59 S. C. 15, 36 S. E. 1004; Bradley v. Richardson, 62 S. C. 502, 40 S. E. 954.

For other cases, see Wills, Cent. Dig. § 1122; Dec. Dig. ⟸524.]

The question in this case arose out of a clause in the last will and testament of Mrs. Susannah J. Platt, which was in the following words:

"I give, devise, and bequeath unto my daughter, Susannah Swinton, all the remainder and residue of my estate whatsoever, and wheresoever the same may be found, to her use during life, and after her death to be equally divided among the survivors of her children, to each of them share and share alike, as they shall attain the age of twenty-one or marriage."

Hugh Swinton was one of the children of Susannah Swinton, and the father of William H. Swinton and Maria Bonneau, and the husband of Jane Swinton. The father of the present complainant, Hugh Swinton, was born in the lifetime of the testatrix, but departed this life some time before his mother, the tenant for life. The question was whether his children took under the will?

Chancellor Thompson decreed that the legacy vested at the death of Susannah J. Platt

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the testatrix, and was *postponed until the death of Susannah Swinton, the tenant for life; and as the legatee died before her, the vested interest became transmissible to his legal representatives.

The defendants appealed on the ground that Hugh Swinton had no vested interest, and that as he died during the existence of the life estate, his widow and children could take nothing; but that at the death of the tenant for life, the whole estate went over to her surviving children.

Hugh S. Legare, for the appellant, cited 1 P. Wms. 96. 4 Ves. 551. 10 Ves. 562. 4 Ves. 692. 7 Ves. 279, 4 Bro. Cha. Rep. 403. 3 Burr. 1881. Drayton v. Drayton, 1 Desaus. Rep. 324. 3 Atk. Rep. 524. 1 Jac. & Walk. 146. 4 Ves. 692. 10 Ves. 755. 6 Dow, Par. Rep. 35—7. 53. 13 East's Rep. 526. Roebuck v. Dean, 2 Ves. Jun. 265. 4 Bro. C. C. 403.

Toomer, contra, cited De Vaux v. De Vaux, 1 Desaus. Rep. 497. 3 Burr. 1881. Elliott v. Smith, 1 Desaus. Rep. 331. 2 Desaus. Rep. 123. 1 Eq. Ca. 292.

Curia, per NOTT, J. If we are to judge of the intention of the testatrix in this case from the face of the will, it appears to me that there cannot be two opinions on the subject. I think that no one can doubt that it was intended that the survivorship should relate to the death of the tenant for life, and not to the death of the testatrix. And that seems to be the great question in all the cases of this description. There are cases where the survivorship has been held to relate to the death of the testator; but in

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the case of Russel v. Long, 4 *Ves. 554, Lord Thurlow is represented to have said that it was an unnatural construction; and in the same case the Master of the Rolls says, he thinks that construction is not to be adopted if any other can be. Lord Hardwicke uses the same language in the case of Hawes v. Hawes, 3 Atk. Rep. 526, and adds that it ought not to be resorted to where any other reasonable construction can be put upon these words. The principal cases where the survivorship has been construed to relate to the death of the testator are, Lord Bindon v. Earl of Suffolk, 1 P. Wms. 96. Stringer v. Phillips, 1 Eq. Ca. Abr. 292. Rose v. Hill, 3 Burrows, 1881, and Drayton v. Drayton, 1 Desaus. Rep. 324. But in all those cases where a life intervenes, the specific object of a testator's bounty who is to take upon the termination of the first life is particularly mentioned by name. In the first case, of Bindon v. Suffolk, there was no life estate upon the termination of which the legacy should vest; nor was there any time mentioned when it should be paid. But it was given to his five grandchildren by name, share and share alike, to be equally divided between them, and if any of them died, then his share to go to the survivors or survivor of them. One of the legatees died after the testator, but before any of the money was paid, and the question was whether his share went to the survivors or his representatives. Lord Chancellor Cowper held that it should be paid to his representatives, for that he must give such construction to the will that every word might take effect if possible, and that as no particular time was mentioned to which the survivorship should relate, it must refer to the death of the testator, otherwise the words of the will which relate to the deceased legatee would be inoperative. The case of Stringer v. Phillips is no where so fully reported, that

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I can find, as to *enable us to ascertain what the words of the will were. I should not, therefore, have considered it of much authority, if I had not found it so often referred to as such in other cases. By the words of the decree, as given in a note to the case of Bindon v. Suffolk, it would appear that the legacy was given to five persons to be equally divided between them, &c. after the termination of a life estate. The time of survivorship might therefore have been referred to the death of the tenant for life. But then, if one of the legatees

had died during the life of the first taker, the bequest to him must have failed, and therefore, in order to give effect to those words, it became necessary to refer the survivorship to the death of the testator, as in the case of Bindon v. Suffolk.

The case of Rose v. Hill, 3 Burr. 1881, depended upon the same principle, though there were other circumstances which aided the construction. The case of Roebuck v. Dean, 4 Bro. C. C. 403, was decided upon another principle. In that case the legacy was clearly vested in the trustees for the use of a niece of the testatrix during her life, and then over. The legacy clearly vested in the trustees at the death of the testatrix, and could not be divested by the death of one of the persons for whose use it was intended, but still remained in the trustees for the use of the representatives of such deceased legatee.

In the case of Drayton v. Drayton, 1 Desaus. Rep. 324, the testator gave certain lands to his son John, and if he should die during his minority, then to his four sons, William Henry, Charles, Glen, and Thomas, or to the survivors of them. John died during his minority and without issue. William Henry survived the testator, but died before John. The question was, whether the representatives of William Henry should take the part which would have fallen to him if

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he had survived *his brother, or whether it would go to the three survivors. The Court were of opinion that the share given to William Henry should go to his representatives. And the principal ground of decision was, because the legacy was given to the four surviving sons by name; and although in the last bequest the testator made use of the words surviving brothers, without naming them, yet as the intention appeared to be the same, the Court gave it the same construction,—intimating thereby that if both clauses had mentioned the surviving brothers, without any specification of their names, the construction would have been otherwise.

In the case now under consideration, the testatrix has given the property in question to her daughter for life, and after her death to her surviving children. She does not give any thing to Hugh Swinton and others by name, as in all the cases referred to, but to the survivors only.

The probability is, that the testatrix gave the property in that way for the purpose of taking in such as might be afterwards born, as well as those then in esse. It is presumed that she intended to put all her grandchildren on the same footing. But unfortunately the will is so worded, that either those who should die during the continuance of the life estate or those who should be born after her own death must be excluded. We must, therefore, refer the survivorship to that period of time which best comports with the grammatical construction of the words, unless controlled by some other words manifesting a different intention. But none such are found in this will. We give effect to every word of the will, without resorting to the unnatural construction contended for by the complainants. This construction also gives effect to the apparent intention of the testatrix, without disturbing any of the decided cases which have been relied on. This, it

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will be observed, was a provi*sion for her grandchildren, in which case it is much more natural to suppose the testatrix would have regard to those who should survive their own mother than herself. In Drayton v. Drayton, the Court appear to rely on the circumstance that the limitation over was to the "survivors" in the plural number, and conclude that if but one of the brothers had survived the legacy would have lapsed. But that reasoning cannot be supported either by principle or authority. Where property is given to a class of persons and not by name, it will take in all who shall answer the description at the time the gift shall take effect, and if there be but one, though it be expressed in the plural number, that one will take. Lessee of Stewart v. Sheffield, 13 East, 527. 6 Dow's Parl. Cases, 35, 37, 53. If, therefore, the tenant for life had left but one surviving child, that one would have been entitled to the whole legacy. If the legacy had been given to Hugh Swinton and to his brothers and sisters by name, or to the survivors of them, it might, perhaps, have been brought within the principle of some of the cases referred to. If it had been given over to the children of Mrs. Swinton generally, it would probably have embraced the complainants' ancestor, as well as the after born children, if there were any. But being given to her during life "and after her death to be divided among her surviving children," it must necessarily relate only to those who were living at the time of her death.

The decree must therefore be reversed and the bill dismissed with costs.

Decree reversed.[1]

[1] See on the important subject whether a devise to grandchildren comprehends any other than those in esse at the death of the testator, in the important case of Myers v. Myers, ante, page 214 [16 Am. Dec. 648].

*ALEXANDER HOWARD and LOUISA, His Wife, v. MARY M. FABER and MARIA FABER, Executors of Faber.

(Charleston. Feb. Term, 1827.)

[*Guardian and Ward* ⇐8.]

Ordinaries can appoint guardians of the persons and personal property of infants.

[Ed. Note.—Cited in Trumbo v. Reigne, 11 Rich. 191.

For other cases, see Guardian and Ward, Cent. Dig. § 14; Dec. Dig. ⇐8.]

This bill was filed by the complainants against the defendants, to recover funds to which they alleged they were entitled, as heirs and distributees of Dr. Adam Petsch. The defence set up was, that the fund had been paid over to one Brown, the complainants' guardian. The complainants replied that Brown had been appointed their guardian by the Court of Ordinary, which had no such power, and that therefore the payment was not such as would preclude the complainants, having been made to a person not legally authorized to receive it. That the Ordinary had no power to appoint a guardian to an infant, either by the common or statute law. That if such had been the usage of this state, it could not make law.

De Saussure, Chancellor. There is, no doubt, a considerable apparent difference in the authorities on the question, whether in England the Ordinary can appoint a guardian to an infant. The language of Lord Hardwicke in 3 Atk. 631, and Lord Mansfield in 3 Burr. 1436, seems to bear strongly against such a power. On the other hand there are several express authorities in its favour. Sir M. Hale so determines it. 2 Lev. 162, 217. Comyns, in his digest, lays it down as clear law. Swinburn in his Treatise on Wills and Testaments, Vol. I. Powell's edition, 209, 289, and Burn in his Ecclesiastical Law, Vol. IV. 103, adopt the same doctrine. Dr. Cooper, in his notes on Justinian's Institutes, 455, speaks

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of it as settled. And Hargrave in *his note to Coke on Littleton, 89. c. 16, in which he examined the apparently conflicting opinions, evidently leans in favour of the affirmative. If, indeed (as well we may), we consider the language of Lord Hardwicke as applying to a case in which the Ordinary had appointed a guardian for the lands of an infant, which was clearly beyond his jurisdiction, all the authorities may be easily reconciled. The dictum of Lord Mansfield when explained by the case in which it was used, will not, in any manner, shake the general principle. But if this point be unsettled in Europe, it seems to be well warranted by the long continued usage of South Carolina. The royal governors before the revolution, who, with the council, formed the Court of Chancery, uniformly, as Ordinary of the province, exercised this power. The constitutions of this state, of 1776, sec. 16, and of 1778, sec. 28, specially provide for Ordinaries, who should exercise the powers formerly exercised by that officer, and from that to the present time, under successive officers, some of them highly respectable and able men, and on the application of the first lawyers in the state, the Ordinaries have granted the guardianship of the person and personal estate of infants in a multitude of cases which have never been questioned. The power has been indirectly recognized by the legislature. For in the act of 1791, establishing the fee bill, which has since been repeatedly published, the fees of the Ordinary are allowed for doing services, which it is alleged are illegal. It will not be seriously contended, that the legislature would allow a compensation for doing an illegal act. It must also be remembered that property to a large extent must, in a lapse of so many years, have passed under these guardianships; and were the Court to hold them illegal, no foresight can anticipate the evils to which such a decision (which

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would *necessarily be retrospective) might lead. It should seem too, that after such a lapse of time, a grant of power to the Ordinary may be legally presumed. 1 Cowp. 103. 110. 12 Coke, 5, and 1 P. Wms. 107. Usage too has sometimes altered the law; and I am not aware that we have any other foundation than usage, now established by legal decisions, for the maxim that a sound price warrants a sound commodity, and in opposition to the rule in England. The case of the executors of Wood and others against the executors of Radcliffe has, in this state, settled that executors are not entitled to the residue undisposed of. On the whole I am clearly of opinion, that the appointment of Brown, as guardian, by the Ordinary was a valid appointment, and all payments made to him in that capacity are good against complainants. This point disposes of the whole case.

It is ordered and decreed, that the bill of the complainants be dismissed, without costs, except as to the heirs of J. Williamson.

From this decree there was an appeal.

Petigru, Attorney General, for the appellants. Lord Mansfield and Lord Hardwicke treat the power exercised by the Ordinary of appointing a guardian, and denounce it, as a plain usurpation. The right to appoint a guardian as to real estate the Ordinary could not pretend to, and how could an infant have a guardian for the personal, and another for the real estate. 3 Burr. 1346. 1436. 3 Atk. 639. If an inferior tribunal has not jurisdiction over the subject, no usage, however inveterate, can give effect to it. And so of assuming the power of issuing process, which does not fall within their province. Foster's

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Cr. Law, 311. Stephenson's *Case, 19 State Trials, 846. 3 Campb. 388. 16 Ves. 346.

Grimke, contra. By the custom of Kent, the Lord has the power to appoint a guardian; and so by the custom of London. Coke Lit. 88—9. These instances shew that jurisdiction may be created by custom, and on this subject the records of the Court of Ordinary for one hundred years shew that they have exercised this power. 1 Black. Com. 76. The constitution of 1776 (see Acts of 1823, p. 154, 16, 160) constitutes the office of Ordinary, and invests it with all the powers before used. They then exercise the power of appointing guardians.

King, same side. In England, the king, as parens patriæ, is the fountain of all power, civil, military, and ecclesiastical, and as such had the power of appointing guardians, and this power, in time, was distributed out to the several Courts. Watson, E. L. 336, 7. Under the regal government of the state, the governor was the representative of the king, and as such exercised the powers of Ordinary, and hence the origin of the power exercised by the Ordinaries in this state. It is no disparagement to Lords Mansfield and Hardwicke to say that Lord Hale was at least as well acquainted with the rules of the Common Law as they were, and he expressly recognizes the power in the Ecclesiastical Court. 2 Lev. 162. Co. Lit. 88, 9, a. note 16. 3 Keble, 384. 4 Burn's Ecc. L. 103. Grimke's Law of Ex. 84. 1 Powel, 269, 289. Cooper's Just. 384, 5. Usage will make law. 12 Coke, 4, 5. Cowp. 1045. There is another view of the subject. Under this custom an immense amount of property has been disposed of, and now to unsettle it would cre-

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ate inexplicable confusion. *The fee bill of 1791 contains a fee of 14s. to the Ordinary for guardianship bond, and letters, &c.

W. H. De Saussure, in reply. The Court of Chancery is the only Court having power to appoint guardians. 3 Bac. 410, tit. Guardian C. The Ecclesiastical Court has no power over guardians in socage or testamentary guardians. The Ecclesiastical Court of York claims the power under a local custom, but even this is questioned in modern times. Before the revolution the powers of the Chancellor and Ordinary were vested in the Governor and Council, and nothing can be inferred from the exercise of this power by that Court, which had jurisdiction in the character of a Court of Chancery. By the act of 1745, Pub. Laws, 202. 1 Brev. 345, guardians are required to make returns to the office of the Secretary of State, and not to the Ordinary. See the act of 1824, p. 26.

Curia, per NOTT, J. The Court concur in opinion with the Chancellor in this case; and I will add, that although under the royal government the Governor and Council constituted the Court of Equity, the Governor alone was Ordinary. The appointments therefore of guardians by him were made in the capacity of Ordinary and not as Chancellor. The constitutions of 1776 and 1778 confer on the Ordinaries then to be appointed the power heretofore exercised by the Ordinary. And the Judges of the County Courts, to whom was confided the powers of the Ordinary, always exercised the power of appointing guardians. And the clerk was allowed compensation for entering guardian's accounts, and all matters relating thereto, binding out poor orphans, and appointing guardians, &c. P. L. 387. The long exercise of the power of appointing guardians by the Ordinary, and the frequent recognitions of such a power by the legislature, although it does not appear

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any *where to be directly conferred, certainly authorizes the exercise of it at this day, and makes it the duty of the Court to support the authority of guardians so appointed. The decree is therefore affirmed.

Decree affirmed.

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2 McCord, Eq. 451

MARY S. DARBY, Administratrix, v. Creditors of R. A. DARBY.

(Charleston. Feb. Term, 1827.)

[*Executors and Administrators* ⇐176.]

Moderate and reasonable advances in support of the family allowed, where the estate is bona fide thought to be solvent, and made prior to application of creditors, whose demands would make the estate insolvent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 665; Dec. Dig. ⇐176.]

[*Executors and Administrators* ⇐495.]

Commissions also allowed if the accounts are regularly rendered to the Ordinary.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2089–2106, 2108; Dec. Dig. ⇐495.]

The late Robert A. Darby died in the year 1819, and his widow administered on his estate and effects. She took the usual steps and gave the usual notices to creditors. And upon such demands as were sent in within the usual time, she proceeded to make payment. Of the debts of the estate she also paid bills to the amount of $165 99 cents, from the 7th of October 1819, to December 5th, 1819, for mourning for the family. She also expended the sum of $596.39 cents, from the death of her husband to the 1st of February 1821, for household expenses in maintaining herself and six children, and for the education of the children. The expenditures for the benefit of the family were objected to by the creditor Packard, as prejudicial to the legal rights of the creditors, who would

be injured by the allowance of these sums, the estate being insolvent. As soon as the administratrix discovered that the estate was insolvent, she deposited the funds in the hands of the Master, and filed this bill of interpleader.

The Master considered these expenditures for the support of the family as illegal, and rejected them.

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*The complainant excepted to the Master's report, on the ground that the sums in question had been expended by the administratrix for the clothing and maintenance of the intestate's children prior to due notice and application of creditors, and whilst the estate was deemed perfectly solvent.

De Saussure, Chancellor. The exception to the report is founded on this, that the sums in question were expended by the administratrix for the clothing and necessary maintenance of the intestate's children prior to due notice and application of creditors, and whilst the estate was deemed perfectly solvent. The situation of executors and administrators is exceedingly embarrassing in many cases of estates in their hands. The deceased often leaves a good deal of property and a family accustomed to live in comfort on that property. The real situation of the estate as to debts is not and cannot be known with any certainty for a considerable time. To refuse support to the family would be considered hard and unjust on mere apprehension of danger of insolvency. To make the requisite advances at the risk and responsibility of the executors and administrators, is requiring more than can be reasonably expected in the common course of life. In this dilemma the sound principle would be to allow moderate and reasonable advances made for the support of the family, in the bona fide expectation that the estate was solvent, and made prior to the application of creditors, whose demands would make the estate insolvent. Thus Chancellor Kent in the case of Thompson v. Brown et al. 4 Johns. Cha. Rep. 619, 645, says, "I am not disposed to call the mother to account for rents and profits (even of real estate) so received and expended"—that is for the support of the children. And he further says, "the guardian ought not certainly to be reanswerable

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for rents *and profits applied for the support of the infants prior to any due notice from the creditors."

The important statute of the 13th of March 1789 recognizes the principle; for in section 27, (see Grimke's Pub. Laws, p. 424) it directs executors and administrators to give three weeks notice by advertisement, or otherwise, for creditors to render an account of their demands, and they shall be allowed twelve months to ascertain the debts due to and from the deceased, to be computed from the probate of the will, or granting letters of administration; and creditors neglecting to give in a statement of their debts within the time aforesaid, the executors and administrators shall not be liable to make good the same. Now in the case before us, it is alleged, and not contradicted either by the pleading or in the argument, that the notice was given by the administratrix, and that the heavy demand which renders the estate insolvent was not brought forward in due time; whereupon the administratrix proceeded to pay off bond debts, and some simple contract debts, and to pay the expenses of the family on the supposition of the solvency of the estate. Upon this state of facts, I must say with Chancellor Kent, that I am not disposed to call the mother to account for rent and profits so received and expended; and I must say with our statute that the executors and administrators are not bound (under such circumstances) to make good the same. It is therefore ordered and decreed, that the exception be sustained and the report overruled. As to the question of commissions, as the money was rightfully paid, the commissions must be paid if the accounts were regularly rendered before the Ordinary.

From this decree an appeal was taken up on the following grounds.

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*First. That the report of the Master should have been sustained. The items struck out of the account by him not having been expended in due course of administration according to the provisions of the act of 1789.

Second. That his Honour the Chancellor was mistaken in point of fact in supposing that the creditors did not present statements of their demands, as would appear from the vouchers themselves presented by the administratrix, and now in possession of the Master in Equity, and referred to by the administratrix in the exhibit filed by her with the bill.

Furman, for the appellants. Distribution is not to be made until after the expiration of one year. He cited Toller, 245. Salk. 296. 3 Atk. 299. 3 Bacon, 89. The case from 4 Johns. is not applicable. An executor is a trustee for creditors.

J. E. Holmes, in reply, cited 1 Vern. 369. Amb. 219. 3 Ves. 565. 5 Ves. 843. Courts look on the conduct of executors and trustees with great indulgence, and are reluctant to charge them when they have acted with apparent fairness.

The Court of Appeals delivered no opinion, but entered an order confirming the decree of the Chancellor.

Decree affirmed.

2 McCord, Eq. *455

*LOWNDES and I'ON v. CHISHOLM.

(Charleston. Feb. Term, 1827.)

[*Subrogation* ⇐7.]

A surety entitled to all the securities given by the principal.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 18, 21–29, 58, 77, 83, 92; Dec. Dig. ⇐7.]

[*Mortgages* ⇐218.]

The mortgagor is the owner of the land, by act of 1791; but on a judgment at law being obtained against him, without foreclosing the mortgage and execution issued, nothing but the equity of redemption can be sold; and where a purchaser bought thinking he obtained the fee simple, the Court set aside the sale on account of the mistake, but ordered him to account for rents while in possession.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 583; Dec. Dig. ⇐218.]

[*Judgment* ⇐435.]

Relief is given in cases of mistake, where the mistake was clearly one of law.

[Ed. Note.—Cited in Hopkins v. Mazyck, 1 Hill, Eq. 250; Maner v. Washington, 3 Strob. Eq. 179; Brockington v. Camlin, 4 Strob. Eq. 198; McDow v. Brown, 2 S. C. 112; Annely v. De Saussure, 12 S. C. 520, 522; Cuningham v. Cuningham, 20 S. C. 332; Brock v. O'Dell, 44 S. C. 34, 39, 21 S. E. 976; Whitehill & Son v. Dacus & Jordan, 49 S. C. 277, 27 S. E. 200; Hutchison v. Fuller, 67 S. C. 284, 45 S. E. 164.

For other cases, see Judgment, Cent. Dig. § 821; Dec. Dig. ⇐435.]

[*Subrogation* ⇐7.]

The sureties to a bond, to secure which the principal gave a mortgage, are entitled to the benefit of a foreclosure and sale of the mortgaged premises, they having paid the debt. They are entitled to the benefit of all the securities given by the principal.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 77; Dec. Dig. ⇐7.]

[*Mortgages* ⇐515.]

The Court of Equity has the power to order sales on a credit. It must not be governed by an arbitrary discretion.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1517; Dec. Dig. ⇐515.]

[*Judicial Sales* ⇐46.]

Sale set aside and resale ordered; notice of one month to be given and a credit of nine months, with personal security.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 87; Dec. Dig. ⇐46.]

[*Mortgages* ⇐194, 202, 203.]

All just allowances to be made to the defendant for necessary repairs, management and improvement.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 502, 538, 542; Dec. Dig. ⇐194, 202, 203.]

Defendant's costs at Law and in Equity allowed.

[This case is also cited in Cuningham v. Cuningham, 20 S. C. 332, Norman v. Norman, 26 S. C. 48, 11 S. E. 1096, and Brock v. O'Dell, 44 S. C. 38, 21 S. E. 976, regarding distinction between ignorance and mistake of law.]

In June 1806, George Chisolm sold to William S. Hasell, a wharf in Charleston for the sum of $48,000. The purchase money, except $22,000, was paid up. For the residue of $22,000, Hasell gave seven bonds, viz.

1	bond	payable	30th	of	June	1807	for	$ 4,400
1	"	"	"	"	"	1808	"	4,400
1	"	"	"	"	"	1809	"	4,400
1	"	"	"	"	"	1810	"	1,400
1	"	"	"	"	"	1811	"	400
1	bond	with J. B. I'On as surety,				1810	"	3,000
1	"	W. Lowndes		"		"	"	4,000
								$22,000

To secure the payment of these bonds, Hasell gave Chisolm a mortgage on one half of the wharf. On the 30th of August 1806, Chisolm assigned the two bonds on which Mr Lowndes and Mr I'On were sureties, to the State Bank, as well as so much of the mortgage as relates to the said bonds, and guarantied the payment.

Hasell having mortgaged one moiety of the wharf as above mentioned, sold the other moiety to Abraham Motte, and paid nothing on the bonds. All the bonds, except those assigned, were put in suit at law by Chisolm, and a judgment recovered on the 17th of February 1810, and the undivided moiety of the wharf belonging to Hasell was taken in execution and sold by the Sheriff under a fi. fa. upon the judgment without any foreclosure of the mortgage, and purchased by

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Chisolm *for $15,000. In March 1811, Mr Chisolm filed a petition in the Court of Equity for Charleston district, for a partition of the wharf, against Motte and wife and their trustees. A writ of partition issued, and the Commissioners certified that the property could not be divided, and recommended a sale. They certified also that Mr Chisolm had offered to accept whatever was due of the purchase of Hasell and release his moiety, and recommended that time should be allowed to effect this arrangement. The report was confirmed, but no arrangement was effected. The Court ordered a sale and the property was sold by the Master in November 1811, to make partition between Chisolm and Motte, and Chisolm became the purchaser at $55,000.

The state bank sued Lowndes and I'On on the bonds to which they were sureties, recovered judgment and received satisfaction of them. This bill was filed by them against Chisolm, claiming to stand in the place of the Bank and to have the proceeds of the mortgaged property applied to pay them in their proper proportion, and insisting likewise that the equity of redemption was not foreclosed, and that the mortgaged premises in Chisolm's possession were liable to them as mortgage creditors standing in the place of the Bank.

On the part of complainants Mr Motte testified to improvements made by Hasell on the wharf to the amount of $12,000. That the Sheriff's sale was for cash and 10 per cent to be paid down. That he would have bid but was prevented because he could not

pay the cash. That it would have sold better if it had been put up in parts—but the whole undivided moiety of Hasell was offered at one time. He had no objection to the Sheriff's title, but was prevented from buying by want of funds. It was also proved by Motte that Hasell was in North Carolina at the time of the judgment and sale, and

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was *totally an insolvent man. When the Sheriff sold the undivided moiety in June 1810, he offered the fee simple of the property and not the mere equity of redemption for sale. Chisolm and his counsel, acting under the same impression, meant to sell the entire interest of Hasell.

The Chancellor's decree (Chancellor De Saussure) declared that the complainants had a right to stand in the place of the Bank and to receive a proportionable part of the mortgaged property of Hasell, and ordered Chisolm to account for the rents and profits of the wharf. It ordered him also, as standing in the place of Hasell, to pay to the complainants their principal, interest and costs, or the mortgaged premises to be sold (nothing but the equity of redemption having been previously sold by the Sheriff), and the proceeds applied to satisfy the complainants, and also to pay him (Chisolm) so much as was remaining due to him on his mortgage from Hasell.

From this decree the defendant appealed on the grounds:

First. That the doctrine assumed in the decree was that Chisolm could not lawfully apply the mortgaged property towards the bonds which were secured by the mortgage alone, a position not to be supported by principle or authority.

Second. That the decree declared that the complainants were entitled to the same remedy against Chisolm which the Bank, to whom he assigned the bonds, would have been entitled to. But that this was wholly inverting the situation and rights of the parties, and making Chisolm, the obligee, (who took a bond from Hasell wherein the complainants were bound as joint obligors) guaranty them

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the sureties against Hasell the princi*pal. And if this decree could stand, no man could assign a bond if the relation of principal and surety existed among the obligors, without making himself liable to pay back the money if the surety should pay it.

Third. That if relief were granted on the ground that the mortgage was still a subsisting lien, equity required that the parties should be put in statu quo. The sale should be annulled and Chisolm considered as a mortgagee in possession.

Fourth. That the property was put up by the Sheriff and bought in by Chisolm, under the opinion on all sides that the mortgage was thereby extinguished: and to compel him to hold the property subject to the mortgage would be forcing on him an entirely different contract, which would be inequitable and unjust.

Fifth. That the acquiescence of the complainants in the sale of Hasell's property and the peculiar circumstances of the case were a bar to relief.

Sixth. That upon the case made upon the bill and answer and evidence, the bill should have been dismissed with costs.

Petigru, Attorney General, for the appellant. There is nothing in the merits of this case, so far as the Sheriff's sale and the defendant's purchase, to distinguish it from an ordinary Sheriff's sale. The questions of law arising are, first, that the complainants were entitled to be subrogated to the rights of the Bank, to whom their bond had been assigned. The defendant not only transferred the mortgage as a collateral security, but added his personal guarantee. It would involve the contradiction of a creditor guarantying the security of his debtor against his liability.

The next objection is, that the equity of redemption only could be sold. That was all the interest which Hasell had in it. The le-

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gal fee was in Chisolm. He *was competent to consent to the sale of it. That would be doing Hasell a favour. If parties act upon a deed it is good in Equity although not at Law. Coop. Rep. 103. There can be no doubt that the defendant acted in the belief that he could dispose of the fee.

Ford, contra. It is unimportant what were the intentions of the defendant. The Court will look to the consequences, rather than to the motive of action. There is then no doubt that the defendant did use a legal process, the effect of which is, if his cause prevails, to secure the wharf to himself exclusively in a manner which renders it impossible for others interested to interpose their claims. The legal effect of the sale was to put the defendant in possession as mortgagee, and as such he was liable to account for rents, &c. 2 Ves. 99, 104—156. If one assign a debt, the securities pass by such assignment. 3 Johns. Cha. Rep. 322. There is also in this case an express assignment of the security to the Bank; and no act that he could do would divest them of that right. The purchaser at Sheriff's sale stands in the place of the defendant. The mortgagee in possession is trustee to the mortgagor. 1 Johns. Cha. Rep. 550. 2 Fonb. 257, 261. The equity of redemption may be sold under a fi. fa. and nothing else can be sold: of course, the land still stands chargeable with the debt. Nor will the mortgagee's bidding at the sale alter the thing. 1 Caines' Rep. 47. 10 Johns. Rep. 481. 4 Johns. Rep. 151, 222. The equity of redemption is a title in equity. 1 Vern. 190. 1 Mad. Cha. 414, 415. Nor can any agreement between the parties change the character of the mortgage. Once a mortgage, always a mortgage. 1

Vern. 8. 1 Vern. 418. The right of redemption is not confined to the mortgagor. Any one who has acquired an interest may come in and redeem. Chancellor Kent says, there

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never was a case in which *the mortgagee can foreclose without the decree of the Court. Hart v. Ten Eyck, 2 Johns. Cha. Rep. 101, 125. The Court will not order or decree a foreclosure until the whole sum is due and forfeited, and then they will allow the party time (six months) to redeem. 2 Johns. Cha. Rep. 63. 2 Vent. 365. 1 Vern. 232. 3 Johns. Cha. Rep. 467. The Court will, under circumstances, enlarge the time to foreclose; and in the case of Edwards v. Cunliffe, 1 Mad. Rep. 287, it was enlarged a fourth time. When a part of the debt is due, the Court will decree a sale of part of the property if it is capable of division. 2 Johns. Cha. Rep. 486. 4 Johns. Cha. Rep. 534. The property here was capable of division, and by this mode of proceeding, the complainant has been deprived of all these advantages. A mortgagee in possession is bound to account, and that although he entered believing he had a right, and that the equity had been foreclosed. 1 Mad. 269, 278. If a creditor take a mortgage from his debtor, his personal surety is entitled to the benefit of it, and the creditor shall be entitled to it if he pays the debt. Hayes v. Ward, 4 Johns. Cha. Rep. 123, 413. Hampton v. Levy, 1 M'Cord's Cha. Rep. 107.

Toomer, the same side. The fee cannot be sold but under a decree or order of foreclosure. It is true, that if the mortgagee purchases, the fee and the equity of redemption are united in the same person, and there is no one to complain. In Hunt v. Rousmanier, 8 Wheat. 211, 215, the Court say, that they have found no case in which a plain and acknowledged mistake in law has not been relieved against.

King, in reply. When this property was sold, the sale was made according to the understanding of the law at that time, as laid

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down in the case of the Execu*tors of Ash v. Executors of Livingston, 2 Bay, 81. Relief may be granted where a person has acted under an erroneous construction of law. Bacon's Law Tracts, 280. Pothier, 387, et passim. 2 Bro. Cha. Rep. 250. Onions v. Tyrer, 1 P. Wms. 345. 1 Ves. & Beam. 168. 16 Ves. 72, 84. 1 Binney, 27, 37. Parrot v. Parrot, 14 East, 423. 2 Desaus. Rep. 529. 7 Johns. Cha. Rep. 394. 2 Pothier, 444. The statute of limitations was not pleaded.

Curia, per COLCOCK, J. The principal ground now made does not seem to have been much considered below. I am, in the first place, constrained to think, that the case has been unnecessarily encumbered with the fact, that the bonds to which the complainants were sureties had been assigned to the Bank, and with a great deal of argument founded on that fact, when it can have no possible bearing on the rights of the complainants. Their equitable claim to the aid of this Court arises out of the original contract made by their principal with the defendant, and their subsequent payment of the two bonds to which they were sureties. To whom they were paid was not a matter which could either increase or diminish their equitable claim, nor could the fact of the bonds having been assigned create any other right than that which they had before.

The first, and the important question in the case is, whether the defendant is bound by the purchase at the sale made by virtue of the execution? It is said that he could acquire no more than the equity of redemption under that sale; but yet, that he must be held accountable for the fifteen thousand dollars which he bid for the property, under a supposition that he was buying the fee simple. And this position is maintained by attempting to show, that a Court of Equity never relieves against a mistake at Law,

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though it will always relieve against a *mistake of fact. Now, without attempting to investigate the propriety of this distinction, as being generally well founded, it is obvious that cases may arise in which it becomes the duty of a Court of Equity to relieve against the consequences of a mistake at law as well as against those of a mistake of fact. The law is sometimes doubtful. A sudden and important alteration of the well established doctrine on any particular subject, by a crude undigested act of the legislature, oftentimes produces such uncertainty as to render it extremely difficult to know what the law is, until the proper tribunals shall have given the act some exposition. And this certainly was the situation of the country, in relation to the act of 1791, until the decision Ex parte the City Sheriff, [1 McCord, 399.]

The act of 1791 declared that the mortgagor was the owner of the land, notwithstanding the conveyance to the mortgagee, and says the land is only to be considered as a pledge. Now under that state of things it was supposed that the interest of the mortgagor might as well be disposed of by a sale under execution as by the usual mode of foreclosing the mortgage in equity, or by the mode prescribed by the act, which applied only to some particular cases; and it is admitted that in this case the defendant thought he was selling the fee. And it has been further stated, and not contradicted, that he was confirmed in such opinion by that of one of the most distinguished members of the bar. Be that as it may, there was, to say the least of it, some confusion created by the act of 1791 and the subsequent act of 1797; and although the conduct of the defendant has been complained of as

hard and rigorous, I confess I can discover nothing in it which should preclude him from the benefit of that relief which has been afforded in many cases of a similar kind. His debtor failed to comply with his con-

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tract, and he sought the remedy which *the law gave him, and it is evident meant to use it in legal form. His debtor had left the state. There is no evidence of any overtures of accommodation. What then was the rational conclusion? I think no other could be drawn from the circumstances, than that the property was abandoned by the debtor. Had there been a regular foreclosure either at Law or in Equity, there would have been no ground left for this application. But it is well established that relief is given in cases where the mistake has been clearly one of law. And the authorities relied on put the matter beyond all doubt, if indeed it could be doubted at this day. The only case on which I shall make any particular comment is that of Hunt v. Rousmanier, 8 Wheat. 215, [5 L. Ed. 589,] in which the point is expressly decided in the opinion delivered by Chief Justice Marshall, in which he refers to some of the English cases which have been relied on in the argument and says, "although we do not find the naked principle that relief may be granted on account of ignorance of law asserted in the books, we find no case in which a plain and acknowledged mistake in Law is beyond the reach of Equity," and surely no case can prove more clearly that such mistake is not beyond the reach of Law, than the case of Lansdown v. Lansdown, Mosely's Rep. 346. The ignorance in that case was that the complainant was entitled as eldest son to the estate: and yet relief was afforded in so plain a mistake."

It being determined then that the defendant is not to be held liable on the purchase made under the execution, it follows of course that the original debtor William S. Hasell is still entitled to the equity of redemption, and the defendant is to be considered as a mortgagee in possession, and as such liable to account for the rents and profits.

But as no claim is set up by the mortgagor, it becomes a question whether the

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complainants are enti*tled to any and what relief; and on this part of the case it is certainly not necessary, after the decision in the case of Hampton v. Levy, 1 M'Cord's Eq. Rep. 107, that much should be said. The equitable claim of a surety to all the securities given by the principal to his creditors is now too well established and too familiar to need any illustration. The sureties in this case had a right to rely and no doubt did rely on the mortgage as operating as a counter security in their favour, to the amount of whatever the land would bring at public sale. I say public sale; for as all contracts are supposed to be made in reference to the law of the land, they had a right to calculate that, if their principal failed to pay the debt, the mortgage would be foreclosed according to law; and in such case it was well known, that the property would be sold at public sale and on a reasonable credit; for notwithstanding all that has been said against the exercise of this power by the Court of Equity of "selling on credit," it seems to be now too well established to admit of any doubt; and therefore both the defendants and complainants may be considered as contracting with reference to this power of the Court,—a power which it is not pretended the Court can exercise to an arbitrary extent, any more than any other discretionary power (of which there are an infinite number vested in all the higher Courts both of Law and Equity). The property not having been disposed of then according to law, if on an account taken it should appear that the debt is not yet paid, the mortgage is to be considered as foreclosed and the property must be sold on a credit. On this part of the case we concur with the Chancellor; but we do not conceive that the defendant is in any event liable to refund the money paid by the sureties. If the rents and profits of the wharf and the proceeds of the sale cover the bonds to which they are sureties, it is well; but if not, they must sustain

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the loss. *for their equity extends no further. Whether the property when brought to the hammer should sell for its value or for a less sum was a risk which they the sureties took upon themselves.

It is therefore ordered and decreed, that the sale made by the Sheriff of Charleston district, of a moiety of the wharf mentioned in the pleadings, be set aside and that the said moiety of William S. Hasell in the wharf be sold by the Master of this Court, giving one month's notice, and on a credit of nine months, with personal security if required by the Master, in the manner directed by the 44th rule of the Court. And it is further ordered that the Master do take an account of the rents and profits of the wharf, and that the defendant George Chisolm be charged with one moiety of the rents and profits as a mortgagee in possession. All just allowances to be made to the defendant for necessary expenses of repairs and management and improvement, after which the proceeds to be applied in the first place to the interest due, to be calculated according to the contract, and to his (defendant's) costs at Law and in Equity; and in the next place to the satisfaction of the principal due to the defendant on the bonds of William S. Hasell in his hands, of which an account is also to be taken—and that the balance which may be still due to defendant (if any) be paid in the first place out of the moneys arising out of the sale of the property, and the surplus if

any there be, to be then applied to the repayment to the complainants of the sums paid by them and the interest which has since accrued.

Decree modified.

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2 McCord, Eq. *466

*FRANCIS HENDERSON v. JOHN M'CLURE, Administrator, WILLIAM M'CLURE, and Others.

(Charleston. Feb. Term, 1827.)

[*Abatement and Revival* ⇐45.]

Where a bill was filed against an administrator to account, and a decree pronounced on his liability, and a reference of accounts ordered, and, pending the reference, his administration is revoked and granted to another, it does not abate the bill as to the first administrator, who must still account; and to save a multiplicity of suits the second administrator may be joined, and a decree made between them.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 233; Dec. Dig. ⇐ 45.]

[*Principal and Agent* ⇐78; *Trusts* ⇐305.]

In all cases of agencies or trusts a bill to account may be maintained, although they are no longer in the character in which they acted.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 162–177; Dec. Dig. ⇐78; Trusts, Cent. Dig. §§ 421–426; Dec. Dig. ⇐305.]

[*Abatement and Revival* ⇐34.]

So a suit against an executrix does not abate by her marriage, but the husband may be made a party and the suit continued.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 187; Dec. Dig. ⇐ 34.]

[*Equity* ⇐426.]

Decree may be made between codefendants.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1000; Dec. Dig. ⇐426.]

This was a bill to account. The case came before the Chancellor on a point arising on the Commissioner's report. The case, on the merits, was argued in March 1824: and the decree of the Court, delivered on the 6th of December 1824, sustained the liability of William M'Clure to the complainant, and directed a reference to the Commissioner to ascertain the amount due to the complainant. From this decree the complainant appealed upon grounds now unnecessary to notice. He however withdrew that appeal and remained satisfied to pursue his remedy under the decree and order for reference of accounts against the estate of William M'Clure. John M'Clure, the defendant (nephew of William M'Clure), had administered on his estate the 26th of January 1821, and after the decree of the Chancellor, but before the appeal had been withdrawn. On the 4th of February 1825, the administration of John M'Clure was revoked on the petition of his sureties, and immediately regranted to his brother William M'Clure. The same persons who were securities for John M'Clure became sureties for William M'Clure. No notice of this revocation was given to the complainant, and it was entirely unknown to him until a recent meeting of the solicitors of the parties before the Commissioner to examine and ascertain the balance due to the complainant from the estate of William M'Clure; and it was not until after the complainant had proved the items of the principal of the debt charged in his account, that an objection was taken that the suit had abated as to John M'Clure as

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administrator of William M'Clure, and *that there could be no decree binding that estate until that estate was represented and William M'Clure the new administrator made a party to the suit. Both William and John M'Clure had left the state. The Commissioner now submitted the question to the judgment of the Court.

De Saussure, Chancellor. In this case the Court feels no difficulty. After the decree to account against John M'Clure, neither he nor his sureties could, by any act of theirs, withdraw him from obeying the obligation of that decree. If an administrator, after a tedious litigation and when a judgment or decree was on the eve of being given against him, could, by any act of his own or of his sureties, defeat the suit and compel the party to renew the litigation with a new defendant, it would be impossible to anticipate all the evils which might arise from such a cause. The sureties in numerous instances would certainly adopt such a measure, and it might well be supposed that the administrator himself would often gladly avail himself of it. Now, it is a standing rule of this Court, that pendente lite nihil innovetur, and the maxim was never more properly applicable than in the present case. The Court must therefore hold John M'Clure still bound to comply with the decree. It is equally clear that William M'Clure the administrator de bonis non should be made a party. It is therefore ordered and decreed, that the complainant, Francis Henderson, be allowed to go on and establish the amount of his debt against the estate of the said William M'Clure deceased, and that the said complainant do make the said William M'Clure administrator de bonis non a party to this suit.

From the above decree the defendant John M'Clure appealed, upon the ground that when-

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ever an administra*tion is revoked, the former administrator is not liable to account to a general creditor under a decree to account.

That whether the revocation arose from the act of the sureties of the former administrator, from death or otherwise, was immaterial; and that the new administrator was the only person liable, and should be made so under a supplemental bill.

Grimke and Toomer, for the appellants.

King, contra.

Curia, per NOTT, J. I concur with the Chancellor in this case, and I should have regretted to have found any rule of law or practice which would have required us to come to any other conclusion. If the revocation of letters of administration, at the moment when the complainant has nearly arrived at the consummation of a long and laborious investigation, is to turn him round to commence another action against another person for the same cause, and delay him until such other person has travelled through a similar investigation, it would open a field of fraud and litigation the extent of which cannot be foreseen. And although it is said that no fraud was intended in this case, and I am not disposed to impute any, yet we cannot shut our eyes against the consequences of such a precedent. It is contended that the revocation of the letters of administration was the judicial death of the administrator, and that the suit therefore abated, as if he were actually dead. But there is an essential difference between a natural death and this judicial death. In the first case there is no party against whom an account can be taken. In the latter the person remains,—the character only is changed, but the liability continues. It is not pretended indeed that the defendant is not still liable, but that he can be required to account to his successor

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only *and not to the complainants. It is not pretended that justice may not as well be done this way, but that the practice of the Court requires the useless formalities to be observed of going the round of two successive actions to bring the parties back to the very spot where they now are. The current however of analogous cases would lead us to conclude, that the practice of the Court does not require any such circuity of action. In all cases of attorneys, factors and agents of every description, a bill for an account may be maintained, although the character in which they acted may have terminated. A woman, acting in the character of executrix or administratrix, does not abate a suit by marrying although her identity is much more nearly destroyed, by being merged in that of her husband on whom the liability devolves, than in the present case. But by making the husband a party, the complainant may go on to require an account in the same manner as if no such event had occurred. The administrator de bonis non is now made a party; so that all the parties on whom the responsibility must ultimately devolve are before the Court. No good reason therefore can be urged, why the decree should not be supported, unless some technical rule be interposed, which has not presented itself to my mind.

Two objections are relied on which are thought to oppose insurmountable obstacles to the further progress of the complainant against the first administrator. The first is, that it would require the Court to render a decree between the two defendants, which it is contended cannot be done; and the second, that there is no such privity between the complainant and the first administrator since his character of administrator is gone, as will authorise them to proceed against him. With regard to the first, the experience of every day teaches us that the Equity jurisdiction could hardly exist without the exercise of such a power. In most of the cases between creditors, legatees and executors, be-

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tween princi*pal and sureties, partners, and cases involving the interests of executors and administrators, when there have been successive executorships, an adjustment of the claims of the respective parties and between the different defendants is necessary. On this subject however, we are not without direct and very high authority. In the case of Chamley v. Lord Dunsany and others, 2 Sch. & Lefr. 690, before the House of Lords, which was an appeal from a decree of Lord Redesdale, one of the grounds of appeal was, that a decree between co-defendants was not warranted by the practice of the Court. Lord Redesdale in speaking to that point says, it seems strange to object to a decree because it is between co-defendants, when it is grounded on evidence between plaintiffs and defendants. It is a jurisdiction long settled and acted on, and the constant practice of the Court of Equity; so much so that it is quite unnecessary to state any case in its support. Lord Eldon, in speaking on the same subject, says, where a case is made out between defendants by evidence arising from the pleadings and proofs between plaintiffs and defendants, a Court of Equity is entitled to make a decree between the defendants. Further, says this learned Chancellor, a Court of Equity is bound to do so. The defendant chargeable has a right to insist, that he shall not be liable to be made a defendant in another suit for the same matter that may then be decided between him and his co-defendant. And the co-defendant may insist that he shall not be obliged to institute another suit for a matter that may then be adjusted between the defendants. And if a Court of Equity refused so to decree, it would be a good ground of appeal by either defendant. And Lord Erskine, who was then on the woolsack, said, he concurred with these two noble lords in every position they had laid down. This case is valuable, not only as deciding that question, but as laying down

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the principles upon which *the practice is founded, and pointing out the description of cases to which it applies. And in the case now before us, that course is recommended by all the considerations upon which such a proceeding is authorised. The decree between the defendants is to be made out by pleadings and proof between the plaintiff and defendants. It will relieve one defendant

from liability to another action. It relieves the other defendant from the expense, trouble, and delay, of bringing another suit, and it affords the complainant all the means of obtaining justice, without commencing his suit de novo.

It only remains to be determined, whether by the revocation of the letters of administration the privity between the complainant and the first administrator is so destroyed as to abate the suit? And it would appear to me, from the principles already laid down, that no such change in their relations has taken place as must necessarily lead to such a result. The appellant will be ultimately liable to this complainant in another form, and justice cannot be so encumbered with the "net work of form" as to require such a circuity of action to effect the object. But, on this point also, we have an authority, without looking beyond the volume already before me, which fully maintains the position which I am endeavouring to maintain. In the case of Doyle v. Blake, 2 Sch. & Lefr. 229, the circumstances were as follows: Dominick Fields made his will, by which he appointed Blake and Athy his executors. His widow entered a caveat in the Prerogative Court to prevent probate of the will from being granted. The two executors, Blake and Athy, were appointed administrators pendente lite. The widow afterwards withdrew her suit. The two executors then renounced their executorship, and administration cum testamento annexo was granted to Martin Horace. A bill was afterwards filed by the legatees against the two executors and the administrator

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*Horace, for an account. The complainants alleged that the executors had taken upon themselves the execution of the will by becoming administrators pendente lite, and that they could not afterwards renounce, and that Horace could only be considered as their agent and not as a lawful administrator. Lord Redesdale was of that opinion, and declared, that under all the circumstances of the case, the defendants, Blake and Athy, had so far accepted the will of the testator as executors therein named, and had so far acted in the execution thereof, that they ought to be deemed to have taken on themselves the burthen of the execution of such will, and were not at liberty to renounce the probate thereof. And that Horace ought to be considered as having acted in the affairs of the estate as the agent of the defendants, Blake and Athy. The Master, however, was directed to inquire and report in what manner such part of the estate and effects of said Fields as should appear to have come to the hands of Horace were applied, and whether the same was properly managed, and whether the produce thereof was properly applied by him in due course of administration, and according to the directions made in the will. It was also directed that an account of the estate of Horace should be taken, and that the same should be applied in the first instance to the payment of any balance which might appear against him; and if insufficient to pay the whole, that Blake and Athy should be answerable for that deficiency. In this case, although the administration was void, and the administrator considered merely as agent of the executors, and therefore as we might suppose accountable only to them, the Lord Chancellor held his representatives accountable for his administration, and subjected his estate first to the payment of the demands of the complainants, and held the executors liable for the balance only which might be due after

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*his estate was exhausted. It was, therefore, a much stronger case than the one now under consideration. For in this case the administrator was duly appointed, and acted under a lawful authority. He is still liable in the character of administrator, and not as agent, and the mere form of proceeding is the only matter in contest; and as all the matters between the respective parties may as well be adjusted by making the second administrator a party to this bill, as by filing another against him, and driving him to an action against his predecessor, I think we are authorized upon principle, as well as by precedent, to adopt that course. The decree of the Chancellor must therefore be affirmed.

Decree affirmed.

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2 McCord, Eq. 473

S. B. GIST and Children v. The Executors of STALES GIST.

(Charleston. Feb. Term, 1827.)

[*Executors and Administrators* ⇐=495.]

Where an estate is properly sold on a credit and bonds taken by the executor, he is entitled to charge commissions on the bonds, as on so much money received.

[Ed. Note.—Cited in Ball v. Brown, Bailey, Eq. 374; College of Charleston v. Willingham, 13 Rich. Eq. 204; Jones v. Jones, 39 S. C. 252, 17 S. E. 587, 802.

For other cases, see Executors and Administrators, Cent. Dig. § 2099; Dec. Dig. ⇐=495.]

[*Executors and Administrators* ⇐=495.]

An executor is entitled to commissions on all sums received and paid, whether in bonds, notes, or cash.

[Ed. Note.—Cited in Ball v. Brown, Bailey, Eq. 374; College of Charleston v. Willingham, 13 Rich. Eq. 204; Jones v. Jones, 39 S. C. 252, 17 S. E. 587, 802.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2089–2106, 2108; Dec. Dig. ⇐=495.]

There were several points in this case. The Reporter thinks it unnecessary to publish any but one. The property of the estate of Stales Gist was sold, and bonds to the amount of $11,923 34 cents taken by the exec-

utors, on the receipt of which commissions are charged by them as on so much money received. The complainants excepted to the charge before the Master, who sustained the objection, except as to a part of the bonds which were passed away by the executors in payment of debts of the estate amounting to $4738 84 cents.

De Saussure, Chancellor. I concur with
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the Master *in the view he has taken of this question. As far as the executors passed away bonds in the payment of debts, the executors are entitled to commissions, as if they had received the money and paid it away. But for bonds remaining in their hands to be delivered up to the heirs, they are not entitled to commissions.

The executors appealed.

Grimke, for the appellants, cited 1 Desaus. Rep. 160. 1 Harper's Eq. Rep. 176. 223. Taveau v. Ball, 1 M'Cord's Cha. Rep. 456.

Finley, contra, cited Toller's Law of Exec. 427.

Curia, per COLCOCK, J. I thought it a point settled, that executors and administrators were entitled to commissions in cases like this.

The commissions are certainly not given for the mere act of receiving and paying away money, but as a compensation for all the trouble and risk which are imposed by the duty of the office on executors and administrators; and when it is recollected how great they are, I think the act should receive a liberal construction as to all who discharge this laborious and unthankful office with fidelity. The executor has no right himself to convert the lands and negroes into money; but when this is done by a competent Court, and for the benefit of those concerned, I can see no reason why they should not be entitled to commissions on all sums received and paid away, whether the amount be in bonds and notes or in bank notes. The executor or administrator might sue for and recover such debts. The distributees may refuse to take the bonds: but if both parties consent to this arrangement for their mutual accommodation or convenience, the commissions are still a claim of strict right.

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*In the case of Rutledge v. Williamson's Ex., 1 Des. Rep. 160, it is not stated what bonds they were which the Court ordered to be delivered up, and it is presumed they must have been bonds found among the testator's papers. This case (under circumstances) cannot be considered as an authority in point. But the subsequent case of Deas v. Spann, Harper's Eq. Rep. 176, seems to determine the point expressly: and it is stated in the report of that case, that it was decided by the unanimous opinion of the Court; and it is further stated, that the opinion of the Court was delivered by the learned Chancellor from whose decree this appeal is made. Whether the report be correct or not, however, in these particulars, the case as presented to us does decide that commissions are allowable in such cases as the one now before us, and it meets the unanimous opinion of the Court.

It is therefore ordered that the decree be reformed in this particular, and in all other respects be affirmed.

Decree modified.

[End of Volume 2 McCord, Eq.]

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA, JANUARY, 1830.

JUDGES PRESENT.

HON. ABRAHAM NOTT,
" CHARLES J. COLCOCK,
" DAVID JOHNSON.

*ROBERT MARTIN v. JOHN SALE, JOHNSON SALE, and Others.

(Columbia. Jan., 1830.)

[1. *Mortgages* ⇐176.]

A purchaser with notice of a prior mortgage takes subject to its lien, although it has not been duly recorded; and he is equally liable, although without actual notice, if the mortgage were recorded prior to his purchase.(a)

[Ed. Note.—Cited in Steele v. Mansell, 6 Rich. 461; Page v. Street, Speers, Eq. 212; Fowke v. Woodward, Id. 246.

For other cases, see Mortgages, Cent. Dig. § 425; Dec. Dig. ⇐176.]

[2. *Equity* ⇐345.]

An answer by a purchaser, denying notice of a prior unrecorded mortgage, is sufficiently disproved by the positive oath of a single witness, aided by corroborating circumstances.(b)

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 722; Dec. Dig. ⇐345.]

[3. *Mortgages* ⇐151.]

A conveyance of lands not recorded within the period limited by the Act of 1785,(c) is void only as against a bona fide purchaser for valuable consideration. And where a voluntary conveyance is absolute upon its face, it cannot be set up against a prior unrecorded mortgage, upon the allegation of the parties, unsupported by other evidence, that it was intended as a security for a creditor of the grantor: nor will it avail, that the grantee subsequently conveyed the land to the use of the creditor, if the mortgage were recorded prior to such conveyance.

[Ed. Note.—Cited in Steele v. Mansell, 6 Rich. 442, 454, note; Wingo v. Parker, 19 S. C. 16.

For other cases, see Mortgages, Cent. Dig. §§ 307, 309–311, 314–329, 332–336; Dec. Dig. ⇐151.]

[*Vendor and Purchaser* ⇐231.]

[Cited in Steele v. Mansell, 6 Rich. 466, to the point that Judge Nott's dictum, "Recording was notice to all the world," must be accepted with certain qualifications named.]

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 487, 513–539; Dec. Dig. ⇐231.]

Bill for foreclosure, and sale of the mortgaged premises. The defendant, John Sale,

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on 9 July, 1825, mortgaged a tract of *land, situate in Edgefield district, to Charles C. Mayson, in fee, to secure payment of a promissory note in favor of complainant, for $4,296.48, dated 1 July, 1825, and payable four months after date, which had been signed by Mayson as surety for the said John Sale. The note not being paid at maturity, judgment was obtained upon it by the complainant against both principal and surety; and Mayson subsequently assigned his mortgage to complainant. The bill charged that the defendant, Johnson Sale, had set up a claim to

(a) Post, 412, 479; Tart v. Crawford, 1 McC. L., 265; 2 Id., 273; Harp. L., 295; 2 McC. L., 152; 1 Bail. L., 315; Kottman v. Ayer, (Errors,) 1 Strob. L., 560; Steele v. Mansell, 6 Rich. L., (Errors,) 437, 453, n; Fowke v. Woodward, Sp. E., 233, 246, n; 3 Rich. E., 33; Gibbes v. Cobb, 7 Id., 54; Chev. E., 322; McM. E., 115; Sp. E., 212; 9 Rich. E., 483; 10 Id., 226, 157.

(b) Post, 126.

(c) 7 Stat., 232.

the land, by a title acquired from John Sale, subsequent to the mortgage to Mayson, and with notice of it, and prayed foreclosure, and a sale of the mortgaged premises in satisfaction of the debt.

Johnson Sale by his answer, denied all knowledge of the mortgage to Mayson; and stated, that his brother, the defendant, John Sale, being guardian of Tabitha and Annis Burton, minors, the children of William Burton, deceased, and being in embarrassed circumstances, and desirous of securing his wards, whose estates were in his hands, on 27 January, 1826, executed a bill of sale to Tabitha Burton of certain slaves, with the view of securing the amount for which he might be found to be indebted to her, and at the same time executed a conveyance in fee to this defendant, of the tract of land now in dispute, which conveyance the defendant alleged was intended to be for the benefit of, and as a like security to, the other infant, Annis Burton. The defendant further stated, that John Sale, being afterwards required by Whitfield Brooks, Esquire, commissioner in equity, to give additional security for the fulfillment of his trusts as guardian, this defendant, at his instance, conveyed the same lands to the said commissioner, in trust for the said Annis Burton, and this defendant had remained in possession ever since, merely as tenant of the commissioner. The answer further set forth, that it appeared by the records in the office of the register of mesne conveyances of Edgefield district, that the mortgage to Mayson was not recorded until 6 February, 1826, which was more than six months subsequent to the day, upon which it was alleged to have been executed, and subsequent, also, to the conveyance to this defendant, which was duly recorded on the day after its execution. And the defendant therefore submitted, that as against the

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conveyance to this defendant, and *all parties claiming under it, the mortgage to Mayson was utterly null and void by the provisions of the Act of 1785.

The answer of John Sale admitted the mortgage to Mayson, but alleged, that Mayson had subsequently agreed to accept a mortgage of other real estate as a substitute, and that the last mentioned real estate had been mortgaged to him accordingly. In other respects, the answer of this defendant confirmed that of Johnson Sale.

The other defendants having answered, the cause came on for hearing before De Saussure, Chancellor, at Edgefield, in June, 1829.

The mortgage to Mayson, and the assignment by him to complainant, and also the conveyance to Johnson Sale, and the conveyance by him to Brooks, together with the bill of sale to Tabitha Burton, were produced and proved. The dates at which the mortgage to Mayson, and the conveyance to Johnson Sale, were the same set forth in the bill and answers. The date of the conveyance to Brooks was subsequent to the recording of the mortgage to Mayson. A mortgage by John Sale and John Marsh to Charles C. Mayson, of certain lots in the town of Hamburg, as a security for the payment of the note to complainant, executed in February, 1826, was also introduced and proved; but there was no evidence of any agreement by Mayson to accept it as a substitute for the former mortgage. The allegations of the answers as to a requisition, made by the commissioner, of further security from John Sale, as guardian of Tabitha and Annis Burton, and that the conveyance by Johnson Sale was executed in compliance with that requisition in part, were established by reports made at the time by the commissioner, and remaining on record in his office.

Charles C. Mayson was examined as a witness by complainant, and testified, that Johnson Sale was fully aware of the mortgage to witness at the time of its execution.

The Chancellor overruled the defence set up, and made a decree for sale and foreclosure, conformably to the prayer of the bill.

The defendants appealed, and moved to reverse the decree on the following grounds:

1. That the mortgage to Mayson not being recorded within the time prescribed by law, nor until the conveyance to Johnson Sale had been executed and recorded, was absolutely null and void, except as between the parties and their heirs.

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*2. That there was not sufficient evidence of notice to Johnson Sale of the mortgage to Mayson, even if notice could have dispensed with the necessity of recording: notice being denied by the answer, and the evidence in contradiction being insufficient to rebut the defendant's oath.

3. That the question of notice, or no notice, was in itself wholly immaterial: the Act of 1791 (1 Faust, 65; 5 Stat., 170) having fixed the test of the validity or priority of mortgages upon the recording, and not upon notice.

4. That Johnson Sale was not a mere volunteer, but a trustee for the benefit of Annis Burton, who was, and still is, a meritorious creditor of John Sale, to more than the value of the land.

5. That the title to the land is now, and was, long before the commencement of this suit, in Brooks, as commissioner in equity, in trust for Annis Burton; and that he purchased without actual notice of the mortgage to Mayson.

6. That the land mortgaged was the patrimonial inheritance of Tabitha and Annis Burton; and although it had been sold for partition, and bid off by John Sale, it had never been paid for, and their right to payment of the purchase money constituted a

lien on the land paramount to complainant's mortgage.(*d*)

Banskett, for Appellants.
Butler, contra.

NOTT, J., delivered the opinion of the court.

The first and second ground of appeal in this case may be considered together.

It has been settled in this State, long before any of our printed cases, that notice of a previous conveyance, to a subsequent purchaser, was equivalent to recording. And that is not a peculiar doctrine of our courts. It is a principle well settled in all civilized nations where registry Acts are required; and for the best of all possible reasons. The object of recording is to give notice, and thereby to prevent fraud; but if the party has actual notice, the purpose is as effectually answered as it can be by notice implied from recording: and a person purchasing with notice is guilty of a fraud himself, and ought not to derive a benefit from his own fraudulent act. Notice must be proved like any other fact; but the evidence ought to be clear and satisfactory. And the only question now is, whether the evidence in this case was of that sort.

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*Mr. Mayson swears, that Johnson Sale undoubtedly had notice: for that he, Mayson, conversed with him on the subject, and expressed his doubts whether the property was sufficient to make him secure. The relation, too, in which Johnson Sale stood to the parties, and all the circumstances attending the transaction, go to establish the fact. The goods, to obtain possession of which the mortgage was given, were in the hands of Mr. Rodgers, and would not be delivered out until the arrangement was effected; and Johnson Sale was the brother and confidential clerk of the mortgagor, and must necessarily have been acquainted with the fact. This view of the ground also answers another objection, that there was but one witness opposed to the answer of this defendant. The testimony of Mr. Mayson, taken in connection with the other circumstances, was abundantly sufficient to answer that objection. Possibly, a difference of opinion may exist on this question, but the Chancellor has decided upon it, and I see no reason to be dissatisfied with his decision.

I am also of opinion, that the decree may be supported as against this defendant on another ground. The Act(*e*) makes the prior unrecorded deed void, only as against a creditor or subsequent bona fide purchaser for a valuable consideration; and there is no evidence that the defendant is of that description. The pretence is, that the land was conveyed to him as trustee for his brother's ward; but there is not a title of evidence of that fact. Johnson Sale stood in no such relation to the infants as to entitle him to their confidence. Nor does it appear, that they, or any friend of theirs, had solicited such a favor; or that they had intimated such a wish; or that it was necessary for their security. It was then a voluntary deed of John Sale, the guardian. And we have no evidence that his motives were such as are now pretended, but his own declarations, which certainly are entitled to no confidence. The deed speaks a different language; and if his object was that which is now alleged, why was it not so declared on the face of the deed? As between him and his wards his declaration might be evidence against himself; but they were not evidence against others, and particularly to defeat his own deed. We do not see that the measure was called for by the occasion. He had given se-

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curity for the faithful performance *of his duty as guardian; and it does not appear that the security was not ample. I can see no other motive, therefore, but to defraud his creditor, and his friend, and to make his brother his tenant to hold for him, for any purpose that he might afterwards desire. I consider it not only a voluntary deed, but one contaminated throughout with actual fraud. It was made to his brother as an absolute, unconditional deed, without any declaration of trust, and without any consideration, as is admitted by both. It was immediately put upon record, in order to secure it against the prior mortgage; and then the brother might convey to any future uses as occasion might require.

On both of these grounds I am, therefore, of opinion that the mortgage to the complainant is to be preferred.

In relation to the third ground, the question can only now arise as between the mortgage to Mayson and the one to Brooks; and it is conceded, in the language of the defendant's brief, that "the Act of 1791 (5 Stat., 170) has fixed the test of the validity and priority of mortgages upon the recording, and not upon notice." But it never was doubted, that recording was notice to all the world; and the mortgage to Mayson having been made, and recorded, before that to Brooks was executed, was undoubtedly entitled to a preference.

The fourth and fifth grounds are already embraced in the observations made of the other grounds. On the sixth ground, no evidence has been given by which we can ascertain to what merit it is entitled; but I am inclined to think, that upon John Sale being appointed guardian, and titles being executed to him, and the funds being thus placed in his hands, the land would be released from the legal lien previously created. However that may be, the minors are not prejudiced

(*d*) Act of 1791; 1 Faust, 28; 5 Stat., 163.
(*e*) 1785, 7 Stat., 232.

by this decree, as they are not parties to the suit.

I am of opinion, therefore, that the decree ought to be affirmed, and it is ordered and adjudged accordingly.

Decree affirmed.

Bailey, Eq. *7

*HENRY RUFF v. WILLIAM RUTHERFORD and Wife, and Others.

(Columbia, Jan., 1830.)

[1. *Wills* ⟸497, 762.]

The testator, by the second clause of his will, bequeathed personal estate to his wife, for her support during life, and after her decease, if anything remained, to be equally divided among his children. A subsequent clause was in these words: "The remainder of my estate, when all my heirs are made equal, as will appear by receipts, to be equally divided among them; and the whole of the heirs of my son, David, deceased, to have an equal share with one of my children, to be equally divided among them the said heirs." Held—That the bequest to his children in the former was not controlled by the directions contained in the latter clause; and that upon the death of the wife, the personal estate bequeathed to her for life by the former clause, must be divided in equal shares among the children of the testator, in exclusion of the children of the deceased son, and without regard to advancements received from the testator in his lifetime; although his residuary estate might not have been sufficient to put the legatees upon an equal footing, as directed by the latter clause.

[Ed. Note.—Cited in Cloud v. Calhoun, 10 Rich. Eq. 376; Robert v. Ellis, 59 S. C. 160, 37 S. E. 250.

For other cases, see Wills, Cent. Dig. §§ 1081, 1970; Dec. Dig. ⟸497, 762.]

[2. *Wills* ⟸497.]

Grand-children do not take under a bequest to children, except where there are no children, or there are strong and conclusive circumstances to shew that such was the intention of the testator.(a)

[Ed. Note.—Cited in Matthis v. Hammond, 6 Rich. Eq. 402; Presley v. Davis, 7 Rich. Eq. 107, 62 Am. Dec. 396; Addison v. Addison, 9 Rich. Eq. 67; Cloud v. Calhoun, 10 Rich. Eq. 376; Heyward v. Hasell, 2 S. C. 520; Logan v. Brunson, 56 S. C. 10, 33 S. E. 737; Tindal v. Richbourg, 91 S. C. 410, 74 S. E. 932.

For other cases, see Wills, Cent. Dig. §§ 1080–1086; Dec. Dig. ⟸497.]

George Ruff, deceased, the father of complainant, by the second clause of his will, bequeathed as follows: "I give to my wife, Ann Barbara Ruff, two work horses, four cows and calves, and ten head of hogs, at her choice, out of my stock. Also, all my household and kitchen furniture, $400 in cash, and four negros, such as she will choose, for her support during her natural life; but after her decease, if anything remains, to be equally divided among my children."

The sixth and last clause of his will was in these words: "The remainder of my estate, when all my heirs are made equal, as will appear by receipts, to be equally divided among them; and the whole of the heirs of my son, David Ruff, deceased, to have an equal share with one of my children, to be equally divided among them the said heirs; only it is my will and desire that it might be done in peace. My estate, I think, need not be sold, but might be delivered to the heirs at the appraisement rate. Should, however, a majority of my heirs see cause to sell some part thereof, they may do so for peace sake."

The testator died some time about the year 1803, leaving his wife surviving, and leaving also two sons, including the complainant, two daughters, one of whom was the wife of the

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defendant, *Rutherford, and seven children of the deceased son, David Ruff. The widow qualified as executrix, and died in the year 1827, having survived her coexecutors; and the complainant shortly afterwards took out letters of administration de bonis non, with the will annexed. The complainant possessed himself of the personal estate, which had been bequeathed to the widow for her life, and a dispute having arisen as to the mode of dividing it, filed this bill, to which the other children of the testator and the children of the deceased son were made parties, defendants, for the purpose of taking the opinion of the court upon the points in dispute.

It appeared from papers in the ordinary's office, that a division of the testator's residuary estate had been made in the year 1803. A part of the property had been divided among the legatees, and a part sold, and the proceeds divided; owing to which circumstance, together with the lapse of time, and the death of all the executors, it had become impossible to determine, otherwise than by a loose and uncertain estimate, either the whole value of the residuum, or the value of the shares of it received by the several legatees. It appeared, however, that a settlement had been made with the executors, and receipts in full from three of the legatees were found; and it was conceded, that the complainant, who had been more largely advanced by the testator in his lifetime than any other of the legatees, received no part of the residuary estate.

The complainant contended that the division now to be made should be confined to the children of the testator, in exclusion of the children of David Ruff; and that it should be made in equal shares to each, without regard to the receipts mentioned in the last clause of the will; and that even if the bequest in the second clause were subject to the directions contained in the last clause, the court, after so great a lapse of time, and in the absence of satisfactory proof to the

(a) 1 De S. E., 331, 499; 2 Id., 123, 308; Snoddy v. Snoddy, 1 Strob. E., 84; Mathis v. Hammond, 6 Rich. E., 399, 402; 2 Hill L., 543; 7 Rich. E., 107; Rice E., 330; 8 Rich. E., 241; 9 Id., 67; 3 Id., 342.

contrary, would presume that the legatees had been equalized by the division made in 1803; particularly as there was some reason to infer, from the papers in the ordinary's office, that the residuary estate was, in fact, sufficient for the purpose. The defendants insisted, that an account should be taken both of the receipts mentioned in the last clause of the will, and of the value of the shares received by the several legatees out of the residuary estate: and that all the legatees should be placed upon an equal

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*footing out of the estate which had fallen in by the death of the widow, in the first instance, and then the residue of that estate, if any, be divided in equal shares among them. It was further contended, on the part of the children of David Ruff, that they were, in any event, entitled, under the second clause, to a share of the property in dispute.

The cause came on for hearing at Newberry, in July, 1829, before De Saussure, Chancellor, who was of opinion that the directions contained in the sixth and last clause were applicable to the second clause; and that the property now in question must be so divided as to put all the legatees, including the children of David, in right of their father, upon an equal footing, if that had not been effected by the division of the residuary estate. He, therefore, ordered an account to be taken, and the division to be made accordingly.

Johnstone, for the complainant, appealed, and now moved to reverse the decree of the Chancellor.

COLCOCK, J., delivered the opinion of the court.

The questions submitted to us are, whether, if the children were not equalized by the distribution of the remainder mentioned in the sixth and last clause of the will, the equality intended by the testator shall be now produced in the division of the remainder of the personal property, which has fallen in by the death of the widow; and whether in such division, or in any other, the children of David Ruff shall be permitted to participate.

These questions depend upon a single inquiry, to wit: whether the bequest to the children in the second clause, is controlled by the directions contained in the last clause of the will. The second clause is clearly and plainly expressed, and there can be no doubt as to its construction. The testator gives the property to his wife during her life; and at her death it is to be equally divided among his children. The division is, in express terms, directed to be equal, and is confined to the children of the testator. I am aware that there are cases(*b*) in which grand-children have been permitted to take under a bequest to "children;" but this has never been done except where there were no children, or there were very strong and conclusive circumstances to show, that such was the intention of the testator. When the language of the

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testator is *ambiguous, it is proper to look through the whole will to give explanation to his meaning; but it does not follow, that because he expresses an intention in one clause in favor of one set of persons, he means that intention to be applied to all the clauses of his will in which those persons are mentioned. It is very true, that the testator intended the residue of his property to be so divided among his children, and the children of David in right of their father, as to put them all on a footing of equality, in reference to advancements he had made to some of them in his lifetime, and for which he had taken their receipts. And I may here remark, by the way, that if it were necessary to the decision of this case, I should, under the circumstances, and after the lapse of so many years, be inclined to presume that this equality had been effected by the division of 1803; a presumption which seems to me to be aided by the receipts in full given to the executors by some of the legatees, although of themselves they are not conclusive. But it does not follow from the declared intention as to the residue, either that the children of David ought to share in a bequest in which they are not named, or that if the residuary estate were insufficient to produce the equality intended, the testator further intended, that the deficiency should be made up from another, and that a specific bequest.

I cannot perceive that such a construction is called for by the sixth clause, or that it is in any manner necessary, in order to give that clause the full effect intended by the testator. That clause is in these words: "The remainder of my estate, when all my heirs are made equal, as will appear by receipts, to be equally divided among them; and the whole of the heirs of my son David Ruff, deceased, to have an equal share with one of my children, to be equally divided among them the said heirs." Now, what remainder could the testator mean? Surely that which remained after the specific bequests, and not that which was to fall in on the death of his wife, an event which might not, and in fact did not, happen for many years; and which remainder, whenever it did fall in, was most clearly and explicitly given to other persons than those named in the residuary clause, that is, to his children, and not to any of his grand-children. The bequest in the sixth clause is then confined to the residuary estate, and the directions contained in that

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clause must *he understood as confined within the same limit, unless there is something in them which requires a more extensive application.

(*b*) 2 Vern., 107; 4 Ves., 492; 10 Id., 192; 3 Ves. & Bea., 59, 69.

I was at first inclined to suppose, that the words giving an interest to the children of David in right of their father, might be regarded as a distinct clause, applicable to every other clause in which the testator had made a provision for his children; but, upon further examination, they appear to me to be so inseparably connected with the sixth clause, that they cannot be applied to any other without the hazard of violating the intention of the testator. It is to be remarked, too, that he appears to have recognized a distinction between the effect of the words "children" and "heirs." In the second clause, he directs the property to be divided among his "children;" but in the sixth clause, where he intends the children of his deceased son to come in for a share, he uses the word "heirs;" and the sentence which follows, declaring in express terms that he intended the children of his son David to be accounted one of his "heirs," seems to me to have been added out of caution, to show the sense in which he understood that term, in contradistinction to the term "children," which he had employed in the second clause. Under these circumstances, it would be venturing upon dangerous ground, to wrest the words in relation to the heirs of David, from their connection in the sixth clause, in order to render them applicable to the second.

The children of David being excluded from participation in the bequest of the remainder mentioned in the second clause, the testator could hardly have intended, that the value of that remainder should be computed in making the heirs equal, as directed by the sixth clause; for that would be, in effect, to give them, indirectly, the full benefit of the fund, from which they were directly excluded. The argument, that this was his intention, proceeds upon the ground that he has directed all his heirs to be made equal. But they are only directed to be made equal in reference to certain advancements, for which he had taken receipts. And, besides, they are to be made equal by the division of the residuary estate; whilst the testator most obviously contemplated a more distinct period for the division of the remainder, which was to fall in upon the death of the wife. If the heirs were made equal in the division of the residue, the directions of the sixth clause are fully satisfied, and their object accomplished: and although that equality is subsequently

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disturbed *by the division of the property bequeathed to the wife for life, the directions of the sixth clause are not thereby violated; and there is nothing in them therefore to control the operations of the unequivocal provision of the second clause.

There is, if possible, even less ground for holding the remainder, specifically bequeathed by the second clause, liable to make up a deficiency in the residuary estate to put the legatees upon an equal footing. Such a result can only be attained by giving to the sixth clause the effect of revoking the bequest of the remainder, and substituting a provision that it should sink into the residuum; and there is not a syllable in any part of the will to warrant such a course. If the testator had looked so far forward as to the death of his wife for an additional fund to equalize his heirs, he would, undoubtedly, have said so. But he has not said so; and in the absence of such a direction, it would be establishing a novel doctrine, if the court were to order specific legatees to abate in favor of the legatees of the residue. The testator no doubt supposed his residuary estate amply sufficient to make all the legatees equal; and I think it quite probable that it was so; but if it were insufficient, although the will may be disappointed, we have no authority for saying that the testator would have made his will differently, even if he had anticipated such a result.

That the will of a testator should be carried into effect, it is not a prerequisite that his motives should be known, and approved, by the court. He has a right to lock them up in his own breast, although if disclosed, they might show that a provision in his will, which of itself appeared idle and capricious, was in fact in the highest degree just and reasonable. In the present instance, the testator did not appear to estimate, very highly, the value of the remainder, which was to fall in on the death of his wife. The expression, "if anything remains," shows, that he looked forward to the probability of its being lost or dissipated by some casualty during the continuance of the life estate. Now, it is quite possible that he might wish to secure to his children, most of whom had been advanced in his lifetime, a benefit out of this contingent fund, which should not be liable to any abatement; since in the event of the residuary estate proving insufficient to put them all upon an equal footing, those who

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had been most largely advanced would *have nothing else to receive from his estate after his death. Similar reasons might have prevailed to exclude the children of the deceased son; as they might otherwise have been sufficiently provided for. But it is unnecessary to speculate upon the motives of the testator. It is sufficient that this is the necessary and legal construction.

Upon the whole, I am of opinion, that the second and sixth clauses of the will have no connection with each other, but that they must be taken separately; and that the remainder which has fallen in by the death of the widow, must, in pursuance of the provisions of the second clause, be divided among the children of the testator, in exclusion of the children of his deceased son, David Ruff, and without regard to the receipts mentioned in the sixth clause; whether the residuary estate was or was not sufficient to

put the legatees upon an equal footing, at the time when the division of that estate was made. The division is, therefore, ordered accordingly; and the decree of the Chancellor is reversed.

Decree reversed.

Bailey, Eq. 13

SARAH YOUNG, and Others, v. Dr. THOMAS TEAGUE.(*a*)

(Columbia, Jan., 1830.)

[1. *Partition* ⟸100.]

The commissioner was directed to sell a tract of land to the highest bidder, and to take a bond for the purchase money, with a mortgage of the land as a security. Held—That he was also authorized to execute a conveyance to the purchaser, and that the validity of the title did not depend upon a confirmation of the commissioner's report of the sale.

[Ed. Note.—Cited in Williamson v. Farrow, 1 Bailey, 614, 21 Am. Dec. 492; Hamilton v. Hamilton, 2 Rich. Eq. 362, 46 Am. Dec. 58; Peake v. Young, 40 S. C. 54, 18 S. E. 237.

For other cases, see Partition, Cent. Dig. § 399; Dec. Dig. ⟸100.]

[2. *Judicial Sales* ⟸31.]

The authority of the commissioner in relation to sales depends upon the terms of the order of sale; and where he is authorized, directly or impliedly, to execute a conveyance to the purchaser, the title of the latter is complete without confirmation by the court; nor can the sale be afterwards set aside, or the biddings opened, upon the offer of an advance in the price, even before a report of the sale has been confirmed, unless for fraud, or under circumstances which would authorize the interference of the court in any other case. If it is desired that the court should reserve a further control of the contract, the order of the sale must be qualified, so as expressly to restrict the authority of the commissioner.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59–67; Dec. Dig. ⟸31.]

[3. *Judicial Sales* ⟸41, 44.]

The English practice of opening the biddings, upon the offer of an advance, at any time before the confirmation of a report of the sale, does not apply to sales by the commissioner in this State, where the latter is authorized to complete the contract by executing a conveyance to the purchaser; and even

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*where, by the terms of the order, the contract is left open, until confirmed by the court, the biddings ought not to be opened upon the offer of an advance, unless a deposit of money be made as a security for the performance of the offer.

[Ed. Note.—Cited in Hamilton v. Hamilton, 2 Rich. Eq. 360, 46 Am. Dec. 58; Farrow v. Farrow, 88 S. C. 342, 70 S. E. 459.

For other cases, see Judicial Sales, Cent. Dig. §§ 79, 84; Dec. Dig. ⟸41, 44.]

[4. *Judicial Sales* ⟸35, 38.]

It is not a sufficient ground for setting aside a sale by the commissioner, that one of the parties interested intended to bid higher, but neglected to do so, or was prevented by a mistake at the time of sale; if neither the commissioner nor the purchaser contributed to the mistake, and the sale was fair and regularly conducted; and it makes no difference that some of the parties are minors. Nor will the sale be set aside on the ground, that the commissioner neglected to take a mortgage, as required by the order of sale, if it appear that the purchaser was always ready and willing to have complied with the terms of sale, by executing a mortgage; and the court will do no more under these circumstances than to compel the purchaser to execute the security required by the order of sale.

[Ed. Note.—Cited in Yates v. Gridley, 16 S. C. 503; Ex parte Cooley, 69 S. C. 154, 48 S. E. 92; Connor v. McCoy, 83 S. C. 174, 65 S. E. 257; Farrow v. Farrow, 88 S. C. 341, 345, 70 S. E. 459.

For other cases, see Judicial Sales, Cent. Dig. §§ 73, 76; Dec. Dig. ⟸35, 38.]

Motion to set aside a sale of land by the commissioner, and to open the biddings. The land was sold in August, 1828, under an order made in proceedings for partition, and was purchased by the respondent, Dr. Thomas Teague, at the price of $1,008. This application was grounded upon the offer of an advance of $600 on that price, by Mrs. Sarah Young, one of the parties interested, who, it was alleged, had been prevented bidding at the time of the sale by a mistake; and the further ground was also relied on, that the purchaser had forfeited his right to insist on the sale, in consequence of his not having executed a mortgage of the land, to secure payment of the purchase money, as required by the terms of the sale, although he had received a conveyance from the commissioner.

The motion was made at Laurens, July, 1829, before De Saussure, Chancellor, who, after hearing the evidence, made a decree, by which the sale was set aside, the purchaser's conveyance directed to be delivered up to be cancelled, and the land ordered to be resold. Mrs. Young was also required to give security, as well for the advance offered by her, as for the further indemnity of the parties.

Irby, for the respondent, gave notice of appeal, and now moved to reverse the decree, as unsupported by principle or precedent, and as being contrary to both law and equity. The English practice of opening the biddings was wholly inapplicable to the course of proceedings at sales by the com-

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missioner in this State. *2 McC. Eq. 159, n. (2). The policy of the practice was moreover condemned by the most eminent English jurists, and in one case, that of White v. Wilson, 14 Ves., 153, Lord Eldon went so far as to say that "half the estates sold in chancery were thrown away upon the speculation, that there would be an opportunity of purchasing afterwards by opening the biddings." But even in England to open the

(*a*) See Gordon v. Sims, 2 McC. E., 158 and note, 159; McM. E., 59; 2 Hill E., 582; McM. E., 157; 2 Rich. E., 360; Williamson v. Farrow, 1 Bail. L., 614 [21 Am. Dec. 492].

biddings, after titles have been executed and delivered to the purchaser, was a novelty; and this court is called on, not merely to introduce a practice, the policy of which is decidedly condemned where its existence is recognized, but to extend that practice to a class of cases to which it has never been anywhere applied. In this State, the settled practice has always been, to regard all parties as bound by the fall of the hammer, if the sale were fair and regular; and this was unquestionably the true policy, inasmuch as it left purchasers unembarrassed by apprehensions of losing their bids afterwards. In this case, it was conceded that the sale was fair, regular and deliberate, and there was not the slightest pretext of deception, management or fraud of any kind. The sale, too, has been consummated by the execution of a conveyance, by which the title has been legally vested in the purchaser; and it deserves consideration whether a citizen can consistently with the provisions of Magna Charta and the Constitution, be deprived of his freehold upon a mere motion.

But, if the court possessed jurisdiction, what ground is there for equitable interference? The alleged mistake was confined to the individual by whom the advance was now offered; and, after all, it seemed to be no more than a mistake in her own mind as to what she was willing to give for the land. If sales are to be set aside on such grounds, no one would venture to purchase at a commissioner's sale; for whilst he would be bound by an injudicious bid, it was next to certain he would never be allowed to retain an advantageous bargain.

With regard to the nonexecution of the mortgage, that was a ground destitute of even a shadow of equity. The mortgage was perfectly immaterial; for as the land was sold for partition, it stood pledged for the purchase money, under the Act of 1791, without a mortgage. 1 Faust. 28, 5 Stat. 163. But the commissioner states, that the purchaser was ready and willing to execute the

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mortgage; and that he, *the commissioner, declined taking it, because he thought it an unnecessary expense.. Under these circumstances, it would be a gross injustice to hold that the purchaser had forfeited his rights, when he has been guilty of no default. He is ready now, as he always has been, to execute a mortgage, whenever the commissioner, who is the agent of the applicants, is willing to receive it; and this is all that can be equitably required of him.

Dunlap & Thompson, contra, cited Upton v. Lord Ferrers, 4 Ves., 700; Chetham v. Grugeon, 5 Id., 86; Tait v. Lord Northwick, Id., 655; Countess Gower v. Earl Gower, 2 Eden, 348; Watson v. Birch, 2 Ves., 52; Morice v. Bishop of Durham, 11 Id., 57; and Sug. on Ven., 45, et seq.; and contended that the applicants were entitled to have the biddings opened on the ground of the advance alone, even if the merits of the application stopped there, as there had been no confirmation of the commissioner's report of the sale; but that even if the report had been confirmed, the biddings would be opened on the clear evidence which had been adduced of a mistake on the part of one of the bidders at the sale. The fact that the distributees of the estate have lost by a mere mistake or inadvertence a sum equal to more than one-half of the price agreed to be paid by the purchaser, is not controverted, and presents as strong a case for opening the biddings as is to be found in any of the books.

The premature execution of titles by the commissioner to the purchaser could not defeat the rights of the parties. The order of sale had not directed the commissioner to execute a conveyance, and if it had, still the whole matter remained subject to the approval of the court. The court was bound to exercise a control over the sale, for the purpose of protecting the rights of the parties interested, some of whom in this case were minors; and this control of the court could neither be divested, nor delegated to an inferior officer.

With regard to the policy of the practice of opening the biddings, much might be said on both sides; but that was a question for the legislature, and not for the court. The Act of 1721, P. L., 111, 7 Stat., 165, had provided that the Court of Equity should conform to the practice of the English Chancery, and the practice of opening the biddings, having existed in that court from the earliest period of judicial sales, was obligatory upon this court, until the legislature should abolish it.

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*In New York a similar practice prevails, although the English practice has not been authoritatively adopted in that State; and the cases of Williamson v. Dale, 3 John. C. R., 290, and Lansing v. McPherson, Id., 424, decided in the court of Chancery of that State, are conclusive of this case, upon the general principles of chancery jurisdiction.

But the failure of the purchaser to execute a mortgage deprives him of the right to insist upon any benefit from the sale. The neglect of the commissioner is not an excuse for him. His rights depended upon the completion of his contract, according to the terms of the order; and his not being in default will no more avail him, than it would, if he had no conveyance, because the commissioner refused to execute it. But here he is actually in default, because he might have executed and tendered a mortgage; and he was bound to have done so, for he was bound to perform his part of the contract. To execute a mortgage now is not sufficient, for it would not avail against intervening

incumbrances; and the only effectual remedy is to avoid his title ab initio.

NOTT, J., delivered the opinion of the court.

This was an application to set aside a sale, made by the commissioner under an order of the Court of Equity; or to use the words of the Chancellor, "in technical language, to open the biddings." The Chancellor granted the application, and the purchaser now moves to reverse the decree; and I am of opinion that the motion ought to be granted.

With all the respect which I feel for the learned Chancellor, and which is so justly due to him, I think the decree erroneous, both in form and substance; and it appears to me, that the error, if it be an error, is in considering this an application, "in technical language, to open the biddings;" to which proceeding in the English courts I think it will appear, upon investigating the subject, that it bears no analogy. In England, when a sale of land has been ordered by the Chancellor, the master first opens books for the purpose of receiving offers, or bids, for a given time, at the expiration of which, the books, or the biddings, are closed, and the master reports his proceedings to the Chancellor. If in the meantime, and before the report is confirmed a higher offer is made, such offer may be received: or, as it is

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there properly termed, the biddings *are opened, although they had been previously closed; and sometimes, even after the report is confirmed, but before the terms are complied with, and the deeds executed, the biddings may be opened upon terms. But in this State, the course of proceeding is different. The commissioners are not limited to receiving bids, or offers; but they are directed to sell to the highest bidder, and to execute titles. This, as far as I am informed, has been the invariable practice from the first establishment of the Court of Equity. In the case before us the commissioner was directed to sell the property to the highest bidder, and to take a bond, with security, for the purchase money and a mortgage of the premises. The order, it is true, was not, in so many words, to execute titles; but that was implied in the instruction to take a mortgage of the premises, for without first executing titles, a mortgage could not be given. The commissioner, accordingly, did execute and deliver titles to the purchaser; and such has been the invariable usage in this State. To set aside the sale, and vacate the title of the purchaser, under these circumstances, is certainly, therefore, not at all analogous to the English proceeding of opening the biddings.

In New York, as far as I am able to collect from their reported cases, something like a middle course is pursued. The master sells to the highest bidder; but titles are not executed until he reports his proceedings, and the report is confirmed: so that it is rather a contract to sell, than an actual sale, until it is approved by the Chancellor. In that stage of the proceedings, the court has, in a few instances, set aside the sale under particular circumstances, but yet Chancellor Kent says, expressly, that the English practice of opening the biddings has never been adopted in that State. 3 John. C. R., 292.

I do not find, therefore, that a sale made by order of a court of Equity has ever been set aside, either in England, or in any of the United States, after the terms have been complied with, and the deeds executed, except for fraud or under circumstances which would authorize the interference of the court in any other case. In England titles are never executed until the report has been confirmed; and it appears to be now a settled rule in that country, that after confirmation of the report, the court will not open the biddings, upon a higher offer, or for negligence,

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surprise, or circumstances* of that kind, unless there has been some misconduct on the part of the individual who has the benefit of the confirmation. 1 Bro. C. C., 287; 3 Id., 475; 11 Ves., 57; 14 Id., 151. And in New York, in the only two cases found in the reports of that State, Chancellor Kent relies upon the ground, that deeds had not been executed. 3 John. C. R., 290; Id., 424. To set aside a sale, therefore, after titles have been delivered, except upon some plain ground of ordinary equitable jurisdiction, is, in my opinion, without authority, or precedent. This brings me to the inquiry, whether the circumstances of this case were such as authorized the Chancellor to set aside the sale, and direct the deeds to be cancelled. And this may be followed by another question, whether, if the sale ought to be set aside, the manner of effecting the object directed by the decree is to be approved.

The two grounds on which the Chancellor professes to set aside the sale, are: 1. A misapprehension, or mistake, on the part of the applicant, Mrs. Young, as to the manner of bidding at the time of sale. And 2, the non-compliance, on the part of the purchaser, with the terms of the sale.

In relation to the first ground, the Chancellor uses this strong language: "That the sale was conducted by the commissioner, and by the auctioneer acting under his directions, with perfect fairness, appears to me to be unquestionable from a review of the whole evidence." And again: "It is unquestionably true, that neither the officer, nor Dr. Teague, the purchaser, produced, or contributed to the unfortunate mistake." Now, it must be remarked, that neither Mrs. Young, nor any other person, was under any obligation, either moral or legal, to bid for the property; and her interference was merely gratuitous.

All that could be required was, that the sale should be fairly conducted, and the terms complied with. The first, it is admitted, was done; and the second will, by and by, be considered. It does appear from the evidence, that Mrs. Young had requested Major Dunlap to bid for her to the amount of the appraised value of the land; and he says that he would have done so, but supposed the last bid to have been by her son. But it also appears, that Mrs. Young herself was present; that she had bid off two other tracts; and that she directed her son to stop bidding, for that he had bid enough. She afterwards

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said the land was worn *out, and that she had bid as much as she intended to give, and that she did not want to go in debt; and if Major Dunlap was surprised, it does not appear that Mrs. Young, or her son, were, for they were both present; she ordered him to stop bidding, and the land was cried at least ten minutes, says the witness, after the last bid was made, before it was knocked down. The amount of the evidence then is, that Mrs. Young is a capricious woman, who sometimes thought she would buy the land even at the appraised value, and at other times that she had bid as high as she could afford to give; who would have been willing to have taken it at a low price, and was probably vexed that others bid against her. And who, upon the whole, did not know her own mind, and, after it was too late, became dissatisfied, although she would not bid higher at the time. But, give to the testimony all the weight in favor of the applicants of which it is susceptible, it will not authorize the interposition of the court to relieve them. It amounts to nothing more than this: That they neglected their own interests, and now wish the court to do for them what they ought to have done for themselves. The fact that minors are interested can have no influence upon the question, more than in the case of a sale by the sheriff, when their interests are concerned. The widow had a greater interest, and her son, who was of age, an equal interest with the minor children.

The next question, is whether the neglect of the commissioner to take a mortgage, as directed by the order of sale, can affect the rights of the purchaser. And here I admit, most unhesitatingly, that if the purchaser had refused or neglected, or even now refused to comply with the terms of the sale, he would not have been entitled to derive any benefit from the purchase. It appears, however, that he did not refuse, but on the contrary was ready and willing to comply. All that the court can require, therefore, is that he should do now what he ought to have done then; give a mortgage according to the terms of the sale. The Chancellor himself says: "That sales made by the officers of this court are subject, in a great measure, to the same rules and principles of justice and equity, which prevail in other and more private sales." In this opinion I concur; and what I have stated is that which would be required in the case of a sale by an agent of an individual, and what of course ought to have

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been *done in this case; that is, to require the purchaser now to comply with the terms of the sale.

The next question is, whether, if the sale were properly set aside, it should have been upon the terms directed by the Chancellor. It appears that in England the biddings are never opened but upon a precedent condition, that a deposit of money shall be made as a security for the performance of the offer. In an anonymous case, 6 Ves., 513, the Lord Chancellor mentions with approbation a case during the time of Lord Thurlow, where the master of the rolls said, if the Lord Chancellor was the bidder, he should make a large deposit; the deposit being the only hold the court has on the purchaser; and ordered a deposit of the whole advance. And I lay it down as a rule never to be departed from, that if a sale is ever set aside for the purpose of letting in a higher bidder, it shall be only upon the condition, that a deposit shall be made, or some adequate security given, by the person making the offer, for the performance of the undertaking. In this case, no such terms are required. It is an unconditional decree that the sale be set aside. It is true Mrs. Young is required to give security for the advance which she has offered, and for further indemnity; but it is not made a condition precedent, nor has the court any means of enforcing that order. There is, therefore, no security, that on another sale it will sell for more, or even as much as has already been given. I differ, therefore, in opinion from the Chancellor in the terms as well as the principles of the decree.

I might have dismissed this case here, but the remarks of the Chancellor as to the power and duties of the commissioner in relation to sales, seem to me to require a more specific notice; inasmuch as his views upon this point are intimately connected with what I regard the fundamental error in this case, of considering the application of the complainants a motion, "in technical language, to open the biddings." He says: "It is the duty of the commissioner when he has made a sale under the authority of the court, to make a report and a return; and thus enable the parties to examine, and say whether they are satisfied, and also to enable the court to exercise its judgment on the sale, and decree whether it ought to be confirmed or not; and unless this be done before the conveyance is made to the purchaser, then the controlling

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power of the court is *lost, and the commissioner substantially exercises the authority of deciding on the regularity of his own sales, and the rights of the parties. This the law has not committed to him, and it is, therefore, an exercise of power which cannot be

binding on the parties. I do not, therefore, consider the premature execution of a conveyance, without the sanction of the court, and without even the express sanction of the parties interested in the estate, as barring the complainant's right to relief." Now, I take it, that the powers of the commissioner are precisely what the decretal order of the court confers. In this case, I have shewn, that the order was to sell to the highest bidder, to take bond and security for the purchase money, and a mortgage of the premises, which implied an order to execute the titles. I do not, therefore, see upon what ground the commissioner can be charged with having transcended his authority, when he has literally complied with the order of the court. Neither can I see how it can be said that he has prematurely executed titles, when the fulfillment of his duty required that he should do so. Nor does it appear to me that this opinion of the Chancellor comports very well with that part of the decree which makes the non-execution of the mortgage a ground for setting aside the sale.

If the Court of Equity has hitherto been in the habit of conferring on the commissioner the power over sales of property which belongs to the Chancellor, and which can only be safely exercised by him, it is in the power of the court to correct the evil. It will be only necessary to qualify the order of sale so as to restrict the authority of the commissioner in such manner as the court shall think fit. The parties will then know what rights they have acquired, what liabilities they have incurred, and what duties they have to perform. And the officers of court will know what powers they are to exercise, and what control the court has reserved to itself. It is a subject, however, on which it will perhaps be difficult to adopt any general rule; and it must, therefore, as it appears to me, be left to the Chancellor, to adapt the order to the occasion. It would, certainly, be an excessive clog to sales, if the purchaser must wait a year, before he can know whether he can have the benefit of his purchase: and I think it, at least, questionable whether the present mode will not be found to be attended with as few difficulties as any that can be adopted. If the directions of the

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court are not *pursued, or if there is any fraud in the transaction, the courts have a controlling power over it; and if the proceedings are fair and regular, why should they interfere? This, however, is a matter on which I am disposed to suffer the Chancellors to make their own rules, without any interference on the part of this court. And whatever directions they give, their officers must pursue.

I will make but one other remark on the subject. Although the property in this instance has been sold for one-third less than its appraised value, it is as good a sale as has generally been made of real property in this State within the last three years. And for the proof of this assertion I refer with confidence to the sales which have been made in this town and Charleston, and the lands which have been sold throughout the whole State within that period.

On the whole, I am of opinion that the decree of the Chancellor must be reversed.

JOHNSON, J., concurred. COLCOCK, J., dissented.

Decree reversed.

Bailey, Eq. 23

JOHN J. MYERS v. DAVID MYERS, Executor of Jacob Myers, William Myers, and Robert Clendinen and Wife.

(Columbia. Jan., 1830.)

[1. *Executors and Administrators* ⇐486.]

An executor not allowed credit in his account for the amount of a promissory note of his testator in his favor, which he had neglected for a great many years to charge in any way to the estate; there being no proof of a consideration, and some evidence that the note was without any consideration, and intended merely to give color to another transaction. And it is no excuse for his laches that he had not filed any account with the ordinary, which would have furnished the most direct mode of making the charge.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2064; Dec. Dig. ⇐486.]

[2. *Executors and Administrators* ⇐477.]

The old rule, in accounting for the hire of slaves of charging £10, per annum for each slave, although not imperative in all cases, particularly for short periods of service, where the value of the labor of slaves can be ascertained with more certainty, should nevertheless govern in taking an account for a long series of years, as to which there is no certain and satisfactory evidence to establish any other rate, which would not be equally arbitrary and conjectural.(a)

[Ed. Note.—Cited in Lyles v. Lyles, 1 Hill, Eq. 87.

For other cases, see Executors and Administrators, Cent. Dig. § 2062; Dec. Dig. ⇐477.]

[3. *Executors and Administrators* ⇐104.]

In an account against an executor for the rent of land and hire of slaves, he should be charged with simple interest only, where there is no allegation that he has ill-treated the slaves. Compound interest is never allowed but in very special cases.(b)

[Ed. Note.—Cited in Huggins v. Blakely, 9 Rich. Eq. 409.

For other cases, see Executors and Administrators, Cent. Dig. § 432; Dec. Dig. ⇐104.]

(a) Rainsford v. Rainsford, McM. E., 16, 335 and notes to 2 ed.; Rice E., 343; Harley v. Dewitt, 2 Hill E., 367; 1 Id., 203, 76; Johnson v. Lewis, 2 Strob. E., 160.

(b) Post, 98, 460, 487; 2 McC. E., 1; 2 Strob. E., 166; 2 Hill E., 492; Baker v. Lafitte, and cases cited in note, 4 Rich. E., 395; Henderson v. Laurens, Car. L. J., 134; Huggins v. Blakely, 9 Rich. E., 408; Id., 71; Pettus v. Sutton, 10 Id., 356; Wright v. Eaves, Id., 582; McClendon v. Gomillion, Dud. L., 48.

[4. *Executors and Administrators* ⟸91.]
On a bill by devisees against an executor for an account, and execution of his trust, the executor having claimed a part of the land de-
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vised, in his own *right, and an issue been directed to try the title at law, the court will not order the lands in dispute to be in the meantime surrendered to the devisees.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 397; Dec. Dig. ⟸91.]

[5. *Executors and Administrators* ⟸132.]
The expenses of manuring, ditching and fencing the land cultivated by an executor, allowed to him in an account against him for the rent, upon evidence that it was necessary for the preservation and improvement of the property.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 437; Dec. Dig. ⟸ 132.]

[6. *Executors and Administrators* ⟸305.]
The delivery of slaves by an executor to the husband of his daughter, who was one of the legatees, will not be presumed to be either a gift in consideration of marriage on the one hand, or the satisfaction of her claims as a legatee on the other; but in the absence of clear proof to the contrary, will be regarded as a payment pro tanto.

[Ed. Note.—Cited in Bouknight v. Epting, 11 S. C. 77.

For other cases, see Executors and Administrators, Cent. Dig. § 1198; Dec. Dig. ⟸305.]

[7. *Husband and Wife* ⟸12.]
The wife's equity will not be enforced against the husband, except upon application made by the wife herself, her guardian or attorney, or by some one standing in a similar relation to her. But although a settlement will not be ordered upon the application of a stranger, the court will not direct the property of the wife, which is under its control, to be transferred to the husband, until she has been consulted, and her consent obtained.(*c*)

[Ed. Note.—Cited in Bouknight v. Epting, 11 S. C. 77.

For other cases, see Husband and Wife, Cent. Dig. § 67; Dec. Dig. ⟸12.]

[8. *Appeal and Error* ⟸840.]
The Court of Appeals will not undertake a detailed examination of accounts. These must be settled in the court below, and the decree of the Chancellor will not be interfered with, unless a specific error be pointed out.(*d*)

[Ed. Note.—Cited in Farrar v. Farley, 3 S. C. 24; Talbert v. Hamlin, 86 S. C. 526, 68 S. E. 765.

For other cases, see Appeal and Error, Cent. Dig. § 3314; Dec. Dig. ⟸840.]

This was a bill for an account, and partition of the real and personal estate of Jacob Myers, deceased, in the hands of the defendant, David Myers, the son of the testator, and the executor of his will, and the father and guardian of the devisees and legatees. The principal questions made by the pleadings were settled by a decree of the Court of Appeals, by which the matters of account were referred to the commissioner, and the cause remanded for a further hearing on a point reserved. Vide 2 McC. Eq. 214, et seq. [16 Am. Dec. 648]. It now came on for a hearing, before De Saussure, Chancellor, at Columbia, in February, 1829, on the matter reserved by the appeal decree, and upon exceptions to the commissioner's report. A large mass of evidence was introduced, and a great number of questions made; of all of which, however it will be necessary to notice the following only.

The executor claimed credit in his account for a promissory note of the testator in his favor for $6,950, dated in 1802, and purporting to have been given for land and negroes sold. The hand-writing of the testator was proved by several witnesses: and also an acknowledgment by him in his lifetime that he had given such a note, but coupled with a statement, that the object of it was to cover the property of the payee from his
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creditors. There was also evidence *of similar declarations by the executor many years since. There was no proof of an actual consideration; nor had the executor in any way set up this claim until recently. It was rejected by the commissioner, and his decision was confirmed by the Chancellor.

In the account, the executor was charged for negro hire by the commissioner, from the year 1804, at the average rate of $70 per annum, for every full hand. The Chancellor thought the average too high, under the evidence, and reduced it to $50 per annum.

The commissioner also charged the executor with interest on the annual amount of land rent and negro hire, and interest on interest annually compounded. The Chancellor ordered the account to be reformed, so as to allow simple interest only.

There were certain of the lands devised by the testator, known as the Gut, and Bluff tracts, which were claimed by the executor, in his own right, under an alleged parol gift from the testator. In relation to these the Chancellor directed an issue to try the title at law; and ordered that in the mean time the possession should be surrendered to the devisees. It is not expressly stated, but it is to be inferred from the decree, that the executor did not enter into the possession of these lands until after the testator's death.

The appeal decree had directed that the executor should be credited in the account for the expenses of such improvements, made on the land by him, as were necessary to preserve the property, or to render it more permanently valuable to the devisees; and under this order the commissioner allowed certain charges for ditching, manuring, and fencing; which, upon the evidence adduced, the Chancellor sustained.

On the question reserved by the decree, to

(*c*) Ex parte Geddes, and cases there cited, 4 Rich. E., 304; Graydon v. Graydon, McM. E., 63 and notes in 2 ed; Dud. E., 179; Sp. E., 150.

(*d*) Post, 375; 2 McC. E., 285.

wit: whether the delivery of certain slaves by the executor to Robert Clendinen, was a gift in consideration of his marriage with the daughter of the executor, or a satisfaction in whole, or in part, of her claims under the will of the testator, much evidence was introduced which it is unnecessary to specify. But there was a paper introduced for another purpose, which was relied on in reference to this question. It purported to be a release from Robert Clendinen, John J. Myers, and William Myers, to the executor, on condition of his surrendering the land and negroes of the testator, and recited that they had received "full and ample satisfac-

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tion for his estate." This paper was *signed by Clendinen, and William Myers, but was not duly executed by the other parties to it. The Chancellor decided, that the slaves were neither a gift to Mr. Clendinen, nor a full satisfaction of Mrs. Clendinen's claims, but a payment pro tanto of her interest in the estate.

The Chancellor, at the instance of the executor, directed that so much of Mrs. Clendinen's share of the personal estate, as had not been actually paid, or delivered, to her husband, should be settled in trust, for the use of herself and husband during their joint lives, and of the survivor during his or her life, and after the death of such survivor in trust for the children of the marriage. This order was objected to on the ground, that a settlement had not been required, except by the executor, who had no authority to make the application, and had made it, too, without notice to the husband. And it was submitted, that even if the court would entertain the application under such circumstances, it should merely direct an inquiry, as to the wishes of the wife on the subject, and the existence of any previous provision for her. The objection was overruled.

All the parties appealed from various parts of the decree on different grounds: which were argued by Chappell, and Preston, for the devisees and legatees, and by Gregg, and Blanding, for the executor.

NOTT, J., delivered the opinion of the court.

This bill was originally filed by John J. Myers alone, and all the other parties, as appears by the title of the bill, were made defendants. But in the progress of the case William Myers and Robert Clendinen and wife have, in fact, as they were originally, in interest, become joint complainants with John J. Myers. Whenever, therefore, I speak of the complainants, I wish to be understood as embracing them all, except where it shall appear that some one has a distinct interest from the rest.

The case having once before been heard by this court, at which hearing most of the questions of law by which it must be governed were settled, little is now left to be done, except to inquire whether the Chancellor has mistaken the evidence, or drawn incorrect conclusions from it. But that is a matter of no small difficulty, with such a mass of testimony, embracing the transactions of upwards of twenty years, and embarrassed by the conflicting opinions of such a number of witnesses.

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*The first question which I shall consider, is that presented by the first ground relied on by the defendant, and which relates to the note of hand set up by him against his father's estate. This question has undergone a laborious investigation by the commissioner, and the testimony has been actually examined by the Chancellor; and both have come to the conclusion that the claim ought to be rejected. Under these circumstances the court would not reverse the decree, unless some palpable error could be brought to our view. But none such can be discerned. On the contrary, a great variety of circumstances combine to lead us to the same conclusion. The appearance of the paper, on which the note is written, is almost sufficient to pronounce its condemnation. To see a note drawn for upwards of six thousand dollars on a slip of paper, on which a person would hesitate to give a draft for a yard of tape, cannot fail to excite a suspicion, that it was unfairly obtained, or intended for some temporary purpose, which must have been answered in the lifetime of the testator. Indeed, there is reason to believe, from a variety of circumstances, that there was a secret transaction between the parties to which this note was intended to give color; and that it was never intended to be carried into execution. In the will of the defendant's testator, he says he does not know that he owes any debts. Now, it cannot be believed that a person of limited property could forget a debt of such magnitude; and although his declaration may not be received as evidence of the fact, yet such an inference may well be drawn from the acquiescence of the supposed creditor, on whom the execution of the will devolved, and who has not, during an administration of twenty years, given any intimation to the contrary. It is true, as has been urged in the argument, that in making out an inventory of an estate, the debts due by the deceased are not required to be inserted. But an annual account of the administration, including the debts and credits, is required, which has been entirely neglected. This remissness has been attempted to be accounted for by the belief of the defendant, that all his children were entitled to the benefit of their grandfather's bounty; and a confidence on his part, that they would be satisfied with the provision which he would make for them, and not subject him to the rigorous account which is now exacted. It is possible that there may

be some truth in the suggestion. But even

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if it be so, it is the mis*fortune of the defendant, that he must suffer for his misplaced confidence, and not the fault of this court. His children impute to him different motives, and the court cannot undertake to determine whose fault it is, that such an unnatural war has been waged. And if we have not been able to ascertain the truth, the difficulty has been enhanced, if not created, by the defendant's own neglect, and he must take the consequences of it. It is the opinion of the court that this part of the decree must be affirmed.

The next question which I shall consider, is the hire of the slaves. The commissioner has allowed $70 per annum. That, it appears, is the highest estimate made by any of the witnesses, whose opinions have been taken, and double the amount which in the opinion of others ought to be allowed. The commissioner seems to have been governed by some observations made by the court, in this same case on the former trial, wherein it was said, that the defendant's refusing to account, furnishes a very good reason why the court should adopt the most rigid rule of calculation, which the law affords in behalf of the cestuy que trusts. But the court, in making that observation, was merely laying down a general principle, to be applied to cases according to circumstances, without intending to express an opinion as to its application to this case; and the circumstances of the case do not appear to make it our duty to subject the defendant to such a penalty. On the contrary, the lowest calculation which has been made, affords the complainants a profit on the capital employed, equal at least to any thing that could have been contemplated. The Chancellor has reduced the sum to $50 per annum for each slave; and if we were to judge alone from the testimony of the witnesses, I do not know that we could be dissatisfied with the decree. For the witnesses differed so much in opinion, that any conclusion drawn from their testimony must be in great measure conjectural. It was a general rule, formerly, in the Court of Equity, to allow £10 sterling, which is between $42 and $43 ($42.857) for the annual labor of a slave. But since the introduction of the culture of cotton, that rule has been abandoned, and certainly ought not to be resorted to for any short period of service, where the value of the labor can be ascertained by more certain evidence. But it must be recollected that this claim commenced during the

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operation of *that rule; and that several eventful periods of our history, which have had no little influence on the agricultural prosperity of this country, have occurred since that time. The defendant has had the calamities of embargos, war, and inundations to encounter. Under such embarrassments and with the difficulty of ascertaining with anything like precision the amount of crops, and fluctuations of prices, for such a length of time, the court has thought it better to abide by an established rule, although subject to some objections, than to adopt a sum which must in all probability be still more arbitrary. And we are the more inclined to adopt this rule from the result of the calculation, which produces an amount exceeding any thing that, we think, could have been anticipated from the capital employed. The court, therefore, is of opinion, that no injustice is done to the complainants by reforming the decree in that respect.

The next question relates to the interest. On that subject, the opinion of this court has been fully expressed in the cases of Black v. Blakely, 2 McC. Eq. 1, and Wright v. Wright, Id., 185; and we are still satisfied with the views there expressed on the subject. Whether compound interest ought ever to be allowed on the profits of trade, or the labor of slaves, is at least questionable. It is usually allowed in lieu of and as a substitute for such profits; and in some cases is most justly allowed. The profits of trade are usually considered as equal to compound interest on the capital; and in the case of slaves, the value of the labor with simple interest upon the appraised value of the capital, as is actually the case in this instance. In addition to this, an increase of capital may usually be calculated on, to treble the amount of the original, by the increase, of the slaves. And if the result has been otherwise in this instance, it must be imputed to accidental causes, as no allegation of ill-treatment is made against the defendant. We have been furnished with the case Henderson v. Laurens, Car. L. J., 134, [2 Desaus 170,] decided in the former Court of Appeals, which was not known to this court when the cases above referred to were decided, in which the question of compound interest was very fully considered; and it is very gratifying to find that the investigations of the two courts have led to the same conclusion. I shall now be satisfied with referring to that case, as expressing the views of this court, if any further expression of them is necessary. With regard to the practice of the English

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*courts, I would remark, that a legal interest of that country is five per cent.; but influenced, perhaps, by the bank discounts, and usual government interest, I believe the current interest of the country is only four per cent.; and this is the usual rate allowed by the courts. But in cases of neglect, or where there has been a want of good faith, five per cent. is required; so that in most cases, even when something like a penalty for such delinquencies is intended, the lawful rate of interest is thought sufficient. In very special cases, however, compound interest is required, as in the case of Raphael

v. Boehm, 11 Ves., 108, and that calculated with semi-annual rests. The court is, therefore, satisfied with that part of the decree.

With regard to the Gut, and Bluff lands, the court is of opinion that the Chancellor was correct in directing an issue to try the title.(e) But the defendant ought not to be divested of the possession until the right is determined. That part of the decree directing a surrender of those lands must be reversed.

The court is not disposed to interfere with that part of the decree which relates to the improvements made upon the land.(f) For although it may be somewhat ambiguous in some of its parts, yet when we look into the evidence, and into the various opinions of the witnesses on the subject, and the critical and laborious examination which the case has undergone, we have no reason to believe that another investigation would lead us nearer to the truth. The experience of every day teaches me, that the delay and expenses of a tedious law-suit are among the greatest evils that a person can suffer in this country. And I do not believe that we can do greater justice to the parties in this case, than to close, with all possible dispatch, the scene of litigation in which they are engaged.

As to the property given to Mr. Clendinen at the time of his marriage, the court is satisfied with the decree. For whatever might have been the legal presumption in such a case, the parties had a right to make their own terms. And although the evidence on this point, as on almost every point in the case, was somewhat contradictory, yet there was enough to authorize the conclusion at which the Chancellor has arrived. He had the express declaration of the complainant, that the property was received on payment, and not as an advancement of defendant's

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daughter in marriage. And *although there were expressions of the defendant to the contrary, which went equally to weaken his claim, yet some conclusion must be drawn from the testimony, notwithstanding these contending declarations of the parties. Perhaps the unexecuted paper, signed by the complainant, ought of itself be sufficient to turn the scale against him. It was a more deliberate act, and therefore entitled to more consideration than any loose verbal declaration; and although it was never completed, so as to become a binding contract, yet it cannot but be considered as going a great way towards expressing the complainant's own views of the matter. That part of the decree must, therefore, remain undisturbed.

The most important part of the case is that in relation to the settlement ordered to be made on Mrs. Clendinen. It seems to be now a settled rule of equity in England, that where a husband applies to a court of Equity for property belonging to the wife, the court will lend its aid on no other terms, than that he shall make suitable provision for the wife out of the property so recovered, unless a sufficient provision has been already made. There are some qualifications to the rule, which it is not necessary to notice, as they do not affect the general principle. The same rule has been adopted in this State, and, I believe, in all the States in the Union where courts of Equity are established, and the question cannot now be regarded as open for discussion. 1 Mad. C., 482; Oxenden v. Oxenden, 2 Vern., 493; Langham v. Nenny, 3 Ves., 469; Milner v. Colmer, 2 P. Wms., 641; Glaister v. Hewer, 8 Ves., 196; Murray v. Lord Elibank, 10 Ves., 85; 2 Kent Com., 116, 119; Taylor v. Mayrant, 4 De S., 505; Durr v. Bowyer, 2 McC. Eq. 368.

But the great question is, whether the court will, ex-officio, withhold the property or money from the husband, until a settlement is made, without any application on the part of the wife; or whether it is only on such application that a settlement will be required. Mr. Maddock says, "the habit of the court has always been, of itself, and without any application previously made by the married woman, to direct an inquiry, where money has been carried over to her account, whether any settlement has been made adequate to the fortune she then possessed." 1 Mad. C., 486. The cases referred to in support of this position are Lady Elibank v. Montolieu, 5 Ves., 737, and March v. Head, 3 Atk., 720; but in both these cases

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the application *was by the wife against the husband, for the purpose of procuring a provision to be made for her. In the case of Durr v. Bowyer, 2 McC. Eq. 368, the application was made by the defendant, Bowyer, on behalf of the wife, but without any authority from her; and from some expressions which fell from the court, it would appear that such an application would be regarded by the court as sufficient. But the case went off on other grounds, and that question, therefore, cannot be considered as decided. A settlement certainly will not be ordered against the wishes of the wife. Willats v. Cay, 2 Atk., 67; Milner v. Colmer, 2 P. Wms., 638; Murray v. Lord Elibank, 13 Ves., 1. It is true, that in the case of Bourdillon v. Adair, 3 Bro. C. C., 237, Lord Thurlow refused where the wife was abroad, to order a legacy to the wife to be paid to the

(e) Issues.—8 Rich. L., 284, R. R. Co. v. Toomer; 9 Rich. E., 276; 3 Strob. E., 37; 4 Id., 122; 1 Hill, E., 430, 76; Ril. E., 117; 2 Hill, E., 515; 3 Rich. E., 448; 4 Id., 253; 6 Id., 388; 1 Hill, E., 81.

(f) Improvements.—2 McM. E., 214; Chev. E., 62, 213; McM. E., 69, 75, 298, 475, and notes to 2 ed.; Corbett v. Laurens, 5 Rich. E., 301, and cases there cited; 1 Hill, E., 501; 10 Rich. E., 323; 2 Hill, E., 111; 2 Id., 217; 5 Rich. E., 299; 1 Strob., 355.

husband, without the consent of the wife taken by commission: and this goes a great way towards supporting the doctrine in Durr v. Bowyer. But although Lord Thurlow would not order the money to be paid to the husband, he did not order it to be settled on the wife; but declined acting until her wishes could be ascertained: and in the case of Glaister v. Hewer, 8 Ves., 206. Lord Eldon said, that there was no instance of a debtor calling upon the court to interpose the equity for the wife. The same observation, I presume, will apply to any stranger. Kenny v. Udal, 5 John. C. R., 464. The application must be made by the wife herself, or her guardian or attorney, or by some one standing in a similar relation to her; and in Durr v. Bowyer, the court did not say that the money should be settled on the wife, but merely that it should not be paid to the husband without her consent. Upon a comparison, therefore, of all the cases, I am of opinion that the rule ought to be, that the court will not order a settlement for the benefit of the wife, upon the application of a stranger, without the consent of the husband; neither will it order the property to be transferred to the husband until the wife has been consulted; but will merely direct an inquiry to be made, whether any and what provision has already been made for the wife, and whether she will consent that it shall be paid to the husband.

In the present case, the court is of opinion, that the Chancellor ought not, ex-officio, to have ordered a settlement to be made of Mrs. Clendinen's share of the estate, with-

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out an inquiry as to whe*ther she desired it, and whether any provision had already been made for her; but as the Chancellor had made such order at the request of her father, the court will not rescind it until such inquiry has been made. It is, therefore, referred to the commissioner to ascertain and report to the Circuit Court, whether any and what provision has been made for Mrs. Clendinen, and also what are her wishes in relation to a settlement, and the nomination of a trustee, if an order for a settlement should become necessary.

Several other questions growing out of the evidence were submitted to the court; but in a case like the present, for this court to attempt a detailed examination of the accounts would be as embarrassing as it would be fruitless. And we cannot too often impress it upon parties and their counsel, that these matters must be settled in the court below, and that like the verdict of a jury upon matters of fact, the decree of the Chancellor must be final and conclusive, unless some specific error can be pointed out, on which the party can lay his finger, so as to render it at once visible to the court.

The decree must, therefore, be reformed, so as to meet the views here expressed, and in all other respects it is affirmed.

Decree modified.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

CHARLESTON, FEBRUARY, MARCH, AND APRIL, 1830.

JUDGES PRESENT.

HON. CHARLES J. COLCOCK,
" DAVID JOHNSON.

*SARAH M. DE TREVILLE v. RICHARD and EDMOND ELLIS.(a)

(Charleston. Feb., 1830.)

[1. *Trusts* ⇐210.]

The committee of a lunatic is chargeable for a loss of the rents and profits sustained by his letting out the lands and slaves of the lunatic, without security, to a party who proves to be insolvent, unless it appear that the party was solvent, or in good credit, at the time of his contract with the committee; and the burden of proof of such matter of discharge is on the committee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 300; Dec. Dig. ⇐210.]

[2. *Insane Persons* ⇐65.]

The rule, that the committee cannot make leases of the real estate of a lunatic, operates no further than to prevent his binding the estate after the determination of his trust; and letting the lands from year to year is no violation of the rule, ob. dict. per Johnson, J.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 111; Dec. Dig. ⇐65.]

[3. *Equity* ⇐407.]

[Where the report of the commisssioner, upon a reference to him in a suit against the committee of a lunatic for an account, stated conclusions, rather than facts, as that the committee had "acted for the best," which report was affirmed by the court below, the decree was reversed upon appeal, and the case was referred back to the commissioner to report the facts.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 893; Dec. Dig. ⇐407.]

This was a bill for partition of the real and personal estate of a deceased lunatic, and for an account from the defendants, who had been his committee. On taking the ac-

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count the complainant insisted *on charging the defendants with the sum of $1,147.50, and interest, for the rent of land, and wages of slaves, of the lunatic, which had been hired by the defendants to William Pope, for the year 1823. The defendants produced a judgment obtained by them against Pope for this debt in 1824, and a fi. fa. thereon returned nulla bona. The charge was disallowed by the commissioner, who reported, that, in his opinion, the loss was occasioned by Pope's insolvency, and should be borne generally by the parties interested in the estate; the affairs of which were in great confusion when committed to the defendants, who appeared to have acted for the best. The complainant excepted to the report, and the case was heard upon the exceptions, at Coosawhatchie, in February, 1829, before De Saussure, Chancellor, who overruled the exceptions, and made a decree for the defendants. The complainant now moved to reverse the decree.

De Treville, for the motion. The report and decree, in effect, discharge the committee from all responsibility for the management of the estate committed to them. It is proved that they hired the land and negroes to Pope, for the year 1823; and it is held that they are discharged by showing that Pope was insolvent in 1824. But this is not sufficient. Where trustees act with good faith, and have exercised due diligence, they will be protected; but they are bound to show that they have done so, and that the

(a) Glover v. Glover, McM., Eq. 153 and note.

loss has arisen from misfortune, and not from negligence. Taveau v. Ball, 1 McC. C., 464. The presumption is always against the trustee, unless it is evident, from the nature of the loss, that it was occasioned by causes against which he could not guard. If Pope was insolvent in 1824, the presumption is, that he was so in 1823. The fact, indeed, was notorious, and might have been proved; but the onus probandi was on the defendants. They have offered not a title of proof, that Pope was solvent when they hired the lands and negroes to him, or that he was thought to be so by any body. They have not proved that they made any inquiry into his circumstances. They required no security from him, which they were bound to have done under any circumstances. Drayton v. Drayton, 1 DeS., 566. Finally, they neglected the obvious remedy of a distress, and permitted the crop to be removed from the land, without even a demand for the rent.

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*But there is one other view of the case still stronger. The defendants had no authority to rent the land. Knipe v. Palmer, 2 Wils., 130; 1 Fonb. c. 2, s. 2, n. (o). The court therefore can regard Pope in no other light than as the agent of the defendants for the cultivation of the land; and they are responsible for the value of the crop made by him. Wright v. Wright, 2 McC., C., 199.

R. B. Smith, contra. Where executors, or other trustees, intend fairly to discharge their duty, they are never held liable on slight grounds. Belchier v. Parsons, Ambl., 219; Powell v. Evans, 5 Ves., 843; 2 Mad. C., 134. And it is a mistake to say, that the presumption is against the trustee. Fraud is never presumed: and a trustee is only answerable for fraud, or such gross negligence as is equal to fraud. 2 Mad. C., 143. But were there such a presumption, it has in this case been rebutted. The defendants were appointed in February, 1823, and were consequently obliged to make arrangements for the crop of that year in great haste. They had no time for inquiry; and, in addition to this, the affairs of the estate were in great confusion. The commissioner, from a view of all circumstances, was of opinion that they had acted for the best; and his judgment upon this question of fact, sanctioned as it is by the decree of the Chancellor, is conclusive.

It is urged that the defendants ought to have distrained: but they could not distrain until the rent was due, and then there was nothing to distrain. When the rent became due, they lost no time in demanding the rent, and suing the debtor to insolvency. They could not do more.

None of the cases cited affect the present decree. Taveau v. Ball, 1 McC. C., 464, is a case for the defendants; and Wright v. Wright, 2 Id., 199, is so entirely different in its circumstances, as to have no application. Drayton v. Drayton, 1 DeS., 566, is more in point; but that was a case of sale, besides which, it was one where executors had, by their advertisement, required security, and then neglected to take it.

With regard to Knipe v. Palmer, 2 Wils. 130, and the passage cited from Fonblanque, it will be obvious on referring to them, that the rule there laid down, amounts to no more than this, that the committee cannot bind the lunatic by making leases. It is laid down that the committee possesses every power

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necessary to the *proper management of the estate; and hiring lands and negroes from year to year, is, in this country, absolutely essential in many cases to rendering them productive. Without it, they would frequently be merely a burden.

JOHNSON, J. The object of this bill was, in part, to obtain an account from the defendants of the rents and profits of the estate of the lunatic committed to their management; but the report of the commissioner, on which the Circuit Court decree is founded, is so barren of facts, that the court has felt at some loss to see the application of the questions that have been raised here, or to form any judgment as to the merits of the case. The report consists rather of a deduction from facts, than of facts themselves. It states, for instance, that at the time the defendants took possession of the estate, it was in great confusion; and that in renting the lands, and hiring the negroes, the committee acted for the best; and if this be true, it may be that the loss ought to be borne by the estate; for the rule very clearly is, that the defendants ought not to be charged, unless they have been guilty of some degree of negligence. But I cannot consent to lend my sanction to a judgment, without being able to see that it is founded in right; and more especially where, as in this case, there is great reason to suspect that too much indulgence has been shown to the defendants, and that in carrying into effect a rule intended for the protection of trustees, and others acting in a representative character, injustice may have been done to the complainant. Thus it is said, that the estate was in confusion, and that the defendants, in hiring the lands and negroes to Pope, acted for the best; but the object of appointing a committee was to reduce the estate to order; and the act of letting the lands and negroes, was a single act, in which I can conceive of no insurmountable difficulty; and if Pope was, as the evidence seems to indicate, insolvent at the time, it would be difficult to persuade any one, that trusting him for that amount was acting for the best. It may be, that the facts justify the conclusion at which the commissioner has arrived;

but they do not appear in his report; and the inferences necessarily is, that they do not exist. The decree of the Circuit Court must, therefore, be reversed, and the case referred back to the commissioner to ascertain the facts.

It does not appear from the report of the

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commissioner that any *evidence was offered as to the solvency, or insolvency of Pope, at the time that the defendants trusted him; and one of the questions here raised is, whether the proof on the subject ought to have come from the complainant, or the defendants. The fact being ascertained, that the defendants were in possession of the lunatic's estate, prima facie, they were bound to account for the rents and profits, or to show some reason why they should not. If, under the best management, the estate had proved unproductive, that would have been sufficient; or, as more directly applicable to the case, if they had shown that they had trusted it to one in good credit, but who ultimately proved insolvent, that might have proved sufficient. But I take it as an universal rule, that where the presumption of liability attaches, it is incumbent on him to be charged to show matters of excuse. He who alleges the affirmative of any proposition is bound to prove it, for the obvious reason, that the mode of proof is more simple and direct; and this, although it may imply a negative, instances of which are given in the books, more especially, where, from the circumstances, he who seeks to support his cause must be supposed to be cognizant of it. 1 Stark Ev., 376, 7, 8; Dickson v. Evans, 6 T. R., 57. The possession of the lunatic's estate per se, rendered the defendants liable to account for rents and profits. If that fact, and nothing else, had been proved, there cannot be a doubt, that they would have been bound to pay the value; for indulgent as the law is to persons acting in a fiduciary character, it is not charitable enough to presume that they have properly disposed of a fund, without any account from them. They allege the affirmative, then, when they offer matter by way of excuse; and to whom can the circumstances be so well known as to those who were the principal actors? Surely not the lunatic, nor those who claim under him, and who, at the time, may neither have had, nor felt any interest in it. On every principle then, the defendants were bound to furnish the proofs.

In the present state of the case, the court have not thought proper to decide upon the question raised, whether the defendants had or had not the right to lease the lands of the lunatic; but I will observe, passingly, that I incline to think, that upon investigating that doctrine, it will be found that the only restraint imposed upon the committee operate to prevent their binding the lunatic

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*after his restoration, and that letting out the land from year to year is no violation of the rule. Without this power, it is not difficult to imagine a case, in which they would not only be very unproductive, but a charge; and I can conceive of no motives of public policy which would prohibit it. It is, therefore, ordered and decreed, that the decree of the Circuit Court be set aside, and that the case be referred back to the commissioner to ascertain the facts agreeably to the foregoing rules, and that he report thereon to the Circuit Court

COLCOCK, J., concurred.

RICHARDSON, J., sitting for NOTT, J. (*b*) I am of opinion that the case ought to be sent back, although I do not wish to express any opinion on the other points.

Decree reversed.

The right of the complainant to partition of the lunatic's estate depended upon the construction of a limitation over, contained in the will of his father, and was settled by the decree on a former appeal in this case. The judgment of the court on that occasion, and the opinions delivered in two other cases, involving analogous questions, have been frequently referred to; and as they have not hitherto been reported, they are here subjoined.

(*b*) Judge Nott was unable, from indisposition, to take his seat on the bench at any time during the present, or the succeeding term, and died towards the close of the latter. His place was occupied during a part of the present term by Judge Richardson, and during the whole of the succeeding term by Judge Evans and O'Neall, alternately. Vide 1 Bail. L. R., 373. —R.

Bailey, Eq. 40

SARAH M. DE TREVILLE v. RICHARD and EDMOND ELLIS.(*a*)

(In the Court of Appeals, Charleston, Dec., 1827.)

[*Wills* ⇦545.]

Devise of real and personal estate to the children of testator, but "should any of them die without lawful heirs of their own body, their part or division of the estate to be equally divided between the surviving children, share and share alike." *Held*—That the indefinite failure of heirs of the body was controlled by the limitation to the survivors; and that the devise over was good, both as to the real and

(*a*) Post, 391, 298. See McCorkle v. Black, 7 Rich. E., 411–6–7–21; Matthis v. Hammond, 6 Id., 404; Cordes v. Ardrian, 1 Hill E., 154; Terry v. Brunson, 1 Rich. E., 78; Id., 265; 3 Id., 271; Dud. E., 71; 1 Strob. E., 193, 4; Id., 262; 8 Id., 257; 6 Id., 26, 83; 1 Id., 268.

the personal estate. Vide Stevens v. Patterson, post, next case [1 Bailey, Eq. 42].

[Ed. Note.—Cited in Holladay v. Holladay, McMul. Eq. 281; Nix v. Bay, 5 Rich. 425; Lyon v. Walker, 8 Rich. 310; Stevens v. Patterson, Bailey, Eq. 42, 47, 48; Matthis v. Hammond, 6 Rich. Eq. 404; Moore v. Paul, 7 Rich. Eq. 369; McCorkle v. Black, Id., 411, 416, 417, 421; Mendenhall v. Mower, 16 S. C. 314; Henderson v. Kinard, 29 S. C. 17, 6 S. E. 853; Selman v. Robertson, 46 S. C. 265, 24 S. E. 187.

For other cases, see Wills, Cent. Dig. § 1172; Dec. Dig. ⟸545.]

Richard Ellis, by his last will, devised his real and personal estate to his widow and children in different portions, and by one of the clauses thereof provided as follows: "It is my will and desire that should any of my children die without lawful heirs of their body, their part or division of my estate shall be equally divided between the surviving chil-

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dren, share and share alike." William *Ellis, one of the devisees, died in May, 1825, a lunatic, unmarried, and without issue, leaving the complainant, who was his sister of the half blood, and the defendants, who were his brothers of the whole blood, the sole survivors of the testator's children. The defendants were entitled to his estate, under the Act of 1791, in exclusion of the complainant; but the latter claimed a distributive share of the estate derived from the father, both real and personal, by virtue of the limitation over, contained in the above cited clause of his will.

The cause was heard at Coosawhatchie, in January, 1827, before De Saussure, Chancellor, who decreed for complainant. The defendants appealed, and the appeal was argued at Charleston, in March, 1827.

At the sittings in Charleston, in December, 1827, NOTT, J., delivered the opinion of the court.

The will in this case embraces both real and personal estate; but in the decree of the Chancellor no distinction is made between them; and perhaps from the words of this will it was not necessary that any distinction should have been made. But as the same words, when used with reference to lands and personal property, sometimes admit of a different construction, it may not be improper, in this case, to consider them in relation to each respectively as used in the will.

We have not been furnished with a copy of the will, but from the decree it does not appear that the first devising clause in question contains any words of perpetuity. The effect, therefore, would be to give only a life estate in the lands, and an absolute estate in the personal property. The limitation over of the land, after the termination of the life estate, would in that case be good. If a fee simple has been given in the first instance, then the result will depend upon the construction to be given to the words, "if any of my children shall die without lawful issue of their own bodies," &c. If those words are considered as having the effect of converting it into a fee tail, or conditional fee, then the devisee having died without issue, the land descended to the heirs general of the testator, of whom the complainant is one, and is, therefore, entitled to take by descent. Chadock v. Cowley, Cro. Jac., 605. If the words "surviving children," are to be considered as limiting it to the dying without issue living at the death of the first taker, then the limitation over is good, by way of executory devise, and the effect will be the same both as it regards the real and personal estate. Barnfield v. Wetton, 2 Bos. & Pul., 324.

With regard to the personal property, a bequest to one and the heirs of his body, without any qualification and restriction, has always been held to vest an absolute interest. These words are always construed to mean an indefinite failure of issue, and a limitation depending upon such a contingency is too remote, and, therefore, void. But where any words are used, which can be construed into an intention to limit the failure of issue to the time of the death of the first taker, the limitation will be supported. And the court will take advantage of any words, that will bear such construction, in order to carry the intention into effect. The word survivor has,

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*in many instances, been held sufficient for that purpose. Roe v. Scott and Smart, Butler's Fearne, 474, n. (b); Wilkes v. Lion, 2 Cow., 333; Keating and wife v. Reynolds, 1 Bay, 80; Hughes v. Sayer, 1 P. Wms., 534; Massey v. Hudson, 2 Mer., 130.

In this latter case, Sir William Grant points out the distinction between a limitation to a survivor, which is intended as a personal benefit, and one which is intended to vest such an interest as to render it transmissible. "If," says that learned Judge, "A (the legatee) is personally to take the legacy, then the presumption is strong, that an indefinite failure of issue could not be in the testator's contemplation. Prima facie, a bequest over to the survivor of two persons, after the death of one without issue, furnishes this presumption; for it will be intended that the survivor was meant, individually and personally, to enjoy the legacy, and not merely to take a vested interest, which might or might not be accompanied by actual possession." But when it is given over to a survivor, his "executors, administrators and assigns," he was of opinion, that it must be considered as vesting a transmissible interest, and, therefore, too remote and void. If that distinction is to be regarded, and I do not know that it has ever been controverted, the limitation in this case is with-

in the rule, and must be supported. I am of opinion, therefore, that the decree ought to be affirmed, and the motion dismissed.

Decree affirmed.

Bailey, Eq. 42

JAMES STEVENS, and Others, v. WILLIAM PATTERSON.(*a*)

(In the Court of Appeals, Charleston, Feb., 1829.)

[1. *Wills* ⟸625.]

The testator bequeathed a slave to his daughter, "to her and the heirs of her body, but should she die without lawful issue, then to go back and be equally divided amongst the survivors" of the testator's children. The limitation over held good as an executory devise.

[Ed. Note.—Cited in Lyon v. Walker, 8 Rich. 310; De Treville v. Ellis, Bailey, Eq. 40; Moore v. Paul, 7 Rich. Eq. 369; McCorkle v. Black, Id., 411; Mendenhall v. Mower, 16 S. C. 314.

For other cases, see Wills, Cent. Dig. §§ 1447–1451; Dec. Dig. ⟸625.]

[2. *Wills* ⟸545.]

A devise over to "the survivors" of persons in esse, on the death of the first taker, "without lawful issue," is not too remote, unless it appear from the will, that "the survivors" were intended to take a transmissible interest, without reference to the time of its vesting in possession. And in the absence of words to shew such intention, the presumption is, that "the survivors" were intended to take personally, and must be living, on the failure of issue of the first taker.(*b*) Vide De Treville v. Ellis, ante, 40 [21 Am. Dec. 518].

[Ed. Note.—Cited in Henry v. Stewart, 2 Hill, 330; Nix v. Bay, 5 Rich. 425; Lyon v. Walker, 8 Rich. 310; De Treville v. Ellis, Bailey, Eq. 40; Postell v. Postell, Id., 391; Matthis v. Hammond, 6 Rich. Eq. 404; Presley v. Davis, 7 Rich. Eq. 108, 62 Am. Dec. 396; Moore v. Paul, 7 Rich. Eq. 369; Mendenhall v. Mower, 16 S. C. 314, 315; Powers v. Bullwinkle, 33 S. C. 301, 11 S. E. 971; Selman v. Robertson, 46 S. C. 266, 24 S. E. 187.

For other cases, see Wills, Cent. Dig. § 1172; Dec. Dig. ⟸545.]

Michael Perryclear, by his will, dated in 1792, devised, inter alia, as follows: "I also

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give and bequeath unto my daughter, *Mary, my negro girl, named Rose, together with her increase, being a part of the negroes aforementioned, to her and the heirs of her body, but should she die without lawful issue, then the said negro girl, Rose, to go back and be equally divided amongst the survivors of my children aforementioned." Mary, the legatee, intermarried with George Kling, who took Rose into his possession, and died in 1807, having devised and bequeathed his whole estate, real and personal, to his said wife, for life, with limitations over. She died in 1824, without issue, and the complainants, who were entitled under the will of George Kling, claimed Rose and her increase, on the ground that the limitation over in the will of Michael Perryclear was too remote; and that the property, therefore, vested in the daughter, Mary, absolutely, and having been reduced into possession by her husband, it became his jure mariti, and subject to the dispositions contained in his will.

The cause came on for hearing at Walter-

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borough, in May, 1828, *before De Saussure,

(*a*) Post, 391; 7 Rich. E., 108; 6 Id., 26, 404; 8 Id., 259; 1 Id., 266; Hill v. Hill, Dud. E., 71; 1 Strob., 1.

(*b*) A question may arise, in regard to limitations of this sort, as to the period limited for the happening of the contingency: whether it is confined to the death of the first taker, or continues during the lifetime of the survivor. Suppose bequests to A and to B, and, if either die without issue, to the survivor; and that A dies, leaving issue but the issue dies in the lifetime of B. Does B take under the limitation over; or was the contingency determined by the death of A leaving issue? This question does not appear to have been anywhere decided, or even discussed. Mr. Fearne, it is true, classes the cases on such limitations among those in which "the Court of Chancery has very much inclined to lay hold of any words in the will, to tie up the generality of the expression of dying without issue, and confine it to dying without issue living at the time of the person's decease;" and similar language is held in most of the cases. But in none of them was the present question made, or adverted to; nor do Mr. Fearne's observations directly refer to it. In every instance, the full effect of the argument is attained by "tying up the generality of the expression," without tying it up to any particular period.

The phrase, "dying without issue," has for a long time been invariably held to import an indefinite failure of issue; and this is now its fixed legal signification. It is true, that this sense may be controlled by other words, or by inconsistent provisions, in the will; but when not so restricted, the legal interpretation remains. It is held to be restrained by a limitation to a survivor, for the reason that such a limitation can only take effect during the lifetime of the survivor; but unless the restraint is to extend further than the reason of it applies, this would not "tie up the generality of the expression," otherwise than to confine it to a failure of issue at any time during the life of the survivor. There is nothing in the

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limitation to a survivor, that *can limit the failure of issue to the death of the previous taker; but the whole force of the restriction consists in the limitation being to one, who, in order to take under it, must survive both the parents and the issue. Or, as it is expressed in Nicholls v. Skinner, Ch. Pr., 108: "this cannot be a dying without issue generally, but only so as the survivor might take; which must be during the life of some or one of them." Fearne, 472. On strict principles of reasoning, therefore, it might be contended, that B would be entitled to take in the case stated.

On the other hand, it may be urged, that the words, "dying without issue," admit of two constructions: viz., dying without leaving issue then living, and an indefinite failure of issue; and that, although the latter is the legal construction, yet the former is the more natural interpretation of the testator's meaning; and where

Chancellor, who was of opinion with the complainants, and made a decree accordingly. The defendant now moved to reverse his decree.

COLCOCK, J., delivered the opinion of the court.

It is conceded on all sides, that, but for the use of the word "survivors" in the devising clause, the limitation over would have been void, as being after an indefinite failure of issue; and, therefore, any observations on that point are rendered unnecessary. I shall only refer to a late case, decided by this court, which fully explains and maintains that doctrine, vide Henry v. Felder, 2 McC. Eq., 323. We are then to consider the effect of the word "survivors," as used in this clause. I am aware that there are those, and some very eminent and distinguished men, who are of the opinion that courts of justice should not encourage limitations of personal property; because every limitation, it is said, is a perpetuity so long as it lasts. But it is clear that such limitations are permitted; and with all deference to these distinguished jurists, and for the learning and ability of one of them, Chancellor Kent, I entertain the highest veneration, I cannot help thinking that in some cases it is indispensably necessary, that this power of limiting personal property should be exercised. One may have a child who is careless of property, or regardless of its value, and to whom, of course, it would not be proper to give absolutely; or a case may occur, where improper attachments may exist, which might cause the property to go in a direction contrary to the wish of a parent; and in these, and such like cases, it would be proper to give only a life estate, with proper limitations over. Indeed, in the present day, I might add that there is not that reason for some of the distinctions which the law makes between real and personal property, in this respect; and that all the reasons which can be urged why the former may be limited, will apply with equal force to the latter. I take it, however, that wherever it is evidently the intention of the testator to create a limitation upon the happening of any event, and that event is within the prescribed limits, which have been wisely affixed to them by the long established rules for preventing perpetuities, it is the duty of courts to give effect to the intention of the testator, if possible. It is a mockery to say to one, you may make your will, but it must be made in conformity with certain rules, about which you know nothing; or, in other words, we will give a construction to your expressions which you never dreamed of.

As the question in this case depends on construction, it is to be expected that a difference of opinion may have existed in relation to it, as to the effect of the word survivor in restricting the generality of the words, "dying without lawful issue," to the time of the death of the first taker; but I have come to the conclusion, after a tedious research, and close examination of all the cases which I have been able to find, that we are warranted in the determinations which we have heretofore made on this point; and that in the present case the testator intended a personal benefit to those of his children, who should survive any one, "dying without lawful issue," and consequently did not intend to create a perpetuity; and, therefor

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that it *is not a limitation over, after an indefinite failure of issue, but one confined to a failure of issue at the time of the death of his daughter Mary, the first taker. Mr. Fearne, to whom I always refer with great pleasure on these subjects, in treating on the rule, and the reason of the rule, which limits the period within which a limitation is valid, after putting many cases by way of illustration, remarks, "In all the foregoing instances, we may observe, the contingency was confined to the compass of a life in being; and it is just the same thing, if the executory devise be limited to take effect within the compass of several lives in being, for whatever may be the number of such lives, the whole period can amount to no more than the life of the survivor of them." Butler's Fearne, 431, 2. In the language of Twisden, J., "the candles are all lighted at once." Salk, 229. In another place, Mr. Fearne says: "Indeed, with respect to executory devises of terms for years or other personal estates, the court of Chancery has very much inclined to lay hold of any words in the will, to tie up the generality of the expression, dying without issue, and confine it to dying without issue living at the time of the person's decease."

there are any other words, or any circumstances in the will, which shew that the testator did not use the words in their legal sense, that construction is wholly defeated, and the natural interpretation is to be resorted to. There is much force in this view of the subject, and it accords with the language employed, and the course of argument pursued, in all the cases. Thus, in the celebrated case of Keely v. Fowler, 6 Bro. P. C., 309, Wilmot, C. J., is stated, by Buller J., 1 T. R., 597, to have said, "we are bound to an artificial technical sense of those words, unless there is an apparent intention in the testator of using them in their natural meaning;" and in almost every case, the contest is supposed to be between a technical artificial sense, and the natural interpretation of the words.

The precise questions seem never, however, to have been directly made. The case of Nichols v. Hooper, 1 P. Wms., 198, is not in point; for there the direction to pay the legacies in six months after the death of the mother and son, necessarily confined the failure of issue to the death of the survivor of them.—R.(c)

(c) Evans v. Godbold, 6 Rich. E., 26; Schoppert v. Gillam, Id., 83; Deveaux v. Deveaux, 1 Strob. E., 287; Anderson v. Smoot, Sp. E., 312; Yates v. Mitchell, 1 Rich. E., 265; Lowry v. O'Bryan, 4 Id., 262 [57 Am. Dec. 727].

Id., 471. And, in illustration of this, he refers to two cases in point. Hughes v. Sayer, 1 P. Wms., 534, where C having two nephews, A and B, devised the surplus of his personal estate to them, and if either of them should die without children then to the survivor; and it was held, that dying without children must in this case be taken to be dying without children then living, because the immediate limitation over was to the surviving devisee. The case of Nicholls v. Skinner, Ch. Pr., 108, as stated by him, is almost in words the case before us. A devised portions to his four children, payable at their respective ages of twenty-one, or marriage, and in case any of them should die before the time of payment, or without issue, then his or their portion to go to the survivors, or survivor, and his heirs: and it was held, that this could not be a dying without issue generally, but so as the survivor might take; which must be during the life of some one of them, and so was good. But it is said by the master of the Rolls, Sir Wm. Grant, in the case of Massey v. Hudson, 2 Mer., 134, 5, that on comparing the report of this case with the register's book, he found it had been wholly misrepresented; and that it was an authority for him in the case of Massey v. Hudson, making, however, a distinction which cannot affect this case, as I shall show when I come to comment on that case. It is, under the view which Mr. Fearne took of it, a case directly in point. So in Lampley v. Blower, 3 Atk., 396, where the testatrix gave to her two nieces F. and L., each one-half of the produce of bank stock, and to their issue, and if either of them should happen to die before the legacy became due to her, and leave no issue, the share of her so dying should go to the survivor; the words, and leave no issue, were construed "leave no issue living at the time of her death." Mr. Butler, in a note to these cases, adds another, which he says had been decided since Mr. Fearne wrote, but decided on an opinion given by him. It is the case of Roe v. Scott and Smart, Easter term, 27 Geo. III., and it is a case, too, relating to land, where the inclination of the courts is to consider the limitation indefinite. Testator de-

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vised lands to his *son James, to hold to him and his heirs and assigns forever; and other lands in like manner to his son John; and other lands in like manner to his son Thomas; and then added that his will and mind was, that if either of his three sons should depart this life, without issue of his or their bodies, then the estate or estates of such sons should go to the survivors, or survivor: and it was held, that the devise to Thomas did not give him the fee, but an estate tail, which descended to his daughter, and upon her decease, without issue, the estate went over to James, the then survivor of the three brothers, and not to the heirs of the said daughter, to whom James was only related of the half blood.

The next case which I refer to in support of this construction, is the famous case of Wilkes v. Lion, 2 Cow., 333, on the construction of the will of Medcef Eden, which had been considered in the case of Anderson v. Jackson, 16 John. C. R., 382, and that string of cases decided in New York, in support of the ultimate decision. I am aware of the great authority of Chancellor Kent's opinion, who was opposed to that decision; but after an attentive examination of the cases, I think he has for once erred in his conclusion, and has most strangely overlooked the word "survivor" in the clause which was the subject of consideration. The case was decided on the single circumstance of the word survivor, which necessarily limited, as the court said, the failure of issue to a life in being; and the court and the counsel all agreed, that if the limitation had been on a mere failure of issue, without the use of the word survivor, it would have been void as being a limitation on an indefinite failure of issue, and so tending to a perpetuity.

The case of Massey v. Hudson, 2 Mer., 130, I consider an authority as much in point as any other referred to; for the ground on which the master of the Rolls puts the case is, that the word survivor is followed by the words his or her executors, administrators, or assigns; and for that reason he decided that the bequest over was too remote. "A bequest to A," he remarks, "after the death of B, does not import that A must himself live to receive the legacy. The interest vests at the death of the testator, and is transmissible to representatives, who will take whenever the event of B's death may happen. So if the bequest be to A, in case B shall die without issue. If that were allowed to be a good bequest, A's representatives would be entitled to take, at whatever time the issue might fail. It is for that reason that it is held too remote. But if A is personally to take the legacy, then the presumption is strong that an indefinite failure of issue could not be in the testator's contemplation. Prima facie, a bequest over to the survivor of two persons, after the death of one without issue, furnishes this presumption; for it will be intended that the survivor was meant individually, and personally, to enjoy the legacy, and not merely to take a vested interest, which might, or might not, be accompanied by actual possession. For, if the survivorship be necessary only to vest the interest, and to render it transmissible, the objection of remoteness is not all obviated, and the restrictive presumption does not arise. Now, the addition of the words 'executors, administrators and assigns,' excludes the presump-

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tion, that it *was a mere personal benefit that was intended for the survivor. For, although there should be no such failure of is-

sue as would enable him personally to take, yet his representatives would be entitled to claim in his right, whensoever the failure of issue should happen." This conclusion, at which the learned Judge arrives, reduces the devise over to the common case, put in the books, to show that such limitation over is void. He goes on to apply the objection to the case of Nicholls v. Skinner, in which the word survivor is followed by the word heirs, which, he says, so completely excludes the idea of a mere personal benefit to the survivor, that it fails to produce the restrictive effect; and he further states that the case is misreported. This case I consider as a valuable one, since it clearly admits, that if we can arrive at the conclusion, that a personal benefit was intended, it is enough to give the restrictive efficacy to the word survivor.

I will not go so far as to say, that I am satisfied with this reasoning as applicable to all cases of survivorship, when there are more than two ulterior legatees; but as it is put on the ground of intention, I do not hesitate to adopt it, for I am satisfied, that such is the intention of testators, in all cases of a limitation over on a dying without issue: and the authorities taken with this, and the rule of intention, will warrant us in coming to the conclusion in this case, that the limitation over is good. But we have, in fact, decided this case in deciding that of De Treville v. Ellis, there being no possible ground of distinction between the words used in the will in that case, and the one now before the court: and in that case we held the limitation over to be good.

It only remains to turn our attention to the Chancellor's decree, which will be found to rest on a case that cannot possibly support it, under any view which has ever been taken of the point. He relies on the case of Barlow v. Salter, 17 Ves., 479, in which there is a most obvious and striking difference from the case under consideration, and one on which the master of the Rolls makes a clear distinction. The testatrix bequeathed to her daughter, in the following terms: "All my estate, real and personal, of every sort and kind, to her and her heirs, and half the navigation money for her natural life; and in case she dies without issue, all to be divided between my four nephews and nieces, Nathaniel Barlow, of Colchester, William, Catharine, Elizabeth, all at Writtle in the county of Essex: Catharine's part only for life; and her part to be divided between the survivors." The case turned on the last words, giving a life estate to Catharine, and then to the survivor of the legatees over. Now, it is sometimes taken as a circumstance of restriction, that a life estate only is given to the legatee over, who is to take at the death of the first legatee; because, for the reason before alluded to, it is clearly a case in which a personal benefit is intended: but, as the master of the Rolls observes, that is a very different case from a limitation over, at all events, to four, three of whom are to take a transmissible interest. Their representatives would be capable of taking, at whatever period of time the failure of issue might happen. "Their rights, even to Catharine's fourth,

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would not," he remarks, * "depend on their being alive at her death; for the word 'survivors,' as here used, has the same sense as the word 'others,' as has been frequently decided. The whole property goes over upon failure of the issue of the daughter, whether Catharine shall be then living, or dead. How, then, can the giving her a life interest in the part show an intention to use the words 'dying without issue' in any restrictive sense? When nothing but a life interest is given over, the failure of issue must necessarily be intended a failure within the compass of that life: but where the entire interest is given over, the mere circumstance, that one taker is confined to a life interest, furnishes no indication of an intention, to make the whole bequest depend upon the existence of that person at the time when the event happens, on which the limitation over is to take effect." He, therefore, decided that the devise over was too remote. As this is the only case relied on in the decree, I presume it was a decision on circuit, in the hurry of business; for the same learned Chancellor decided the case of De Treville v. Ellis, ante, 40.

Upon the whole, we are of opinion, that the devise over is good, and that the decree must be reversed, and the bill dismissed with costs.

Elmore, for the motion.
H. A. De Saussure, contra.

Decree reversed.

Bailey, Eq. 48

WILLIAM MAZYCK and Wife, and Others, v. RICHARD W. VANDERHORST and Wife.(a)

(In the Court of Appeals, Charleston, April, 1828.)

[1. *Perpetuities* ⟸4.]

Devise of real and personal estate to testator's daughter, and "to the heirs of her body forever," but if she should "depart this life leaving no lawful heir, or heirs, of her body," then over. Held, that the limitation over was

(a) Post, 535; 2 Mill. C. R., 91; 2 McC. L., 66, 75; 1 McC. C., 60; Hay v. Hay, 3 Rich. E., 384; 4 Id., 378; Addison v. Addison, 9 Id., 58; Chaplin v. Turner, 2 Id., 136; Hull v. Hull, 2 Strob. E., 175; 3 Rich. E., 559; 6 Id., 147; 7 Id., 407; 8 Id., 247, 404; Chev. E., 80; 10 Rich. E., 394, 1, 405; Dud. E., 42; 1 Rich. E., 265; Corbett v. Laurens, 5 Id., 301, 215; Rich. E., 422; 4 Id., 264, 426; 7 Id., 411; 2 Hill. L., 328, 543.

good as to the personal estate, but too remote, and therefore void, as to the real estate.

[Ed. Note.—Cited in Brummet v. Barber, 2 Hill, 551, 552; Norton v. Fripp, 1 Speers, 252; Williams v. Caston, 1 Strob. 133; Curry v. Sims, 11 Rich. 490; Adams v. Chaplin, 1 Hill, Eq. 280, 281; Hull v. Hull, 2 Strob. Eq. 192; Buist v. Dawes, 4 Strob. Eq. 48, 51, 52; 4 Rich. Eq. 426; Perry v. Logan, 5 Rich. Eq. 215; Lowry v. Muldrow, 8 Rich. Eq. 247; DuPont v. DuBos, 52 S. C. Append. 606.

For other cases, see Perpetuities, Cent. Dig. §§ 26, 30; Dec. Dig. ⟸4.]

[2. *Wills* ⟸625.]

A devise to one and the heirs of his body carries in this State a fee conditional, and such estate cannot support a remainder; nor can a limitation over upon the determination of that estate be supported as an executory devise, being too remote.

[Ed. Note.—Cited in Norton v. Fripp, 1 Speers, 252; Williams v. Caston, 1 Strob. 133; Curry v. Sims, 11 Rich. 490; Adams v. Chaplin, 1 Hill, Eq. 280; Deas v. Horry, 2 Hill, Eq. 246; Buist v. Dawes, 4 Rich. Eq. 426, 498, 501.

For other cases, see Wills, Cent. Dig. §§ 1447–1451; Dec. Dig. ⟸625.]

[3. *Wills* ⟸625.]

The word "leaving," in an executory devise, will restrain an otherwise indefinite failure of issue to the death of the first taker, in regard to personal estate, but will not do so in the case of real estate; although both species of property are disposed of by the same words, in the same clause of the will.(*b*)

[Ed. Note.—Cited in Brummet v. Barber, 2 Hill, 551, 552; Whitworth v. Stuckey, 1 Rich. Eq. 411; Buist v. Dawes, 4 Rich. Eq. 426, 501; Perry v. Logan, 5 Rich. Eq. 215; McCorkle v. Black, 7 Rich. Eq. 411; Lowry v. Muldrow, 8 Rich. Eq. 247; Addison v. Addison, 9 Rich. Eq. 61; Graham v. Moore, 13 S. C. 119; DuPont v. DuBos, 52 S. C. Append. 606.

For other cases, see Wills, Cent. Dig. §§ 1447–1451; Dec. Dig. ⟸625.]

On appeal from the decree of Thompson, Chancellor, at Charleston, April, 1827.

NOTT, J., delivered the opinion of the court.

The questions submitted to us in this case, arise out of the will of Jonah Collins, deceased; and the clauses which require our consideration, are in the following words: "I give and bequeath unto my loving daughter, Elizabeth Collins, all the remainder of my estate, both real and personal, to her and to the heirs of her body forever. Provided, nevertheless, that should my said daughter, Elizabeth Collins, depart this life, leaving

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no lawful heir or heirs of her *body, then my will is, that the said above mentioned remainder of my estate, both real and personal, I give unto my daughter Mary Woodberry's eldest son, that shall be named Jonah Collins." Other clauses of the will have been referred to in the argument, as having a remote bearing on the question submitted to us; but I have not noticed them, because they do not appear to me to throw any light on the subject, nor to vary the construction which would otherwise be given to the clauses which I have introduced. And I am not disposed to embarrass the case with merely speculative questions which can lead to no valuable result.

Jonah Collins died, leaving Elizabeth Collins his only heiress; and she died unmarried, without leaving any issue, and leaving Mary Woodberry the nearest relative, and heiress, both of the testator, and herself. Mary Woodberry afterwards married Richard Shackleford, by whom she had a son named Jonah Collins, who died within one year of his birth, leaving a father and mother, but no brother or sister. Mr. Shackleford afterwards had two other children, who are now the wives of the complainants. He then died, leaving his wife enciente of a son, who was afterwards born, and died in early infancy, leaving his mother and two sisters his heiresses-at-law. Mrs. Shackleford has since married R. W. Vanderhorst, the present defendant, by whom she has had several children.

The question now submitted to the court is, to whom does the property belong? Chancellor Thompson was of opinion, that the complainants were entitled to the whole, both real and personal, to the entire exclusion of the mother and the children by the second marriage; and he decreed accordingly. And this is an appeal from that decree.

With regard to the personal property, it appears to me, there can be no doubt. And although that point was not expressly conceded by the counsel, yet from their silence, I feel authorized to conclude, that they were of opinion it would not admit of argument. The first part of the devise is to Elizabeth Collins, and the heirs of her body forever. These words constitute a fee tail in England, and in this State, a fee conditional at common law, in the land. The same words give an absolute right to personal property. A limitation over, after a general failure of issue, without any qualifying or restrictive words, has always been construed to mean, an indefinite failure of issue; which is too remote a contingency, and therefore the limitation is void. Some attempts have been made in this State, to construe every limitation over upon the failure of issue, to mean, issue living at the death of the first taker; but the law has hitherto been considered as too well settled to admit of such an innovation. If any change is to take place, it must be effected by the legislature, and not by the court. Such, then, would be the effect of this will, if the words were to be taken in that unqualified sense; and the personal property, upon the death of Elizabeth Collins, would have vested immediately in Mary Woodberry, afterwards Mrs. Shackleford, and now Mrs. Vanderhorst, as her next of kin and personal representative; and

(*b*) See note at the end of this case.

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upon her marriage it would have *vested in her husband, Richard Shackleford. The testator, however, goes on to say, "Provided, nevertheless, that should my daughter, Elizabeth Collins, depart this life, leaving no lawful heir, or heirs of her body, then my will is," &c. Now, the question arises, whether the word "leaving," qualifies generality of the expression, so as to admit of the construction, that the testator meant issue living at the death of Elizabeth Collins, and not an indefinite failure of issue. Such was the opinion of Lord Macclesfield in the case of Forth v. Chapman, 1 P. Wms., 665, and that decision has been followed ever since in England, and adopted as the law of this State. In that view of the case, the limitation over to Jonah Collins, was good, and on his death the property vested in his father, Richard Shackleford. In this case, however, it is not important which construction prevails, for in either event, it came into his hands; and whether he became entitled by virtue of his marital rights, or as the representative of his deceased child, the result will be the same. (c) Upon the death of Mr. Shackleford, his widow became entitled to one-third of his personal estate, and the other two-thirds went to the three children; and upon the death of the posthumous son, Mrs. Shackleford was entitled to one-third of his estate, and the two daughters to the other two-thirds. Upon what ground the Chancellor held, that the complainants were entitled to the whole estate, I have not been able to discover. The decree, therefore, must be reformed in that respect.

The next question relates to the real estate; and the first inquiry will be, whether this was a contingent remainder, or an executory devise. I have already remarked, that Elizabeth Collins took a fee conditional in the land. And there is no rule of law better established, than that a remainder cannot be limited after an estate in fee: for when the whole is given, there is nothing remaining to go over to another. It can not, therefore, be a contingent remainder, and if the limitation over could take effect at all, it must have been as an executory devise.

And this leads to the further inquiry, whether the words of the will, which have been considered, admit of the same construction when used in relation to a devise of real, as of personal estate. And that is the only question of difficulty in the case. That, indeed, is not a difficult question, if we are to be governed by the English authorities. In the case of Forth v. Chapman, which has already been referred to, a distinction was taken, which, I believe, has ever since been permitted to prevail. With regard to real estate, they were construed to mean an indefinite failure of issue, and, therefore, to constitute an estate-tail; but with regard to personal property, to mean issue living at the death of the first taker. If that case is to be taken as authority for one of these positions, it is equally so for the other; or if we are to be governed by the uniform current of decisions from that time to this, we shall come to the same conclusion. It is true, that in the case of Porter v. Bradley, 2 T. R., 143, Lord Kenyon seems to intimate, that there is no distinction between real and personal estate in that respect; but that opinion has not been received with approbation in the

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English courts. Lord Eldon said *in the case of Crook v. De Vandes, 9 Ves., 203, it appeared to him "that it went to shake settled rules to their very foundation." And in the case of Tenny v. Agar, 12 East., 261, it is said, "there is no case where the words, die without leaving issue, simply, have been adjudged to mean, without leaving issue at the time of the death." In the case of Porter v. Bradley, there were also the words, "behind him," which, it is supposed, had their influence in the decision of that case. And I think we are authorized to draw the same conclusion from a subsequent decision of Lord Kenyon himself. In the case of Daintry v. Daintry, 6 T. R., 307, the testator had given his estate, both real and personal, to his son John and the heirs of his body, and if he should "die without leaving issue of his body," then over; and the whole court of King's Bench, with Lord Kenyon at their head, held, that John took an estate-tail in the real estate, and an absolute estate in the personalty. And Lord Kenyon expressly recognized the distinction, made by Lord Macclesfield in the case of Forth v. Chapman, as governing the case then before him.

I have not gone into a very elaborate examination of the cases on this subject, because the positions which I have laid down are too well settled, and too familiar to the profession, to render it necessary that I should have done so: and the only remaining question is whether we shall follow the English decisions, or adopt a new rule for ourselves. On that subject I can only say, that where we find a rule of law settled by a train of decisions, made by the ablest and most enlightened Judges of that country, and acquiesced in and approved, after long experience, I think we must consider it as the highest evidence of the law: and that we ought to receive it as such, unless we can see some cogent reasons arising out of the peculiar laws and customs of this country against it. It is not sufficient that we do not see the reasons on which the rule is founded. If we are to disregard all the distinctions which have hitherto prevailed between real and personal property, the reasons of which we do

(c) Bull v. Smith, 2 Freeman, 230; Edwards v. Freeman, 2 P. Wms., 445; Wallis v. Hodson, 2 Atk., 116.

not perceive, we shall find ourselves in a troubled sea, from which we shall, probably, make our escape with difficulty. What reason can be given why the transfer of personal property without any words of inheritance or perpetuity should give an absolute right, while the same words convey a life estate only in land? Why do the words, "heirs of the body," give only a fee-conditional in real estate, and an absolute right in personal property? Why is the wife entitled to dower in one, and not in the other? Why, upon her marriage, does she retain her interest in her real estate, while her personal property is considered as one of the marital rights of the husband? These and other questions which might be put are not less difficult of solution than the one now under consideration; but yet these distinctions are recognized as a part of our law, and no Judge would feel authorized to explode them.

Suppose there had been no limitation over in this case, and that Elizabeth Collins had died without leaving issue, the personal property would have gone to her representatives, and the real estate to the heirs of the testator. If she had died leaving issue, a daugh-

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*ter, who had married and died, leaving no issue, the real estate would have returned to the heirs of the testator, but the personal estate would have vested indefeasibly in the husband. I might put other cases to shew that we cannot, by any effort that we can make, give a uniform operation to the same words in relation to real and personal estate; and that any such attempt would probably tend to destroy the symmetry of the law, and create new and greater difficulties than those with which we have now to contend. It is also further to be observed, that this will was made nearly forty years ago, and we are now called upon to apply to it a rule of construction, which probably had not been heard of at that time, merely because we do not see the reason why the same rule should not apply to real and personal estate. But if any reason is wanted, it may be found in the case of Forth v. Chapman, where Lord Macclesfield says, those words in a devise of real estate, carry an estate-tail; and the reason "is in favor of the issue, that they may have it, and the intent take effect." 1 P. Wm., 667. In this State, they do not, indeed, carry an estate-tail; but they carry a fee-conditional and manifest the same intention that the issue should take. Whether it is a good reason or not, is not now the question. It is sufficient that such is the law; and whether it is wise or just does not belong to this court to determine. As long as we adhere to established rules, we have landmarks to direct our course; but we cannot foresee to what unexplored regions a deviation may lead. I think it, therefore, our duty to follow the decided cases. I think them not only the best evidence of the law, but that in this case it is the course best calculated to effectuate the intention of the testator. The issue of Mary Woodberry next after the issue of Elizabeth Collins, appear to have been the first object of his affection. And except for the pride of keeping up his family name would, in all probability, have been equally the objects of his bounty.

I am of opinion, therefore, that this must be regarded as a limitation over, after an indefinite failure of issue, and, therefore, too remote and void; that a fee-conditional was given to Elizabeth Collins, and that as she died without issue, the real estate went to Mrs. Vanderhorst, as the only heiress of her grandfather.

It is, therefore, decreed and adjudged, that Mrs. Vanderhorst is entitled to the land in question; that she is entitled to one-third part of the personal estate of her deceased husband, Richard Shackleford; and also to one-third of the estate of her posthumous child, deceased; and that the complainants are entitled to the other two-thirds of both estates. It is also further ordered, that it be referred to the commissioner to take an account of the value of the work and labor of the negroes; and that the case be referred back to the Court of Equity to carry this decree into effect, according to the principles herein laid down, and also to make such further orders and references as shall be necessary to a final adjustment of all matters in controversy between the parties. The costs to be paid out of the estate.

JOHNSON, J., concurred.

Toomer, for appellants.
Mazyck & Frost, contra.

Decree reformed.

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*NOTE.—It may well be questioned, whether the cases cited in the foregoing opinion can be regarded as sufficient authority for the decision that the limitation over, as to the real estate, was too remote and, therefore, void. In every one of them, the limitation over, whether it were of real or of personal estate, was held good; nor do all the books furnish a single case, in which a limitation over of real estate has been held void, when a limitation over of chattels, by the same words, would have been held good as an executory devise. The difference recognized by the cases referred to in the construction of the same words, when used with respect to real, and with respect to personal estate, is founded on the peculiar qualities of an estate-tail, and the rules of construction which have originated in those peculiarities; and the difference, so far as it implies a difference of intention in the testator's mind, is little more than nominal, since practically the intention of the testator is effectuated in both cases. The effect of the distinction is simply to convert the limitation, as to real estate, into a remainder, expectant upon the natural determination of an estate-tail; while as to personal estate, it stands good as an executory devise. But both limitations are supported, the only difference being, that the time within which the limitation of the real

estate may take effect is enlarged. When such is the practical result of the distinction, the verbal anomaly of interpreting the same words in two ways might be tolerated, if it were only for the sake of a consistent adherence to the rule, "that no devise over shall be construed to be an executory devise, which can take effect as a remainder." 12 East, 262. But the principle of the distinction lies even deeper. This difference in the construction of the same words, was supposed to be necessary, in order to effectuate the intention of the testator in regard to both classes of estates; and it is based on that cardinal maxim, with reference to which all the English rules of construction are moulded, that every part of the testator's intention must be carried into effect, when it does not clearly violate the policy of the law as to perpetuities; and that no devise shall be defeated, if effect can, in any manner, be given to it.

The reason of the rule, and its operation, and consequent limitation, are strikingly exemplified by the leading case of Forth v. Chapman. Lord Macclesfield, in the first place, inquires into the actual intention of the testator. "If," says he, "I devise a term to A, and if A die without leaving issue, remainder over: in the natural and vulgar sense this must be intended, if A die without leaving issue at his death, and then the devise over is good; the word die, being the last antecedent, the words, without leaving issue, must refer to that. Besides, the testator, who is inops consilii, will, under such circumstances, be supposed to speak in the vulgar, common and natural, and not in the legal sense." 1 P. Wms., 666. And having thus ascertained the intention, and carried it into effect, in regard to the personalty, he then adverts to the necessity of a different construction in regard to freeholds, in order to effectuate the obvious intention of the testator in favor of the issue. There being no words of perpetuity in the devise to the first taker, according to a stubborn rule, which was more respected formerly than it is now, particularly in this State, the issue, if there were any, could not take, unless an estate-tail were implied; and this, it was supposed could not be done, unless the failure of issue were construed to be indefinite. And hence Lord Macclesfield observes, that "the reason why a devise of a freehold to one for life, and if he die without issue then to another, is determined to be an estate-tail, is in favor of the issue, that such may have it, and the intent take place." 1 P. Wms., 667. And although he does not, in express terms, advert to the circumstance, that such a construction will not defeat the intention of the testator in regard to the limitation over, since it is supported as a remainder by the estate-tail: yet that this was in his lordship's mind, and furnished a ground for the difference in the construction is evident from what he immediately after says in relation to the difficulty of conceiving "how the same words, in the same will, at the same time, should be taken in two different senses." He said: "It might be reasonable enough to take the same words, as to the different estates, in different senses, and as if repeated by two several clauses; in which case, the different clauses would, as he conceived, have the different constructions above mentioned, to make both the devises good; and it was reasonable it should be be so, ut res magis valeat, quam pereat." 1 P. Wms., 667, 8.

The same principle runs through all the cases. In Porter v. Bradley, the propriety of the distinction did not, in fact, come in question: and Lord Kenyon, whose obiter dicta were often hasty and ill-considered, being

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shocked at the *grossness of the distinction adopted in Forth v. Chapman, if it were practically carried out; and not reflecting that in its operation it was little more than nominal, said, in reference to it, "If such a distinction existed in the law, it certainly would not agree with the rule, lex plus laudatur, quando ratione probatur; but it is not founded in law." 3 T. R., 146. But in Daintry v. Daintry, 6 T. R., 307, his lordship had occasion to consider the distinction more fully, both as to its principle and its practical effect; and he there supported the rule, because, otherwise, he would have been compelled to defeat the intention of the testator, by holding the limitation over void as to the personalty. So, too, in Crooke v. De Vandes, 9 Ves., 197, Lord Eldon adhered to the distinction laid down in Forth v. Chapman, in order to preserve the limitation over. And the decision in Tenny v. Agar, 12 East, 253, is placed by the court on a similar ground; namely, that such a construction was the only one which could give effect to the whole will. In Sheffield v. Lord Orrery, Lord Hardwicke, commenting upon Forth v. Chapman, and approving of Lord Macclesfield's decisions, says almost in his words: "And I think it very reasonable to take words in a different sense, with regard to the different estates, to support the intention of the party, ut res magis valeat, quam pereat." 3 Atk. 288. And in the case of Fonnereau v. Fonnereau, the same learned Judge uses the following strong language: "People frequently differ in expression, though they mean the same thing: and it would be construing wills by too great a nicety, to lay weight upon such strict forms of words when the meaning is plain. I never knew a case where this court has departed from such a latitude of construction, as the courts of Law would have made upon a limitation of a freehold estate, in order to defeat a bequest over, though it has frequently done so to support a devise over." 3 Atk., 318.

Such being the spirit of the English cases, and such the principle and operation of the rule, if Lord Hardwicke is correct as to the practice in cases where the reason of the rule does not apply, it is certainly a question deserving very grave consideration, whether these cases can furnish to our courts any authority to apply a similar construction to devises of real estate here, where it must produce a directly opposite effect, and in every instance defeat the acknowledged intention of the testator, which it was the sole purpose of the rule, in its origin, to effectuate. The object of all rules of construction is to ascertain the intention; and, therefore, a rule of construction which implies two opposite intentions from the same words, shocks the common sense of mankind. It may nevertheless be acquiesced in, when it is shewn, that from the specific difference in the qualities of the estates to which the construction is applied, not only is the distinction merely nominal, but it is even necessary to resort to it, in order to carry the whole intention into effect; but when this specific difference does not exist, and the rule is nevertheless applied and enforced, in its naked deformity, so as to defeat the intention, which is admitted by the rule itself, it becomes revolting to the moral sense also, and cannot fail to bring the law into merited disrepute.

Nor would it be going too far to say, that the distinction recognized by the English courts is not even literally applicable to real estates here. It is true, that in most of the cases, the distinction is spoken of as one existing between devises of terms and devises of freeholds: but in England all freeholds are capable of that peculiar limitation known as an estate-tail; and all the cases shew that the distinction is founded on the double capacity of an estate-tail, first as a particular estate, to support the most remote limitations over, as remainders,

and secondly, as an estate of inheritance, to be transmitted to issue. And Lord Hardwicke so expressly limits the rule in the case of the Earl of Stafford v. Buckley; in which he said, "according to Forth v. Chapman, a different construction may be put on the same words in respect of estates capable of such a limitation in tail, and of those not capable of it." 2 Ves., 181. When, therefore, the court decided that a fee-conditional was not a particular estate, and could not support a remainder, limitations over upon such estates were placed without the operation of the doctrine laid down in Forth v. Chapman. It was deciding, that no estate in this country is "capable of such a limitation in tail;" and, therefore, removed all ground for introducing the monstrous anomaly of construing two different intentions out of the same words, as applied to real or personal estate. It is no answer to say, that an estate-tail and a fee-conditional are analogous estates. They are not analogous in the very particular on which the distinction recognized by the English courts is founded; and cessante ratione, cessat ipsa lex. Neither is there anything in the notion, that such a rule of construction is neces-

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sary in order to *effectuate the intention in favor of the issue; for this may be effected by construing the devise to be of a fee-simple, a construction which has always prevailed in this State, whenever the testator has in any way manifested an intention to part with the reversion. The stubborn old English rule on the subject has never fully prevailed in this State. Vide Dunlap v. Crawford, 2 McC. Eq. 171, and the cases there cited. But even were it necessary to construe the words, "die without leaving issue," to mean an indefinite failure of issue, for the benefit of the issue; why not, at the same time, construe them to mean a failure of issue at the death of the party, in order to support the limitation over? This to be sure would be to make the same words mean, at the same time, different things; but certainly it is quite as allowable to do so, in order to support the intention as it is in order to defeat it.

The other point decided in this case, to wit: that a fee-conditional cannot support a remainder, it is not intended to controvert. The question has since been very fully considered, and the decision in this case recognized, in several instances; and the question must now be regarded as settled. Bedon v. Bedon, 2 Bail., 231; Adams v. Chaplin, 1 Hill Eq. 265; Edwards v. Barksdale, 2 Hill Eq. 184; Deas v. Horry, Id., 244. This decision conforms to the current of the English authorities from the time of Plowden, downwards; and, moreover, tends in its results to simplify one of the most intricate branches of our law, and to free it from a mass of metaphysical jargon, by which the analogous department of the English law is obscured. It must, however, have so important an influence on the whole of the law relating to limitations of real estate, that it will be proper to make a few observations upon it, with reference to the principal subject of this note.

The capacity of a fee-conditional to support a remainder, presents a question respecting which different opinions have been maintained; and Mr. Preston regards it as even yet "not finally, fully, and exclusively settled." 2 Prest. Est., 318. Mr. Preston himself, one of the most learned, profound, and discriminating commentators upon the law of real estates, maintains the affirmative, 2 Prest. Est. C., 7; and he refers to Bracton, who wrote before, and the author of Fleta, who wrote immediately after the statute de donis, and to a number of other authorities deserving great consideration on such a question, to establish the position, that similar limitations were allowed by the old law, before that statute. See these authorities collected, 2 Prest. Est. C., 8. And the authorities, to the contrary, which are of comparatively modern date, are entitled to less weight, for two reasons: first, that the question was a speculative, rather than a practical one, inasmuch as the statute de donis, by converting fees-conditional into estates-tail, had rendered it impossible, that the validity of such a limitation could be brought into question; except, indeed, in some very rare instances respecting personal hereditaments, such as annuities in fee; and cases of this sort did not arise until long afterwards. And secondly, the supposed separation of the fee into a particular estate, and the reversion, which was alleged to have been effected by the statute de donis, was the very contrivance fallen upon by the Judges, two hundred years after the statute was passed, in order to defeat the statute, by holding that the entail might be barred by a common recovery, 2 Inst., 335; and thenceforth it became necessary, ever afterwards to maintain, that a limitation after a fee-conditional was not allowed before the statute; a proposition, which, from the infancy of the law in the reign of Edw. I, when the statute was enacted, and the slender records which remained of it in 12 Edw. IV, when Taltarum's case was decided, it would not have been easy to controvert, however unfounded; vide Wilion v. Berkeley, Plow., 235, 242. But is it the proper mode of considering such a question, to conduct the inquiry merely with reference to what was the old law on the subject? Are not the improvements and amendments, which have been made in the law since, not only by statute, but by judicial decisions also, applicable to these, as well as to all other estates, and all other subjects on which the law operates? It is very eloquently and forcibly said, in one of our reported cases, that "there is a sort of judicial legislation, as it is called, which is inevitable and legitimate. In the progress of society, from a state of more simple to a state of more complicated relations, general principles must be pursued to their consequences; and subordinate rules deduced from those which are more general. Perhaps no case is decided which does not furnish grounds for the decision of other cases, differing in some degree from it, by fair and necessary induction. In this way, a system of laws, once simple,

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may be carried out, and adapted to the *infinite variety of human transactions. But this is improperly called legislation. As new cases arise they must be decided by induction and analogy; and this is not the making, but the expounding of law," per Harper, J., in State v. Witten, 1 Hill, 108. The learning of remainders grew up, and was settled, and refined by the Judges, long after the statute de donis was enacted; and when a question arises as to the capacity of a fee-conditional to support a remainder, is it not the legitimate mode of determining it, to inquire whether, according to the general principles of the law of remainders, the ancient estate in fee-simple conditional at common law, is, or is not, such an estate, as leaves a residuary interest in the grantor capable of limitation by way of remainder? If this be the true inquiry, there could scarcely be two opinions as to the answer. The only argument ever urged for the negative, viz: that "a fee cannot be mounted on a fee," is a merely verbal sophism. A fee-conditional is no more the whole fee, than a fee-tail. They are interests of precisely the same extent and duration. The possibility of reverter, as it is called, is no more a possibility than the reversion after an estate-tail. In point of certainty, as well as quantity, they are identical. If, then, a remainder can be limited upon an estate-tail, no sound reason can be alleged for not allow-

ing a similar limitation upon a fee-conditional. And see the consequences of the contrary rule of decision, and of referring merely to what was the old law previous to 13 Edw. I. for settling questions of this sort. To say nothing of the statute of wills, our own Act of 1734, P. L., 139, provided that all persons "having any estate or interest, in fee-simple in lands," should have power to dispose of them by will. And yet, because it is said, that before the statute de donis, there could be no limitation over upon a fee-conditional, it is held, that a testator in South Carolina cannot devise his right of reverter. Is not the right of reverter an interest in fee-simple in lands? The courts have, in effect, decided that it is so. Deas v. Horry, 2 Hill Eq. 244, and see Jones ads. Postell and Potter, 1 Harper, 92. And to call it "a mere possibility," will not change its nature. It is precisely the same possibility as the reversion after an estate-tail; and besides, it is now settled, that every interest in lands, although it be what is called a possibility, if it is descendible, is also devisable. Jones v. Perry, 3 T. R., 88. In that case it should be remarked, that the decision went upon the ground, that the statute of wills "enables persons having any manors, lands, &c., to devise; which must mean, having an interest in the lands," 3 T. R., 93. The latter words being the very terms which are used in our Act of 1734. Here then, in consequence of directing the attention exclusively to the old law, the courts have actually repealed the plain import of an express enactment of the legislature, upon no other ground than a mere speculation, as to what the law was, on a disputed point in the time of Edward the First.

These remarks are not made for the purpose of suggesting a review of the decision, in relation to the question as to the capacity of a fee-conditional to support a remainder. The question is settled; and it is of much more importance that it should be settled, than that it should be settled in any particular way. If the decision has left an evil in our legal system which requires correction, the legislature may correct it. And it certainly is an evil, that real estate should be clogged with an incumbrance, in the shape of a possibility of reverter, which even the owner of the incumbrance cannot remove, or release, either by will or by deed. But an evil like this cannot long be permitted to exist in a society, so essentially commercial in its character as ours; and if the remedy applied should be an abolition of fees-conditional, by converting them into fees absolute, the decisions referred to will have led to a fortunate result. These comments, however, have been offered with a very different object, viz: to exhibit the error in principle, and the evil in the consequence, of deciding questions of this sort, with exclusive reference to antiquated rules of law; and without regard to the "progress of society from a state of more simple to a state of more complicated relations;" instead of "pursuing general principles to their consequences," and "deciding by induction and analogy" from the existing state of the whole law: the inevitable result of which must be, to render the law a mass of incongruous and unintelligible rules, without principle or symmetry, and alike unworthy of the age and the people to which they belong.

The establishment of the rule, that a fee-conditional cannot support a remainder, renders nearly all the English rules in relation to the construction of devises of real estates, wholly inapplicable in this country. They are all moulded with reference to this capacity of an estate-tail, in conjunction with its qualities as

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an *estate of inheritance; which peculiarities render that estate so convenient an instrument for effecting the various intents of a testator, whilst its liability to be barred by a fine or recovery avoids all objection to it as a perpetuity, that it has long been a great favorite with the English courts. It is implied, whenever there exists the slightest ground for the implication; and a large portion of the rules for the construction of devises of land have, for their sole immediate object, the creation of estates-tail by implication. In their ultimate results all these rules effect their legitimate object of carrying out the intention of the testator; but they would not produce this effect if applied to bequests of personalty, which are not capable of limitation in tail; and for that very reason their operation is confined by the English courts to devises of lands, which alone are capable of such limitation. As soon, then, as it was ascertained, that a fee-conditional would not support a remainder, these rules of construction became as inapplicable to devises of land here, as they are to devises of personal estate in England; and the attempt to apply them can lead to no other result, than to violate the reason of the rule, and defeat the intention of the testator, which it was the object of the rule to carry into effect; and, finally, to involve the law itself in inextricable confusion.

Shall we then persist in applying the English rule, independently of its reason, and with inverted effect; or should we not rather adopt a new rule of our own, carrying out the reason of the English rule, and producing uniformity in the results? It is said, that this "would probably tend to destroy the symmetry of the law, and create new and greater difficulties than those which we now have to contend with:" but it is clear, that this must be the result of adhering to the letter of the old rule, instead of carrying out its spirit by a new one. It is a mistake to say that the new rule removes land marks. The land marks are removed by the decision which destroyed the analogy between estates-tail and fees-conditional; and the new rule does no more than give us the true bearings of the new positions to which they have been removed. To persist in adhering to the letter of the old rule, after so radical a change in the subject matter on which they are to operate, is very much like attempting to navigate a new sea, by maps and charts, which represent only the coasts and shores, the rocks, banks, reefs and breakers of another.

It will be cheerfully conceded, that it is not, in all cases, a sufficient reason for deciding against a settled rule of law, "that we do not see the reason on which the rule is founded." Yet a Judge, who decides, without looking to the reason of the rule, will as often decide against the law, as in conformity to it. And there is, moreover, a vast difference, in regard to the legitimate control which courts possess over them, between rules of law, properly so called, and rules of construction. The latter are the mere creatures of the courts; the instruments which themselves have made, as a guide to the intention in doubtful cases. The rule of law is, that the intention shall be pursued; and the courts transcend their authority, not when they remodel their rules of construction, so as to effectuate the intention, but when, for any reason, they adopt or enforce a rule which habitually defeats the intention. The rules of construction, of the English courts, like their rules of practice, have always been applied by our courts, under modifications suited to our own institutions. Hundreds of instances of this might be cited from our books, to which it would be needlessly tedious to refer. It will be sufficient to mention the cases in relation to devises, without words of perpetuity. See Dunlap v. Crawford, 2 McC. Eq. 171; and see also for the English cases to the contrary, the opinion of Nott, J., in Hall v. Goodwyn

and Moore, 2 N. & M., 334. Even the learned Judge, who delivered the opinion in this case, although in general strongly opposed to a departure from the English decisions, seemed to think, in Hudnal v. Wilder, 4 McC., 294 [17 Am. Dec. 744], that the difference in the substantive character and value of real and personal estate in this country, and in England, would warrant a departure from the rule, settled by the decisions in that country, on the construction of the stat. 27 Eliz. After some remarks on the peculiar character of property in slaves, he observes: "It is difficult to comprehend, how even a statute of the British Parliament can make a person believe, that a conveyance, containing both real and personal estate, or contemporaneous deeds, one containing real and the other personal estate, attended with precisely the same circumstances, and made with the same object, can be good as to one, and fraudulent and void as to the other." 4 McC., 301. And further on he says: "The question then is, whether we shall adopt the English decisions to the whole extent to which they have gone, or whether we shall give our own construction to the statutes, and adopt a uniform rule both as to real and personal estate." Id. And he decides for the latter, with reference indeed to the meaning of the statute, but with regard also to our own peculiar institutions. And to go no further back than the preceding pages, the same learned Judge has decided in Young v. Teague, (ante, *13,) that the English practice of opening biddings, on sales, by the master, is not applicable to sales by the commissioner here.

The opinion in the present case contains this remark: "It is also to be observed, that this will was made nearly forty years ago; and we are now called upon to apply to it a rule of construction, which probably had not been heard of at that time, merely because we do not see the reason why the same rule should not apply to real and personal estate." If we are to judge of what the law was "forty years ago," by the report of the contemporaneous case of Cruger v. Heyward, 2 De S. E., 94, the limitation over in the present will, was regarded as good, so far as relates to the real estate; for in that case, which was very extensively argued, and very carefully considered, the court, consisting of Chancellors Rutledge and Marshall, decided that a limitation over, on the natural determination or efflux of a fee-conditional, was valid. That case was probably looked upon to be good law at the time, and long afterwards; and it does not appear to have been overruled, or even questioned, until the law was altered by the decision in the present case. And yet, that case is not even cited in this opinion; from which it may, perhaps, be fair to infer, that neither the question itself, nor its important bearing on the general law, received that full consideration, which the learned Judge would have bestowed upon it, and which he was so well qualified to bestow upon it, if his attention had been more immediately directed to the subject.

The whole subject did, however, receive a very full consideration in the subsequent case of Bedon v. Bedon, 2 Bail., 231; and there the court, having sustained the decision in this case, that a fee-conditional cannot support a remainder, decided also, that, as a consequence of it, all the English rules of construction, which create estates-tail by implication, become inapplicable to devises of real estate here. And they refused to imply a fee-conditional from words, which in England would have been held to give an estate-tail by implication; but they construed the devise to be of a fee-simple, in order to support the limitation over, so that effect might be given to the whole of the testator's intention. The same doctrine has been maintained and enforced in the subsequent cases of Adams v. Chaplin, 1 Hill Eq. 265, and Edwards v. Barksdale, 2 Hill Eq. 184; and in the two last-mentioned cases, it seems to be intimated, that a gift to one and "the heirs of his body," will be regarded as essential to the creation of an estate in fee-conditional, for that these are the only words which, at common law, could raise that estate; and that all other words which have been held to give an estate-tail, do so only by implication, and construction of the testator's intention. 1 Hill Eq., 282; 2 Id., 198.

These cases rest upon a basis of sound reasoning; and it is to be hoped, that as new cases arise, the general principles of these decisions will be carried out to their consequences and applied. If they are, the rule of construction, which imputes a difference of intention to a testator in respect to his real and his personal estate, when he devises both by the same words, must certainly be abandoned; and if ever the question again comes up, it will not, perhaps, be regarded as having been definitively settled by the decision in Mazyck v. Vanderhorst.—R.

Bailey, Eq. *58

*EDWARD C. WALKER, Adm'or, v. JOHN MAY, and Others.(a)

(Charleston. March, 1830.)

[*Husband and Wife* ⇐11.]

Where a married woman is the sole distributee of the personal estate of an intestate, and there are no debts, and the husband is in possession of the property during the coverture, the marital right attaches, although there has been no administration: and if administration is obtained after the death of the husband, the administrator will not be entitled to maintain a suit for the recovery of the property.

[Ed. Note.—Cited in Markley v. Singletary, 11 Rich. Eq. 403.

For other cases, see Husband and Wife, Cent. Dig. § 53; Dec. Dig. ⇐11.]

This case came up on an appeal from the decree of De Saussure, Chancellor, made at Walterborough, in January, 1829; and will

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be *sufficiently understood from the opinion delivered in the Court of Appeals.

JOHNSON, J. This court concurs in the order of the Chancellor dismissing the complainant's bill; and I will proceed to state concisely the grounds upon which our concurrence is founded. From the case sent up here, it appears that the negros, the subject of controversy, belonged to the four children of Andrew Hall, deceased, all of whom died in their infancy, leaving their mother, then Mrs. May, the wife of Robert May, surviving them, and, as it is conceded, the sole distributee of their estates. At the time of their deaths, which happened between 1810 and 1814, it appears that Robert May was in possession of the negros, and retained possession until his death in 1823; and as the estates of the infants were not indebted, no administration was granted until

(a) A case between same parties, reported 2 Hill, 22.

sued out by the complainant in 1827. A short time after the death of Robert May, the negros were taken in execution, and were sold to satisfy his debts by the present defendant, who was then sheriff. If they were his property, of necessity the complainant can have no right to recover, whether the defendant did, or did not, purchase at the sale, or was, or was not, competent to do so; and the case will be, perhaps, better understood, by confining our inquiries to the question, whether they were, or were not, the property of Robert May. That on the death of all her children intestate, under age, without issue, and free from debt, their mother became entitled to all the interests which they possessed in the negros; and that all chattel interests to which the wife was entitled, and which were reduced into possession by the husband during the coverture, belonged to him, are uncontroverted conclusions of law; and the question therefore now is, whether Robert May, the husband, did reduce these negros into his possession during the coverture.

That he had the actual and exclusive possession of them, for more than ten years before his death, is not denied; but the argument in support of the motion assumes, that his possession was fiduciary only, and vested no beneficial interest in him. The general rule is very clear, that when the husband holds property in trust, in which the wife has an interest in common with others, as when he is executor, or administrator of an estate in which she is interested, his marital

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rights do not attach, until the in*terest of the wife is severed from that of the others; and it is for the reason, that until then the thing itself is uncertain; but here the thing was, at the time, and still is certain; and the case stated ascertains fully the nature and extent of the wife's interest. An administration is the only legal mode of ascertaining the interest of persons in the estate of an intestate; and, in general, it is the only mode by which this court can ascertain it. But the circumstances of this case are peculiar. The intestates were all infants, and incapable of contracting debts; they lived with Robert May, the husband of their mother, whose duty it was to provide for them, and who did provide for them all that was necessary; and whatever of legal obligation the law raised against them, or their estates, was to him; thus not only negativing the existence of any other interest, but showing the utter impossibility that any other could exist. All the objects of an administration have, therefore, been obtained. The possession of May did wrong to no one, and he only had that to which he was entitled. If he held in trust, it was for himself. If as executor, it was in his own right instead of his own wrong.

Let us test this, by supposing an administration regularly granted, immediately after the death of the children, to the complainant, or to a stranger. In an action at law he might, perhaps, have been entitled to recover the negros from Robert May; but there can be as little doubt, that upon a bill filed, showing the state of facts that in truth exist, he would have been restrained from enforcing his title. A court of Equity will never suffer that to be done, from which no benefit can result to him who asks it, and which may, and must, necessarily, prove injurious to another. Why permit the administration to take the property of an intestate, from the only person in all the world who could have any interest in it, when, on the instant, the same court would order it to be restored? What is this case? The complainant comes into the Court of Equity, to ask that the property of the estates of his several intestates shall be put into his hands to be administered. For what object? Their mother was entitled to it; her husband reduced it into his possession, and it became his; and they have enjoyed it. What more does he want? What is there left to give him?

Thus far I have considered the case in reference to the rights of the complainant alone; but regarding the defendant as not incompetent to purchase, he stands in the

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relation of a creditor, for the negroes *were sold to pay the debts of Robert May, and in that character he has claims which deserve consideration. It was before shown, that Mrs. May was entitled to all the interest in the estates, of which these negros constituted a part. Her husband had them in possession, and exercised over them all the acts of ownership, which he could have done over his own property. He used and disposed of them as his own property; and who was there to question his right? He gained credit and contracted debts upon the faith that they belonged to him; and it will not be permitted that the complainant, or any one else, even though there might be an interest, should take advantage of their negligence, to impose such a fraud on his creditors.

The circuit decree proceeds on the ground, that the complainant is barred by the statute of limitations; but independently of the case of Geiger v. Brown, 4 McC., 423, referred to in the argument, and decided by this court, I confess I cannot well discover in what manner the statute could operate. Whatever of interest there was in the subject matter, was concentred in Robert May and wife; and the possession was theirs; so that there was no one to be affected by time, and no one against whom the statute could run. It could only operate against themselves, and for their own benefit; and, therefore, its operation must be nugatory.

Whatever may be the rights of the de-

fendant, the complainant is not entitled to recover. It is very clear, however, that the defendant was the purchaser, through an agent, at his own sale as sheriff; and the Act of 1791, expressly declares such purchase void. 1 Faust, 41, 7 Stat., 263. It would seem, from Mrs. May's letter of 2 January, 1824, that there was some understanding that he was to bid in the negros on account of the estate; and I have no question that he might legally do so; and if that be true, he is liable, on account of any violation of that understanding; but it is only to those who were parties to it, and not to this complainant. The motion to reverse the decree must be refused.

COLCOCK, J., concurred.

Elmore, for appellant.
Memminger, contra.

Decree affirmed.

Bailey, Eq. *62

*JOHN McTEER v. DANIEL MOORER and MALACHI FORD.

(Charleston, March, 1830.)

[1. *Execution* ⇐171.]

A court of Equity will not entertain jurisdiction of a suit to injoin a sale of slaves, by the sheriff under execution, on behalf of a prior mortgagee, who has a plain and adequate remedy at law.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 516; Dec. Dig. ⇐171.]

[2. *Specific Performance* ⇐69.]

Although a bill might be sustained for the delivery of slaves, on the same principles as bills for the delivery of family plate, or pictures; yet the jurisdiction depends upon the peculiar circumstances of the case, and these must be stated, or the jurisdiction will be declined.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 200–202; Dec. Dig. ⇐69.]

[3. *Equity* ⇐42.]

Want of jurisdiction may be taken advantage of at any stage of the proceedings; and even where the defendant has by his answer submitted to the jurisdiction, he may move, at the hearing, to dismiss the bill for want of equity.(a)

[Ed. Note.—Cited in Miller v. Furse, Bailey, Eq. 187.

For other cases, see Equity, Cent. Dig. §§ 119, 120; Dec. Dig. ⇐42.]

Before Harper, Chancellor, at Walterborough, January, 1830.

On this cause coming on for a hearing, a motion was made to dismiss the bill, for want of equity appearing on its face.

The bill charged that in 1824, one Henry Ulmer, mortgaged certain slaves to the complainant, to secure the payment of $400, at a day which has long elapsed; that the defendant, Malachi Ford, as ordinary, has since obtained a judgment against Ulmer, on which execution has been issued and levied on the same slaves; and that the defendant, Daniel Moorer, as sheriff, is about proceeding to sell the said slaves. And the bill prayed an injunction to stay the sale; which was granted by the commissioner. The answer of the ordinary charged the mortgage to be fraudulent; but consented that, if it should be found valid, the slaves might be sold, and the surplus, after satisfying the mortgage, applied to his execution.

Harper, C. I have no hesitation in granting the motion, so far as the merits of the bill are concerned. The complainant, according to his own statement, had a complete legal title to the slaves, and might have seized them, or sued for them at law. Not only the rule of equity but the Act of assembly provides, that parties shall not sue in equity where there is plain and adequate remedy at law. Act of 1791, 1 Faust, 34, 7 Stat., 260. I will not say that a case might not be made, in which a bill would be sustained for the delivery of slaves; on the same principle that bills are allowed in England for the delivery of family plate or pictures. There may exist circumstances to give family slaves a peculiar value to the owner, which they would have to no one else, and for which he could not expect compensation in damages. But it is unnecessary to say, that in such cases, those circumstances, which form the

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ground of the court's *jurisdiction, must be stated and proved. The principle can have no application in the present instance.

What seemed to me to admit of more doubt, was, whether the defendant, after submitting to the jurisdiction of the court by his answer, could afterwards avail himself of this want of equity. The maxim, that consent cannot give jurisdiction, must, I think, be taken with this qualification; that the court does not of itself take notice of the want of jurisdiction, when the matter is of such a nature as might incidentally be drawn within the jurisdiction of the court. But, I believe, the practice of this court has been to allow parties to take advantage of such defect at any stage of the proceedings. No doubt a demurrer for the want of jurisdiction would have been sustained; and the rule seems to be, that a demurrer is intended to save expense, or avoid an inconvenient discovery; and that if a demurrer would hold, the court will not, unless in some particular cases, not analogous to the present, grant relief at the hearing, although the party may have answered. Mitf. Pl., 100. The same authority states, that the formal exceptions in the introductory part of an answer, are to such matters as the party might have taken advantage of by demurrer or plea.

(a) Overruled by Miller v. Furse, post, 187. See note there.

It is therefore ordered and adjudged that the bill be dismissed.

On appeal from this order, COLCOCK, JOHNSON and RICHARDSON, Justices, unanimously concurred in opinion with the Chancellor.

Appeal dismissed.

Bailey, Eq. 63

MAGDALINE KEITH v. PAUL TRAPIER, Executor of John Keith, and R. O. ANDERSON.

(Charleston. April, 1830.)

[1. *Dower* ⟸15.]

The widow is entitled to dower of the surplus value of land, mortgaged by her husband in his lifetime, after satisfying the mortgage debt, although she had renounced her dower on the mortgage. Her renunciation excludes her from dower only as against the lien of the mortgage. Vide Keckley v. Keckley, 2 Hill Eq. 252.(*a*)

[Ed. Note.—Cited in Williams v. Hollingsworth, 1 Strob. Eq. 108, 47 Am. Dec. 527.

For other cases, see Dower, Cent. Dig. §§ 32, 58; Dec. Dig. ⟸15.]

[2. *Dower* ⟸84.]

Dower must be assessed on the actual value of the land, subject only to the lien of prior incumbrances. And where the husband sold to a mortgagee, to whom the wife had renounced, and in order to give an unincumbered title, it was agreed that the land should be sold under a decree of foreclosure, the mortgagee to bid off if it did not exceed a stipulated price, and to pay the difference if it sold for less; and the land was sold accordingly, and was bought by the mortgagee for less than the stipulated price. *Held*—That dower must be assessed on the price which the mortgagee had agreed to pay, and

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not on the price for *which the land was sold under the decree, the amount of the mortgage debt being first deducted.

[Ed. Note.—Cited in Alexander v. Hamilton, 12 S. C. 41; Geiger v. Geiger, 57 S. C. 529, 35 S. E. 1031.

For other cases, see Dower, Cent. Dig. §§ 322–324; Dec. Dig. ⟸84.]

[3. *Dower* ⟸84.]

By whatever rule as to the duration of life the value of dower is assessed, the estimate must be made in reference to the time of the assessment, and not of the husband's death.

[Ed. Note.—Cited in Stewart v. Pearson, 4 S. C. 8.

For other cases, see Dower, Cent. Dig. § 322; Dec. Dig. ⟸84.]

[4. *Dower* ⟸107.]

The widow is entitled to equity, to an account for rents and profits until her dower is assigned; or to interest if a sum of money is assessed in lieu of dower. The contrary rule in proceedings at law for the admeasurement of dower, is founded on the inadequacy of the proceeding for the recovery of damages, and not on the want of title to the mesne profits. Vide Mey v. Mey, 1 Bail., 277;(*b*) Gordon v. Stevens, 2 Hill Eq., 429; McCreary v. Cloud, 2 Bail., 343.(*c*)

[Ed. Note.—Cited in Clark v. Tompkins, 1 S. C. 124; Tibbetts v. Langley Mfg. Co., 12 S. C. 487; Phinney v. Johnson, 15 S. C. 163.

For other cases, see Dower, Cent. Dig. § 180; Dec. Dig. ⟸107.]

[This case is also cited in Grube v. Lilienthal, 51 S. C. 452, 29 S. E. 230, and distinguished therefrom.]

Before Harper, Chancellor, at Georgetown, February, 1829.

Bill for assignment of dower. John Keith, the husband of complainant, was seized of a plantation called Keithfield, which he mortgaged in fee to James Withers; and to render the security more ample, his wife, the present complainant, renounced her right of dower on the mortgage. The mortgage was afterwards assigned to the defendant, R. O. Anderson; and there remained due on it the sum of $13,714.78, when John Keith entered into a treaty with the defendant, Anderson, for the sale of Keithfield, and an agreement was concluded between them at the price of $34,000. In order to make an unincumbered title, it was agreed that a bill should be filed for foreclosure of the mortgage; that the plantation should be sold under a decree of the court, and bid off by the defendant, Anderson, provided it should not exceed the stipulated price; and if it should be bid off for less, the said defendant agreed to pay the difference to Mr. Keith. The bill was filed accordingly; the plantation was sold by the commissioner, and bid off by Mr. Anderson, at $27,000; the price to be paid and the title delivered, according to the terms of the decree, on 1 January, 1824. John Keith subsequently died, and the complainant claimed dower of the surplus proceeds of the land after satisfying the mortgage to Withers.

Harper, C. The questions made in the case, are: Whether, having released her dower in favor of the mortgagee, the complainant can have any right of dower in the surplus of the money for which the land was sold after satisfying the mortgage. If she have such right, whether it is to be assessed on the

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price for which *the land was sold at auction by the commissioner, or whether the additional sum is to be included, which was paid for the plantation by the defendant, Anderson, according to his contract. In what manner must the dower be assessed? In making similar assessments, it has been usual to allow the interest on one-third of the price for seven years, the estimated term of an average life; but as several years have elaps-

(*a*) Rickard v. Talbird, Rice E., 158; Wilson v. McConnell, 9 Rich. E., 500; Henagan v. Harllee, 10 Id., 285; 2 Hill, 46; Ril. E. 205; 1 Rich. E. 271.

(*b*) Rich. E. C., 178.

(*c*) Brown v. Caldwell, Sp. E., 322; Rice E., 171; Woodward v. Woodward, 2 Rich., E., 23. If widow claims and obtains dower at law, she cannot come into equity for arrears of her third of rents and profits before dower was assigned. Bullock v. Griffin, 1 Strob. E., 60.

ed since the death of the husband, and indeed since the commencement of this suit, the questions arise—whether the life is to be estimated at seven years from the death of the husband, or seven years from the time of the assessment; and if the latter, whether the wife is entitled to one-third of the interest which has accrued since the husband's death, up to this time, in addition to the interest for seven years from the time of the assessment.

The two first questions were not pressed in argument, and hardly admit of dispute. The cases in this State have sufficiently settled, that a wife is entitled to dower, in what we term, although not with strict propriety, an equity of redemption after a mortgage in fee. In the case of Crafts v. Crafts, 2 McC., 54, where the husband had mortgaged previously to the marriage, the court held that the wife was not entitled to dower, as against the mortgagee; but that she had a right to redeem, and that the right to dower would then attach. In Brown v. Duncan, decided by the Appeal court, in 1827, 4 McC., 346, it was held that where the husband had purchased the land, and immediately mortgaged it back to the seller for the purchase money, the wife had no right of dower, as against the mortgagee, but was entitled to dower in the surplus, after satisfying that mortgage, as against subsequent mortgagees. In England, a decision to the same effect was made in Banks v. Sutton, 2 P. Wms., 700; but that decision seems to have been overruled. Attorney General v. Scott, Ca. Temp. Talb., 138; Godwin v. Winsmore, 2 Atk., 525; Dixon v. Saville, 1 Bro. C. C., 326; Forder v. Wade, 4 Bro. C. C., 520, and D'Arcy v. Blake, 3 Sch. & Lef., 387.

The doctrine which excludes a wife from dower in an equitable estate, is considered a harsh one in England. But in this State the husband, in consequence of the Act of the legislature on the subject, has a legal seizin in the mortgaged premises. Act of 1791, 1 Faust, 65, 5 Stat., 169. The precise point

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has been decided in New York, by *Chancellor Kent, in the case of Titus v. Neilson, 5 John. C. R., 452. The husband executed a mortgage, in which the wife joined, and duly acknowledged it; and this excluded her from dower in favor of the mortgagee: but she was held to be entitled to dower in the surplus, after satisfying the mortgage. In this case the wife renounced her right of dower only in favor of the mortgagee; and I think it cannot be doubted, that a satisfaction of the mortgage operates a defeazance of the renunciation. If she had not so renounced, she would have been entitled to dower in the whole estate, notwithstanding the mortgage.

The second point is as little doubtful. If a part, only, of the mortgaged property had been sold, sufficient to satisfy the mortgage, she might have taken, in specie, a third of what remained for life. The whole, however, was sold, and she cannot have it in specie. To what then is she entitled? The value of one-third of the surplus; and the value cannot be ascertained by any better test, than what the property actually brought on sale. The property actually brought, and the purchaser actually paid, $34,000, which is about $20.285 over what was due on the mortgage; and it is immaterial whether this was bid at a public sale, or agreed to be paid by private contract. If the husband had sold and released to the mortgagee, and thereby given him an unincumbered title, without any interference of the court, I cannot conceive how this could have affected the wife's rights in the additional price paid for the equity of redemption. If the mortgage had remained unsatisfied after the husband's death, one-third of the land might have been assigned to her, and the whole left subject to the mortgage; and, in that case, the respective tenants must have contributed, ratably, to remove the incumbrance. She would have been tenant for life of one-third; and the rule for apportioning an incumbrance between tenants for life, and the remainderman in fee, is that the tenant for life shall keep down the interest; or if the principal is to be paid, to sell so much of the estate as will discharge the incumbrance, or to sell the whole, and after satisfying the incumbrance, give the tenant for life his estate for life in the surplus of the proceeds. In this case, if only a portion of the estate, sufficient to satisfy the mortgage, had been sold, the widow would have been entitled to a life estate, in one-third of the residue: but the whole was

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sold, and she is entitled, after satisfy*ing the mortgage, to one-third of the proceeds for life. The proceeds must be what the land actually sold for, whether paid to Mr. Keith's executor, or the officer of the court.

The third point presents an appearance of more difficulty. In assessing dower, a practice has prevailed, not sanctioned, so far as I know, by any express authority, of estimating all lives, indiscriminately, at seven years; and this practice is founded on the legal notion, that, taking all the lives in being, an average life, estimated at any given period, is seven years. Whether this practice has made a rule, to be followed in all cases, is a question, upon which I shall not at present express any definite opinion. Insurance offices have, I believe, rules for estimating lives, according to age, constitution, and other circumstances; but these rules I am not acquainted with, and if I were, I have not the evidence in this case to enable me to apply them. This must be, in the first instance, matter of reference; but thus much may be said by way of direction. If there be such a rule on the ground mentioned, that any life, at any period, is to be estimated at seven

years, it follows of course, that the life in question is to be valued at seven years, at the time when the assessment is made, whenever that may be; or if it is to be estimated according to circumstances that must have relation to the future, at the period of assessment. The past is out of the power of contingency, and is not the subject of estimation.

If the dower were to be assigned in the land itself, the widow would take the land after the decree of the court; and the question would be, whether she was entitled to an account for the arrears of rents and profits since the death of her husband: and that is, in fact, the true question in this case. She is entitled to have the land, or its equivalent, estimated at the same time; and one-third of the principal sum, for which the land sold, is the equivalent for one-third of the bond. The purchase money was substituted in place of the land, at the time of sale; and the interest, when the money was payable, or began to bear interest, came instead of rents and profits: and the same question arises, is she entitled to an account for the arrears of interest?

In the case of Heyward v. Cuthbert, 1 McC., 386, it was decided, that a widow, to whom dower had been assigned, was not entitled to damages for the detention of the

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dower. The grounds of that de*cision were, that by the English law, no damages were recoverable in dower, until the statute of Merton, 20 Hen. III., c. 1, and that statute is not of force in this State. That, however, was a decision in a court of Law; and there is no doubt, that the Court of Chancery, ever since it has exercised jurisdiction in cases of dower, has uniformly given an account for the arrears of rents and profits. But as this jurisdiction has been exercised only since the passing of the statute of Merton, it is, perhaps, not perfectly clear, whether the account has been allowed in conformity to the statute, or on distinct equity principles. This statute being in existence, there was no need to explain this matter in the decided cases; but on referring to the cases, I am sufficiently satisfied, that the account for rents and profits has been allowed on distinct equity principles, entirely independent of the statute.

Courts of Equity give an account of rents and profits in dower, when no damages could be recovered at law under the statute. In the case of Dormer v. Fortesque, 3 Atk., 130, Lord Hardwicke observes, that the court will give the dowress profits from the time, not only of her demanding, which is the time from which she is to have it in her writ of dower, but will give it to her from the time her title accrued; although the statute gives her damages only from the time of her demand. Lord Coke, also says, 1 Inst., 32 b., "if the wife have not requested her dower, she shall lose the mean values and her damages." But "it must be supposed that the dowress has nothing to live upon but her dower, and the mesne profits are her subsistence from the time of her husband's death; and the course of this court seemed, therefore, to have been to assign her dower, and universally to give her an account from the death of her husband." By the master of the Rolls, in Curtis v. Curtis, 2 Bro., C. C., 632. In Banks v. Sutton, 2 P. Wms., 719, which may be authority, as to this point, the decree was for "the arrears of dower from the death of her husband, she allowing the third of the interest of the mortgage money unsatisfied at that time, and her dower to be set out if the parties differ." See, also, Oliver v. Richardson, 9 Ves., 222. In cases where the deforciant is dead, before the right to dower is established, so that the widow's right to an action for damages under the statute, is gone at law, the court will give arrears of rents and profits. That was the case

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of Curtis v. Curtis, 2 Bro., C. C., 620. So, *if the widow should die before she had established her right to dower, equity will decree an account in favor of her personal representative, 1 Fonbl., 22.

The decreeing an account for arrears in dower, seems to rest on the same grounds precisely, as the decreeing an account for the rents and profits of real estate. The practice of the court to give an account of rents and profits does not depend on any statute, but on general principles of equity. Lord Hardwicke puts them both on the same footing in Dormer v. Fortesque. He thinks there must be some ground of equity, to give the court jurisdiction; as trust, or infancy, in cases of real estate, or an outstanding term, or discovery in cases of dower: but having jurisdiction, the court will give complete relief by decreeing an account, in general, from the time the title accrued, although under special circumstances, the court may restrain it. Perhaps it would be more correct to speak of these things as identical, rather than resembling. In dower, the widow recovers real estate; and in both cases the court proceeds on the principle, that one party has received what the other was entitled to.

The reason why damages were not recoverable in dower, previously to the statute of Merton, as explained in Curtis v. Curtis, 2 Bro. C. C., 630, was, that damages were not recoverable in any real action. The writ of dower, and the writ of right of dower, were real actions. There is no doubt, that the widow was, at law, entitled to the land—that is, to the use, possession, or rents and profits, from the death of her husband. Magna charta expressly provided, (*d*) that dower shall be assigned within forty days, although, as Lord Coke says, that Act was or

(*d*) 1 Stat., 81.

little effect, for that no penalty was thereby provided, if it were not done. Co. Litt., 32 b. The right at law was perfect, but for the technical reason mentioned, there was no remedy. It is, however, the peculiar office of equity, to afford a relief, when the law gives a right, but the rigor of legal forms affords no remedy, or an inadequate remedy. I cannot doubt, that, independently of the statute of Merton, referred to, a court of Equity will give an account for the arrears of rents and profits in dower.

This view of the subject also conforms to the provisions of the Act of assembly of 1824, 6 Stat., 238, amended by that of 1825, 7 Stat., 330 (not referred to in the general index, 10 volume.) The rule established by these Acts for assessing dower, against a purchaser of the land, is the value of the land at the time of alienation, with inter-

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est *from the time the widow's right to dower accrued. Acts of 1824, p. 24, and of 1825, p. 20. This is in effect giving arrears, or damages for detention. In this case, I suppose the value of the land at the time of alienation to be ascertained by the price at which it sold. The widow is entitled to the value of her dower in that, with the interest which has accrued since her husband's death.

It is ordered and decreed, that it be referred to the commissioner, to take an account of the interest which has accrued on the principal sum for which the plantation, Keithfield, was sold by John Keith, deceased, to the defendant, R. O. Anderson, after satisfying the mortgage executed to James Withers, and afterwards assigned to the said R. O. Anderson, since the death of the said John Keith, up to the time when the account shall be taken; including as well the amount bid by the said R. O. Anderson, at the commissioner's sale, as the additional amount stipulated by contract, to be paid by the said R. O. Anderson, to the said John Keith: and that one-third of the said amount of interest to be paid to the complainant for her arrears of dower. And it is further ordered, that it be referred to the commissioner, to assess the value of the complainant's right of dower in the said principal sum, after satisfying the mortgage as aforesaid.

From this decree the defendant appealed.

Dunkin, for the appellant, cited 2 Saund., 44, n. (g.) and Heyward v. Cuthbert, 1 McC., 386. It is quite clear, that at common law there were no damages in dower; and that the right to recover them was given by the statute of Merton, which is not of force in this State. If the demandant is compelled to go into chancery to make out her title, that court will allow her arrears of dower; but this is in conformity to the rule of the statute. 3 Bro. C. C., 631. There is no case in which the arrears have been allowed on the ground of original chancery jurisdiction. In Dormer v. Fortesque, 3 Atk., 130, Lord Hardwicke is made to say, that the court allows arrears of dower from the death of the husband; although the statute gives damages only from the time of the demand. But this is a mistake of the reporter. 3 Bro. C. C., 633. The statute in express terms gives damages from the death of the husband to the day of judgment in dower. 1 Inst., 32 b, 33 a. The right to the arrears is given only by the statute, and as the statute is not of force here, the right does not exist. Equity may give a remedy, where the law

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gives a right; *but where there is no right, there can be no remedy. The Acts of 1824 and 1825 cannot apply to this case, for the rights of the parties were fixed and vested before those Acts were passed.

King, contra, cited Harvey v. Harvey, Sir Thos. Raym., 366. There is a distinction between damages in dower and mesne profits. The former were given by the statute of Merton, but the right to the latter is a common law incident to the title of the dowress; and it is on this ground that equity decrees an account for rent and profits. 1 Mad. C., 243. Wakefield v. Child, cited, 1 Fonbl., 159, n. (k.) The court in Heyward v. Cuthbert, decided nothing more, than that the demandant could not recover damages in her action of dower, which is in the nature of a real action; but non constat, that she could not maintain a separate action for mesne profits. If the right to the arrears existed, the Acts of 1824 and 1825, which relate to the assessment, do apply to and govern this case.

COLCOCK, J., delivered the opinion of the court.

We concur in the decree of the Chancellor, and should not have thought it necessary to add anything to the elaborate view which he has presented of the doctrines involved, but for the earnestness with which the position maintained in the decree, that an account for mesne profits is allowed by courts of Equity, in suits for dower, on distinct principles, and independently of the statute of Merton, has been controverted. This doctrine, it is insisted, is unsupported by principle or authority, and is directly contrary to the decision in Heyward v. Cuthbert; but we are of a different opinion, and, I think, it will not be difficult to shew, that the decree is as correct, on principle, in the particular objected to, as it is conceded to be upon all the other points involved in it.

I am very much inclined to think that the question is nothing more, after all, than a dispute about words. At this day, "damages" for the detention of real property are usually understood to comprehend mesne profits, and, indeed, they are generally regarded as convertible terms; but there is a distinction between them, which seems always

to have been admitted, and which is even yet recognized in the action of ejectment; in which, although the plaintiff is entitled to recover damages, yet it is only for the injury sustained by the ejectment, which, being fictitious, the damages are merely nominal; and for the recovery of mesne profits, anoth-

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er action is necessary. *If the statute of Merton, then, gave the widow anything, to which she was not before entitled, with the exception of a new remedy, it seems to have been a right to damages as distinguished from mesne profits, which latter are the fruits of her title to the land, and to which she must be as much entitled as to the land itself. And it strikes me that the whole difficulty has arisen from confounding damages and mesne profits; which has led to the opinion, that because the statute gave the former, the widow can have no right to the latter, except by the provisions of the statute. Why is not a widow, who is kept out of possession of the land, which ought to have been assigned to her for her dower, as much entitled to the mesne profits, on principles of equity, as any other proprietor who has been wrongfully deprived of his possession? The difficulty that laid in the way of her recovery of mesne profits at common law, was not peculiar to her, but was common to all persons, whatever their title, who were compelled to recover possession by action. The defect was not in the right, but in the remedy. Land could only be recovered by a real action, and in such actions nothing could be recovered but seisin or possession. It was an improvement upon the old law, which was only gradually and partially engrafted upon it, to permit, in some cases, the recovery of damages and mesne profits, together with the possession, in the same action. For instance, the statute of Merton, for the first time, enabled the widow to recover damages as well as the possession; but it extends only to the writ of dower unde nihil habet, and not to the writ of right of dower. The reason given for this discrimination is curious, and is worthy of remark. Damages are allowed in the former action, it is said, because they are intended to be given for the detention of the possession; and on writs of right, where the right itself is questionable, no damages are given, because no wrong done till the right be determined." Jacob's L. Dic., Dower, 5. But although no damages can be given for the detention, yet surely when the right is determined, the mesne profits, which are the fruits of the right, and not damages for the detention, must accompany the right, although they cannot be recovered in the same proceeding by which the right is determined.

Under the statute of Merton, mesne profits may be recovered in certain cases, under the title of damages; but yet damages for the

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*detention, and the mesne profits, are always assessed separately, as appears by all the authorities. In the case of Harvey v. Harvey, Sir Thos. Raym., 366, the distinction between them is not only recognized, but made the ground of the judgment of the court. In that case, the tenant pleaded, that after marriage the husband settled other lands upon the demandant for her life, for her jointure, and that she, after his death, agreed thereto, and entered accordingly. The demandant replied, that it was a voluntary settlement of her husband, and traversed that it was not for her jointure; and issue was joined thereupon. At the nisi prius, the tenant made default, and a petty cape was awarded and returned, and judgment that the demandant have seisin; and the demandant suggested, that her husband died seised, and prayed a writ to inquire of the damages. The sheriff returned, that he had delivered seisin of the lands particularly; and also an inquisition, finding that the lands were worth £114, 11s., per annum, and that the husband had been dead six years and three-quarters; and that the demandant had sustained damages occasione detentionis dotis ultra valorem prædictam, et ultra misas et custagia sua, £195, et pro misis et custagiis, 20s. And upon this the demandant, gratis, released the £195, and demanded judgment only for the 20s. And judgment was given that the demandant recover tam valorem tertiæ partis prædictæ, from the death of her husband, which comes to £257, and the 20s. and £11, de incremento, & all, £267; and the tenant brought a writ of error, and assigned several things for error, which, upon diminution alleged, were made good; and there being a variance between the inquisition and writ of seisin, the writ of seisin and execution were held erroneous, and thereupon a writ of inquiry, and the value of the land found; and it was alleged, that there ought to be no writ of inquiry, because the damages were released by the demandant. But upon consideration had of the record, the whole court resolved, that the release was only of the damages sustained occasione detentionis dotis, and not of the mesne profits of the land; for they are two distinct things, as appeared by the precedents. Co. Lit., 32 b, Belfield v. Rous. So, too, Lord Coke, in the place referred to, and in several others, continually distinguishes between the "mean values" and "damages." Co. Lit., 32 b, 33 a. Now, this distinction so constantly observed, and the practical conclusion drawn from it in Har-

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vey v. Harvey, are to *my mind conclusive that as far as mesnes profits are concerned, the statute of Merton has never been regarded as giving a new right, but a new remedy only.

It seems obvious, therefore, that the prac-

tice of the Court of Chancery is founded on this distinction: for I can perceive no other ground on which the jurisdiction, as it has been exercised, can be maintained, consistently, with principle. The court has never restricted the account for rents and profits to cases within the statute of Merton; and its jurisdiction, therefore, cannot be supported on that statute; but stands, and can stand only on its acknowledged competency to afford a remedy, where the law gives a right, but no remedy, or an imperfect one. The case of Heyward v. Cuthbert, does not controvert this conclusion. That was a proceeding at law, and the decision went no further than that damages could not be recovered, eo nomine, in that proceeding; and for the reason that the statute of Merton was not of force here. I am not sure, indeed, that if the statute were of force, it could have applied to that proceeding. But of one thing I am sure, that there is nothing in that case which conflicts with the decree in this.

We are, therefore, of opinion that the decree is right, and that the appeal must be dismissed.

Decree affirmed.

Bailey, Eq. 74

Executors of JOSIAH SMITH v. ELIZABETH A. COLLINS, and Others.(a)

(Charleston, April, 1830.)

[*Wills* ⇐872.]

The lapse of less than twenty years after a legatee has been put in possession of his legacy, will protect him against the claims of a creditor of the testator, if aided by circumstances of negligence in the creditor in pursuing the executor, who has become insolvent, and a probability that the debt has been lost in consequence of it.

[Ed. Note.—Cited in Brock v. Kirkpatrick, 72 S. C. 503, 52 S. E. 592.

For other cases, see Wills, Cent. Dig. §§ 2221, 2223–2225; Dec. Dig. ⇐872; Equity, Cent. Dig. § 218.]

This was a bill to subject legacies, in the hands of the legatees, to the payment of a debt of their testator; executions at law against the executrix, who was also a party defendant to the bill, having been returned nulla bona. The original bill was filed in 1828, by the complainants' testator, and on his death was revived by them; and after various interlocutory proceedings, the cause came on for hearing at Georgetown, in April, 1829, before De Saussure, Chancellor, who dismissed the

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bill. The complainants appealed; and *the case will be sufficiently understood from the opinion delivered in the Court of Appeals.

JOHNSON, J., delivered the opinion of the court.

There is no question but that the defendant, Mrs. Collins, is individually bound for the payment of the complainants' demand, in consequence of the judgment at law against herself, and her late husband, Alexander Collins, as the executor and executrix of their testator, George Skinner, obtained in 1812, and revived by scire facias in 1822; but in respect to her, the complainants have, in the judgment, a plain and adequate remedy at law: and the sole ground of claiming the aid of the Court of Equity is, that she is insolvent, and unable to pay it; wherefore the bill prays a discovery from the other defendants, as to the amount of the legacies received by them under the will of George Skinner; and that they may be compelled to contribute to the satisfaction of this judgment. The right of a creditor to pursue the estate of his deceased debtor in the hands of legatees, or distributees, is unquestionable. If it were not so, a worthless or irresponsible executor or administrator might, by assenting to a legacy, or making a distribution, prematurely, deprive creditors of their rights, and enable unprincipled legatees, and distributees, to retain that to which ex aequo et bono they were never entitled. But in giving effect to this right, however just it might be in the abstract, the court is bound to take care that it is not abused, nor suffered to operate injuriously to others, and that the creditor has himself done all that reciprocal justice requires of him.

What are the facts here? George Skinner, the testator, made his bond to Josiah Smith in 1794; and to secure the payment, mortgaged certain negros. Some payments on account of the debt appear to have been made by him, the last of which, was in 1797. He died in 1801, and shortly after, his widow, the present defendant, Mrs. Collins, proved his will, and qualified as executrix; and in 1805, the estate was distributed conformably to his will, amongst herself and the other defendants, his children. In 1807, she intermarried with Alexander Collins, her late husband, who afterwards mortgaged ten of the negros allotted to his wife, for his own debts; and in the end they have been sold to satisfy them. It does not appear, that any one of these parties, not even the executor, or executrix, had notice of the existence of

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this demand, until a suit was *commenced on it in 1811; and from the returns made to the executions issued on the judgment, it would seem, that the executor and executrix were insolvent when it was obtained. And it was not until 1824, when the original bill in this case was filed, nearly twenty years after the estate had been divided among the legatees that any demand appears to have been made on the other defendants. If the executrix had even informal notice of the existence of this demand, it was her right and her duty

(a) 2 McC. E., 435; 2 Hill E., 228; 8 Rich. L., 401; 11 Id., 523; 1 Rich. E., 53; 4 Id., 16, 152; Bird v. Houze, Sp. E., 250.

to have retained in her hands an amount sufficient to pay it, and the presumption is that she did so; and if a creditor will stand by, and see that fund dissipated, and the whole substance of the executors wasted, through a period of near twenty years, he comes with a bad grace to ask indemnity from those who had no power to prevent it. And such does appear to me to have been the situation of the parties now complaining. The excuse offered for this negligence is, that from 1802 to 1810, this bond was impounded by an attachment. But there was time enough, before that proceeding took place, to have given notice to the executors of the existence of the debt; and there is no question but that the court, from whence the attachment issued, would, at any time, have authorized a suit upon it, at the instance of any party claiming an interest in it; so that it does not appear, that there ever was, at any time, any legal, or physical impediment, to the prosecution of the claim, either against the executors, or against the legatees, if they were bound to contribute; and to infer it now, under all the circumstances, would, it appears to me, operate as a great hardship on these defendants.

It is a well settled rule, that twenty years will authorize the presumption that a bond has been paid, without the aid of other circumstances; and a possession of lands, for that length of time will authorize the presumption of a deed, grant, or other muniment necessary to perfect the title of the occupant: and in both these cases a shorter period, aided by circumstances, has been held sufficient. The same principle is applicable to the case under consideration. If the full period of twenty years had elapsed, after the defendants were put into possession of their distributive shares of the estate, it would not be questioned, but that this, of itself, would have protected them; and a lapse of nineteen years, aided by the circumstances, of the negligence of which the plain-

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tiffs have been guilty, and the *great probability that the debt has been lost in consequence of it, well warrants the presumption, that the creditor consented to release the obligation on the legatees to contribute, and to look alone to the executors: and it is no hardship that his representatives should be required to do so now. The complainants are not then entitled to recover against that class of the defendants; but their only remedy is against the executrix, and against her their judgment at law furnishes all the remedy which equity itself could give, and they must resort to it. The appeal is therefore dismissed, and the decree of the Circuit Court affirmed.

Decree affirmed.

Bailey, Eq. 77

Ex parte, JAMES W. GRAY, Commissioner.(a)
(Charleston. April, 1830.)

[1. *Equity* ⟸393.]
A master or commissioner in equity is not a "Judge" within the meaning of 1 section, 3 article of the constitution; and he does not hold his office "during good behavior," by virtue of its provisions, but his tenure is such only as is prescribed by the legislature.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 852; Dec. Dig. ⟸393.]

[2. *Officers* ⟸49.]
The Act of 1812, limiting the term of service of certain officers, is a general law applicable to all such officers as are therein specified, although their offices may have been established subsequently to that Act.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 70; Dec. Dig. ⟸49.]

[3. *Equity* ⟸393.]
The commissioner in equity for Charleston district first elected under the Act of 1813, which provided that he should "exercise all the powers, and authorities of, and perform all the duties incident to" the office of the master in equity, held nevertheless by the tenure prescribed by the Act of 1812, and not by the tenure of the then master in equity, even if the latter were entitled to hold during good behavior. Nor did the benefit of the Act of 1816, releasing the operation of the Act of 1812, as to incumbents in 1812, extend to him, although it applied to the master.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 852, 853; Dec. Dig. ⟸393.]

[4. *Officers* ⟸50.]
Although an officer may be entitled to hold when the legislature declares his office vacant, yet if he becomes a candidate for re-election, and is re-elected, his accepting and holding the office, amounts to a surrender of his former title, and he holds by virtue of his last election only.

[Ed. Note.—Cited in State ex rel. Ottolengui v. Ancker, 2 Rich. 278; Ex parte Smith, 8 S. C. 522.

For other cases, see Officers, Cent. Dig. § 69; Dec. Dig. ⟸50.]

Before De Saussure, Chancellor, at Charleston, January, 1830.

This was a rule on Thomas Hunt, Esquire, late commissioner in equity for Charleston district, to shew cause why he has not turned over to James W. Gray, Esquire, his successor in the said office, the official papers in his hands.

In answer to the rule, the respondent shewed for cause, that the said office was created by Act of the legislature, in December,

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1813, 7 Stat., 315, *when the respondent was duly elected to fill it, and received a commission "continue in force during the time fixed by law." That in 1817, he was re-elected, but did not take out a new commission. That in 1821, Benjamin Elliott, Esquire, was elected to the said office, and held the same for four years; but that his right thereto was contested by the respondent, and decided in favor of Mr. Elli-

(a) See further proceeding, Rich. E. Ca., 475.

ott, by the old Court of Appeals in equity.(b) That in 1825 the respondent was again elected; and in December, 1829, the said James W. Gray was elected to the said office. But the respondent insisted, that he was entitled to hold the said office, notwithstanding the said last mentioned election, for the following reasons:

1. That the said office is a judicial office, and that the tenure thereof, is established by the 1 section, 3 article, of the constitution, 1 Stat., 189, to be during good behavior.

2. That the Act of 1813, creating the said office, does not purport to limit the tenure; nor does the Act of 1812, 5 Stat., 674, limiting the term of service of certain officers, apply to this office: and if it did, yet the Act of 1812 is repealed by the Act of 1816, 6 Stat., 30, so far as it relates to the master in equity, whose tenure before was, and continued to be, during good behavior. And the commissioner in equity for Charleston district, having been placed by the Act of 1813, on the same footing with the master in equity, his tenure is also during good behavior.

3. That, both under the constitution, and the Act of the legislature, therefore, the respondent has a freehold in the said office, which he has neither resigned, nor lost; nor has he been in any manner lawfully deprived thereof.

The Chancellor held the cause shewn to be insufficient; his Honor being of opinion, that a commissioner in equity is not a Judge, within the meaning of the constitution; and the tenure of his office is limited to four years, by virtue of the provisions of the Act of 1812. He therefore ordered the official papers in the hands of the respondent to be transferred to his successor.

From this order the respondent appealed, and moved to reverse the same on the grounds relied on in his answer to the rule.

J. L. Wilson, for the motion. The Act of 1813, p. 44, for appointing an additional mas-

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ter in equity, in Charleston, under the *title of commissioner, does not purport to limit the tenure of the new office: nor can the Act of 1812, p. 35, apply, inasmuch as it is limited, by its terms, to offices then in existence; and is moreover repealed, as to the master in equity, by the Act of 1816. See Acts of 1816, p. 12. In the case of William Hazel Gibbes, 1 De S., E. 587, it was decided, that the master in equity is a judicial officer, under the constitution of 1778, 1 Stat., 137, 143, and that his tenure was consequently during good behavior. And again Fenwicke v. Gibbes, 2 De S., E. 629, it was decided, that he was not amenable for an error of judgment, on the ground, that he was a judicial officer. By the Act of 1813, the commissioner for Charleston is put on the same footing with the master; and it follows conclusively, that the tenure of the commissioner is during good behavior.

The principle, that judicial officers hold under the constitution, and that Acts of the legislature, limiting the tenure, are void, was settled in the case of the ordinary, by the decision of the Constitutional court, in Hays v. Harley, 1 Mill, 267. That decision is strictly applicable to this case. In the case of Hunt v. Elliot, in which a contrary, and somewhat hasty decision was made, it was said, that a few judicial powers will not make a Judge, within the meaning of the constitution; but an examination of the judicial functions conferred on the master in equity, will show that they are neither few nor trivial; and that they far exceed any ever conferred on the ordinary.

By the Act of 1705, P. L., 96, 2 Stat., 437, the master is invested with power to tax costs. By the Act of 1721, P. L., 110, 7 Stat., 164, to grant injunctions to stay waste. By the Act of 1746, P. L., 212, 7 Stat., 192, to hear all motions of course, and make orders thereon. By the Act of 1808, masters and commissioners are invested with all the powers of a Judge at chambers, to grant orders for writs of ne exeat, and attachment, in all cases of practice. Acts of 1808, p. 33, 7 Stat., 306. And by the Act of 1825, they are authorized to grant injunctions in all cases before answer. Acts of 1825, p. 19, 7 Stat., 330.

The Court of Equity of this State was organized on the model of the English Chancery, and was, from its infancy, invested with all the powers and incidents of that court. See Act of 1721, P. L., 110, 111, 7 Stat., 163, 165. The master of the Rolls in England is a judicial officer; and yet his office is analogous to that of master in equity

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here. Indeed *the latter possesses, in regard to ne exeats and injunctions, a larger power than it appears the master of the Rolls is permitted to exercise. 4 Ves., 590; 1 Ves. and Bea., 373. The authority of the Lord Chancellor himself, has grown up from that of a mere clerk, to the most elevated judicial functions. Park's Hist. C., 16, 25, 27, 35, 42, 56, 58. So, too, of the masters in chancery, who are all now recognized to be Judges. Id., 60, 426, 436.

The powers of the master in equity here, which, by the Act of 1721, were the same with the master in England, have been greatly increased by our own legislation. The power as to injunctions is a judicial power of the highest character. Eden on injunctions, 1, 56; 1 McC. C., 346; Termes de la Ley, 338; 1 Woodeson's Lectures, 207. A report of a master is a judgment of the court. Brown v. Barkham, 1 P. Wms., 652. There is no question of law, or fact, which a master may not be called upon to determine. Com. Dig. C., (B. 5.)

(b) See a report of the proceedings on that occasion at the end of this case.—R.

The legislature's not having considered the master a Judge, does not affect his judicial character, under the constitution, since they have conferred upon him the powers of a Judge. The same was done as to the ordinary, but the Constitutional court decided that he was a Judge and that his tenure was during good behavior: and the same decision must be made as to the commissioner.

Grimke, contra. There are three classes of officers in the English chancery. The Lord Chancellor, the master of the Rolls, and the masters in Chancery; and of these, the two former only are regarded as Judges. 1 Harr. C., 57, 58; Jac. L. Dic. C.; Com. Dig. C. (B. 4.) The powers of the commissioner are analogous to those of the masters in Chancery; and not to those of the master of the Rolls. The latter, it is true, is one of the masters in Chancery; but he has been invested with higher functions, and is in that very respect distinguished from the commissioner in equity. It is said, that he has not equal power with the commissioner as to ne exeats, and injunctions; but this is a mistake. See, as to injunctions, 3 Atk., 694; 1 Bro. C. C., 451; 2 Id., 64, 81, 89; 4 Id., 495; 1 Dickens, 314. And as to ne exeats, see Prec. in C., 171; 5 Ves., 91; 3 P. Wms., 313; 1 Dickens, 380.

Gibbes' case, 1 De S. E., 587, so far from availing the respondent, is conclusive against him, on the constitutional ground. Gibbes

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was *elected in 1784, under the constitution of 1778, by the 27 article of which, it was provided, that "judicial officers" should be commissioned "during good behavior." But by the constitution of 1790, this provision was confined to "the Judges." The court, however, held, that as Gibbes was elected under the constitution of 1778, he was entitled to hold by contract; a ground on which the court would not have put their decision, if they had supposed the master to be a "Judge," within the meaning of the constitution of 1790.

What is the test of an officer being a "Judge," within the 1 section, 3 article, of the constitution of 1790? The answer to this question will establish the distinction between the case of the ordinary, and that of the commissioner in equity; and show that the decision in Hays v. Harley, 1 Mill, 267, cannot apply to this case.

It is not a test, that he cannot delegate his office, for that is not peculiar to a Judge. 4 T. R., 716; 5 Id., 511; 4 John. C. R., 368.

Nor that he is not liable to suit for error of judgment; for such exemption extends to all officers who are to act on their discretion: to Justices of the peace, 2 Bay, L., 1; Commissioners of roads, 2 N. & M., 537; Inspectors of beef, 2 Caines, 312. See, also, 1 East, 555; 2 Vern., 90. And this is an answer to the case of Fenwicke v. Gibbes, 2 De S. E., 629, the decision in which case is unexceptionable; although the reasoning of the court is not authority.

Even the possession of judicial powers is not a sufficient test; for every officer of every court has some judicial power, necessarily incident to the discharge of his duties. But these, it has been decided, do not make him a Judge under the constitution. 1 Mill, 45; Id., 55. This, indeed, is the precise distinction between the provisions of the constitutions of 1778 and 1790; a distinction plainly recognized by the court in the case, in 1 De S. E., 587.

Nor does the making of interlocutory orders, or preparing business for the court, render the officer a Judge. Clerks of courts grant orders for judgment, and for bail. The register, as well as the commissioner, may grant a ne exeat, which is nothing more than an order for bail in equity. A great deal has been said of the power to grant injunctions; but orders for injunctions are merely interlocutory in their nature. It is a mistake, too, to say that injunctions restrain courts. They do not. They act only upon the parties; and in that respect differ from

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prohibitions, which do restrain courts. *Eden on injunctions, 1. The commissioner can in no case make a final order; and in this his power is inferior to that of the clerk, who may give an order for judgment final in debt on bond; and yet it has never been pretended, that the clerk is a Judge under the constitution.

That an officer is elected by joint ballot of the legislature; that he is removable by impeachment; or that his tenure is during good behavior; are none of them tests of the office of a Judge. For they are not peculiar to Judges; nor have they any intrinsic connection with the judicial character.

The true tests of a Judge, according to the constitution, are:

1. That he is the Judge of the court; and invested with the whole body of the jurisdiction: that he is, in fact, the court itself.

2. That he hears, and finally determines, to the whole extent of the jurisdiction of the court.

Tried by these tests, it is obvious, that the commissioner is not a Judge. The Judge is invested with the whole jurisdiction, simply by being made a Judge; whilst the Commissioner has only so much of the jurisdiction of his own court, as the statutes have from time to time conferred upon him. Again, a Judge, even of an inferior jurisdiction, determines finally, although his judgment may be appealed from; but the report or judgment of a commissioner is of no avail until confirmed by the court.

The commissioner, if he be a Judge, must be either a Judge of an inferior court, or an inferior Judge of a supreme court.

There are two tests of an inferior court.

1. Its judgments are subject to appeal, but are final if not appealed from. 2. It is subject to writs from superior courts; such as mandamus, prohibition, &c. Apply either of these tests, and it is clear that the commissioner is not a Judge of an inferior court.

It is equally clear, that he is not an inferior Judge of a supreme court. For a Judge, whether inferior or chief, cannot be attached for contempt; but a master or commissioner may. 4 John. C. R., 317; 9 Id., 395.

The subject might be further illustrated, but it can scarcely be necessary. The application of any and every test, by which a Judge is distinguished from other officers, will, in every instance, show clearly, that the commissioner in equity is not a judge within the meaning of the constitution.

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*The other ground relied upon by the respondent is equally untenable. The Act of 1812 was passed to limit the term of office of various officers; and "registers, masters, and commissioners of the Court of Equity," are expressly mentioned, and limited to four years. It makes no difference that the office of commissioner in equity, for Charleston district, was not created until afterwards, by the Act of 1813. The name, and the duties of the office, attach to it all the laws relating to similar offices; and, moreover, the Act of 1813, expressly puts the office of commissioner on the same footing with the office of master in equity. The Act of 1816 did not repeal the Act of 1812, in relation to the office of master in equity. It did no more than release the operation of the Act as to incumbents, who having been elected during good behavior, were entitled by contract to hold by their original tenure; and the Act of 1812 is left to regulate the office, generally, in relation to all the successors of the then incumbents. The present respondent has no claim on the ground of contract. He was not elected until after the Act of 1812 was in force, and he took his office with its tenure regulated by it. The case of the State v. Jeter, 1 McC., 233, is conclusive on this point.

But, be the tenure of the office what it may, the respondent is concluded by the fact, that he was a candidate for re-election in 1829, as he was in 1817, 1821, and 1825. This was an admission on his part that the office was vacant, and amounts to a resignation, or surrender. A resignation need not be formal; but any act amounts to a surrender, which is incompatible with retaining the office or estate; and such is the act of the respondent in becoming a candidate for re-election. Jac. L. Dic., "Surrender." Fitzgib., 195; 16 John. C. R., 28.

J. L. Wilson, in reply. The decisions of the commissioner are as final as those of the Judge himself. They may be appealed from by exceptions; but if not appealed from, they are final and conclusive. No decisions are absolutely final but those of the Court of Appeals.

The ground of the respondent is not that any particular function of his office renders him a Judge; but that the aggregate of his powers are such as can appertain to no officer but a Judge.

The cases cited of injunctions granted by

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the master of the Rolls, *are cases in which that officer sat for the Lord Chancellor. In his own character he has no jurisdiction in injunction cases; and yet it is conceded that he is a Judge. The commissioner has a direct power in himself to grant injunctions, and, indeed, the judicial powers exercised by him are such as could not be committed to any merely ministerial officer.

The case of the State v. Jeter, is based on principles conclusive of the respondent's right to hold by the same tenure as Mr. Gibbes. He asks nothing more than the benefit of that case. The argument as to surrender does not require an answer. The respondent never yielded his right. He did not take out a new commission in 1817; and the legislature's balloting for him cannot affect his title to the office. He has never committed any act, which, in any way, amounts to a surrender, or resignation; and his deprivation, in 1822, against a strenuous opposition on his part, cannot surely be seriously urged against him.

COLCOCK, J., delivered the opinion of the court.

This case has been very elaborately and ably argued by the counsel on both sides; but although it has been attempted to show, that there is some difference between the case now made, and that formerly decided, yet it is certain, that no new principle has been applied to it. I have read again and again the opinions which have been delivered on former arguments, and they, most undoubtedly, cover all the grounds, and expressly decide on all the principles of law, on which the present argument has been raised. But, as it seems to be considered a question of some difficulty, and is, no doubt, one of some importance to the parties, it is our duty to express our own views of the subject, although, in doing so, I shall be compelled to travel a much beaten track.

As the case is now presented, the first question is, whether the respondent is not protected in his office by the constitution of the State; and in order to establish the affirmative of this proposition, it is contended that he is a Judge. There are some views of this part of the case, which I deem it proper to suggest, which have not been taken in the argument. I am not prepared to say that every Judge, eo nomine, which the legislature

might be pleased to appoint, would be protected in his office by the constitution of the State. The legislature may appoint one to do

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certain duties, in *which the public may be much concerned, and call him a Judge; and yet it might be the duty of this court to say, that he was not a Judge within the provisions of the constitution of this State. The constitution is a declaration, by the people, of certain fundamental principles of government, by which they intended to be regulated; and for this purpose they divided all the power, which is necessary to the regulation of civil society, into certain parts, or portions, assigning to certain tribunals, or individuals, by an official name, their respective portions of this power. The whole power is divided into the legislative, the executive, and the judicial; and in regard to the latter, the constitution provides, that it "shall be vested in such superior and inferior courts of Law and Equity, as the legislature shall, from time to time, direct and establish. The Judges of each shall hold their commissions during good behavior, and the Judges of the superior courts, shall, at stated times, receive a compensation for their services, which shall neither be increased or diminished during their continuance in office; but they shall receive no fees or perquisites of office, nor hold any other office of profit, or trust, under this State, the United States, or any other power." 1 section, 3 article, 1 Stat., 189. The judicial power here spoken of, is to be vested in a court, the Judge of which shall hold his office during good behavior; and to bring an officer within this provision of the constitution, it is necessary that he should be appointed a Judge of some court, either one already established, or one newly created, over which he would preside; and further, if he were appointed Judge of a superior court, it would be necessary to give him a salary. Now, in the case before us, the officer not only does not come within the description, but he has never been called a Judge by the legislature; nor has he ever been so considered by any one. It is true, that in the case of Fenwicke v. Gibbes, in the year 1808, 2 De S. E., 629, William H. Gibbes, the late master in equity, an officer performing the same duties which are now required to be performed by the commissioner, in equity, is indirectly called a Judge. The language of the court is, "he is frequently a judicial officer. The determinations of this court, the Acts of assembly of 1721, P. L., 110, and of 1746, P. L., 212, 7 Stat., 163, 191, plainly evince him to be so. In this capacity, he is a Judge, and exercises his mind in forming decisions concerning the rights and interests of others." 2 De S. E.,

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635. But it *was not a question before that court, whether he was a Judge in the sense, in which it is now contended, that the commissioner is one; and, therefore, it is not an authority for us; and with the utmost deference to the court, and to the Judge who delivered the opinion, I am constrained to dissent from it altogether.

But I proceed to meet the argument as it has been presented to us. I do not understand the counsel for the respondent to contend, that the investment of any, and every power, in which there is that exercise of the mind which may be called judgment, will make the officer a Judge; for by that course of reasoning we may have more Judges than even they desire; but I understand them as contending, that the granting of such power as is usually exercised by Judges, or such judicial power as is exercised in the courts of Law or Equity, may constitute one a Judge. Even in this limited sense, however, the position cannot be maintained. Great powers are given to the commissioner; powers which may be called judicial; powers, which it is clear, were once exercised by the Judges alone; powers, greater than the master in equity exercised at the time a commissioner was first appointed; but is he invested with all the powers of a Judge? Nullum simile est idem applies to the artificial, as well as to the natural man. There may be many points of resemblance, and yet a most essential difference between two offices; and it is so strikingly obvious between these two officers, the Judge and the commissioner, that it is impossible they can be mistaken for each other. The commissioner does possess some of the judicial powers; but he does not possess the essential characteristic of hearing and determining in all matters within the jurisdiction of the court. It is said, that in some cases his decisions are final. This might be so, and yet it would not be enough. But he does not possess final power in any one instance; and the parallel, which has been drawn by the counsel for the applicant, between the powers of the commissioner, and those possessed by other officers of other courts, is in most respects complete. The clerks of the Court of Common Pleas, for instance, possess equal powers in their departments, subject, also, to the final determination of the Judges of their courts.

I do not conceive it necessary to follow the counsel through the wide range of cases by which to test the powers which are exercised by the commissioner. As to one

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criterion, it cannot be denied, *that there are some very inferior judicial powers which can not be delegated; and it is, therefore, I admit, not an infallible criterion, by which to decide, that a power is not judicial, in its most unlimited and constitutional sense, to say that it cannot be delegated; but yet this is relied on as a test of judicial power by no

less a person that Lord Coke. 4 Inst., 59, 88, 126, 128. Neither can I think it necessary to the correct decision of this case, to go back to the origin of the Court of Chancery, here or in England: for none can doubt, but that the legislative power of both countries can regulate the constitution of their courts. In our court of Equity, the master was not considered a Judge, and he has never exercised the powers of one; and although we find that in England one of the masters was made a Judge, yet we find that eleven of them are still mere masters. The one who has become a Judge has been so constituted. He was not made a Judge by implication. He is commissioned: has a salary; and he "hears and determines," and his determination is only to be reversed by an appeal to a higher tribunal. The case of Hays v. Harley, 1 Mill C. R., 267, has been referred to, but it can afford no support to the respondent's claim; for there the officer was a Judge, always known as such, called a Judge, presiding in a court, and exercising the power of a Judge, although in a limited jurisdiction. The court was in existence before, and at the adoption of the constitution; and therefore the Judges of it were embraced in its provisions, as clearly as any Judges of any court in the State.

I will now proceed to consider the case in reference to the Acts of assembly. It is said, first, that the Act of 1812, 5 Stat., 674, did not limit the term of office of the master in equity; but this is said in direct opposition to the very words of the Act, which are, "the following officers shall be hereafter elected by joint ballot of both branches of the legislature, for the terms of time hereinafter mentioned;" and among those enumerated are "registers, masters and commissioners of the courts of Equity, for four years." Now, whether the legislature could limit the term of office of the officer then acting as master, it being conceded that he was in for life, which may be conceded without affecting this case, or whether they intended to do so, may admit of doubt; but it cannot, therefore, be doubted, that they had the power of limiting the term of office of any future master or commissioner. In 1813,

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7 Stat., 315, they, for the first time, *appointed a commissioner for Charleston district, and, it is true, did not limit his term of office, but that was for the best reason possible; to wit: that they had already done so by a previous general law on that subject, which embraced him, or any other, who should be thereafter appointed. Let it be admitted that the commissioner was clothed with all the powers of the master, still he was a newly created officer, and his term of office did not depend on the tenure by which the master held. The Act of 1812, 6 Stat., 30, as far as it regarded the person who then held the office of master, was repealed in 1816, and it was also repealed as to other officers; and by a very forced construction it is contended, that it was repealed as to the present respondent. That it cannot refer to him, is put beyond all doubt by the words, "who were in office on the seventeenth day of December, one thousand eight hundred and twelve," which follow the enumeration of officers, to which it was intended to apply. "Masters and commissioners" were in office before, and at the time of passing the Act of 1812; and how, then, can it apply to the respondent, who was not in office either before, or at the time. It is asked, and much reliance seems to be placed on this, why the word masters was put in the Act, if it did not intend to embrace the commissioner in equity, in Charleston district? for there was but one master in the State, and the word being in the plural, it must have been intended to embrace him. But for the qualification above referred to, perhaps this construction might have been contended for. But it is clear, that it applies to both masters and commissioners, by all the rules of common sense, as well as those of grammatical construction; and, therefore, could not comprehend him, either as a master, or a commissioner, for he did not hold office as either the one or the other in 1812. But I do not entertain a doubt, that the legislature had a right to limit the term of office of the master in equity, and that it would have affected the then incumbent; that is, that there was no constitutional restriction on them which would prevent them from doing so, if they thought the good of the country required it. They did so in a case equally strong; in the case of a solicitor. It is true they thought themselves bound in honor to continue some persons who considered themselves as holding for life, or good behavior, in office; and in this I certainly concur with

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them; indeed I have *had cause most seriously to regret, that I ever did concur in limiting the term of any of the officers of the courts; for the records of the country are going fast to destruction throughout the State, where the system prevails, and the duties of other departments are performed in a most unsatisfactory manner. I do, therefore, wish that there had been an appointment to this office during good behavior. But I am to declare what the law is, and it is too plainly written to be mistaken or misconstrued.

But if we could support the respondent in his construction of the Acts, and believed that it was the intention of the legislature, in the first establishment of his office, to put him in all respects on a footing of equality with the then master in equity, and that they considered him, consequently, as holding during good behavior; yet in this case

I am of opinion, that the respondent, by having become a candidate for the office, under the terms prescribed by the Act, had voluntarily resigned all right to the first tenure, and could not now claim the office. As to the right to surrender an estate, or office, I take it no authority is necessary; but whether the Act of taking a lesser interest in a thing from the grantor, is an abandonment of a greater interest previously possessed, may require some authority. I should say, however, that where it was clearly expressed by the grantor, that such was his intention, and the grantee remained in possession, he held by the last tenure; and for the reason, which is given by the writers on this subject, that the two titles are incompatible. Considering the case then on the ground of contract, the legislature had said by a public Act that the tenure of the office should be limited to four years; and they then declared the office vacant. Candidates presented themselves, and one is elected. Suppose the choice falls on him who before held, is not this a new contract? I cannot doubt it. It is said that the doubts of the respondent were stated, and some objections presented at the first election; but he nevertheless entered the lists, and was voted for as a candidate for the office, under the limitation fixed by law, and actually held the office. In Jacob's L. Dic. "Surrender," the law which I think applicable to this case, is collected. "The surrender at common law" it is said, "is the usual surrender, and is of two sorts: viz. a surrender in deed, or by express words in writing, where the words of the lessee to the lessor prove a sufficient

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assent to give him his estate *back again; and a surrender in law, being that which is wrought by the operation of law, and not actual, as if a lessee for life, or years, take a new lease of the same land, during the term, this will be a surrender in law of the first lease." "And this surrender in law, by taking a new lease, holds good, though the second lease is for a less term than the first; and it is said that the second lease is a voidable lease. 5 Rep., 14; 6 Id., 69; 10 Id., 67; 1 Inst., 218; Cro. Eliz., 873." "A surrender may be made of letters patent to the king, to the end that he may grant the estate to whom he pleases; and a second patent for years to the same person, for the same thing, is a surrender in law of the first patent. 10 Rep., 66." "If an officer for life accepts of another grant of the same office, it is in law a surrender of the first grant; but if such an officer takes another grant of the same office to himself and another, it may be otherwise. 1 Ventr., 297; Cro. Jac., 198; Dyer, 167, 198; Godb., 415."

On every ground, therefore, the motion must be dismissed.

Appeal dismissed.

Bailey, Eq. 90

THOMAS HUNT v. BENJAMIN ELLIOTT.

(Charleston. April, 1830.)

[1. *Equity* ⟸393.]

[A master in equity *held* not a judge or judicial officer, so that an act limiting his term to four years is unconstitutional.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 852, 853; Dec. Dig. ⟸393.]

[2. *Equity* ⟸395.]

[The commissioner in equity for Charleston district cannot be at the same time register of the court.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 854; Dec. Dig. ⟸395.]

[3. *Judicial Sales* ⟸7.]

[Cited in Keith v. Gray, Rich. Eq. Cas. 228, to the point that a commissioner in equity is entitled to complete, after the expiration of his term, sales ordered by the court and advertised by the commissioner during his term.]

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 20; Dec. Dig. ⟸7.]

[This case is also cited in State ex rel. Ottolengui v. Ancker, 2 Rich. 278, without specific application.]

This was a bill to injoin the defendant from exercising the functions of commissioner in equity for Charleston district. The common injunction was granted, but before answer filed, the complainant obtained a rule on the defendant, to shew cause why he exercised the duties of said once. Cause was shewn in February, 1822, before Judge Thompson, who made the following decretal order.

THOMPSON, J. This case is presented to the view of the court, on a rule obtained by the late commissioner, Mr. Hunt, against Mr. Elliott, who was elected to that office during the last session of the Legislature, to show cause why he exercised the duties thereof.

The counsel for the complainant predicates his client's claims on two grounds:

The first is that the Act of the legislature of 1812, 5 Stat. 174, limiting the duration of this office to four years, is unconstitutional; he being a judicial officer, and consequently holding his office during good behavior. The question then resolves itself into this, whether the master or commissioner in equity is a Judge, according to the sense and meaning of the constitution.

To be a Judge, it is indispensably necessary that he should be commissioned as such; that he should have jurisdiction, limited, or unlimited, to try causes, or to perform other juridical acts; and that he should preside in court, and exercise judicial authority, and possess all the attributes for enforcing

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his opinions, or decrees. It *is not the exercise of a discretion incident to the performance of every office from the highest to the lowest, which will constitute the office of a Judge in constitutional contemplation. Were

it so, every officer in the State might be considered as one, as there exists none where discretion is not necessary. The master in equity has no original or final jurisdiction; he cannot make a report, unless ordered to do so by the court. This report, when made, has no efficacy until confirmed by an order of the court. He can perform no act of a judicial nature, except such as has been delegated to him by various Acts of the legislature, for the purpose of facilitating the operations of public justice; and he is nothing more than ancillary to the Judges, by performing the minor duties of the court, where no legal talent or exercise of the mind is required.

The masters in chancery, in England, have never been considered as judicial officers, with the exception of the master of the Rolls, who by some, has been considered the Vice Chancellor; and consequently, a judicial officer: but Lord Coke doubts the propriety of his being so considered, unless when acting under a special commission.

The view which I have taken of this case avoids the question of constitutionality, which is of extreme delicacy, and should always be considered with reverence and respect. But should a case of that kind present itself, I trust it would be decided with that firmness, which would become the dignity of the repositories of public confidence, and the organs of the law to whom this great power has been entrusted. I will observe, however, that the presumption is always in favor of the legislature passing constitutional laws. The members are generally men of great integrity and information, and know too well the benefits which flow from that invaluable charter of rights, to touch it with unhallowed hands.

The complainant cannot say he has been deluded by a violation of public faith; he knew the duration of the office when he first accepted of the appointment. After the expiration of the term, he presented himself a second time, and was re-elected. At the end of his term, he again became a candidate, and was unsuccessful. He then offered for the office of register to which he was elected, and which he now holds. But it is contended that he can hold both, and that they are not incompatible. The incompatibility of offices does not wholly depend on constitutional or legal restrictions. It may arise out of circumstances. All offices are incompatible when they interfere with each other, and when, from multiplicity of business, they cannot be executed with care and ability. The reason of the legislature's passing the Act of 1813, 7 Stat., 215 creating the office which is the subject of the present controversy, was, the multiplicity of business. The master, who held this office since 1784, was so worn down with years, that he could not undergo the fatigue of all the duties incident thereto. This being represented to the legislature, they appointed an assistant. There was then, and always has been a register, and the legislature seems uniformly to have considered it a distinct and separate office.

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*It is true, that in the country districts the offices of master and register are identified, but the reason of it is, that were they not so, no man capable of performing the duties would accept of either of them alone, owing to the paucity of business.

But there are other reasons why the offices in Charleston should not be blended. The register is the depositary of the records of the court. Were he allowed to act as commissioner, he would be clothed with an authority to make all sales ordered by the court; to invest money in the funds; and perform various other acts of responsibility: and when called on, he might, were he so disposed, keep out of view the documents which would lead to his detection. Besides, it is the policy of our government to subdivide offices in order to a more faithful performance of their duties.

The second ground is, that the ex-commissioner should be allowed to go on, and complete the sales commenced by him. The law in this case is peremptory. It is that all sales shall be made by the officer of the court. Who is that officer? The legislature has elected and the governor has commissioned Mr. Elliott: and the moment he qualified, Mr. Hunt was functus officio. If the functions of the office ceased, by what process of reasoning can it be said, that he may yet act? The law does not recognize two assistant commissioners. It is the duty of the commissioner to sell property; he must make titles, which become legal muniments. This, Mr. Hunt, being out of office, cannot do.

The commissioner receives the moneys arising from sales. Suppose he should refuse to pay over these moneys; would his sureties be liable? I presume they would not. They were sureties only for the faithful discharge of his duty while in office, and not for his conduct after he had gone out of office; and in all suretyships for public officers, the court never goes beyond the express stipulation.

Upon the whole, it appears to me, that Mr. Benjamin Elliott is the legitimate assistant master or commissioner of this court, and that he is authorized to sell all property ordered for sale by the Court.

It is therefore ordered and decreed, that the injunction restraining him from the functions of his said office be dissolved, and that he be restored thereto, together with all the privileges and emolutions thereunto appertaining. And it is further ordered and decreed, that the rule be discharged with costs.

From this order the complainant appealed, and the appeal was argued in the Court of

Appeals in equity, by Hunt, King, and Lance, for the complainant, and by Gadsden, Petigru, and Ramsay, for the respondent. And the following orders were subsequently made by that court.

It is ordered and adjudged that the decree of the Circuit Court be affirmed, so far as the same establishes the right of Benjamin Elliott, to the tenure and enjoyment of the office of commissioner of the Court of Equity for Charleston district, and to the legal

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rights, *privileges and emoluments of the said office. It is further ordered and adjudged, that the late commissioner do deliver, or cause to be delivered forthwith to the new commissioner, all the papers, books, and documents, belonging to the office, except those coming within the provisions of the succeeding decretal order. It is further ordered and adjudged, that the late commissioner has a lien on the official papers in his hands for the fees of office legally due to him, and has a right to retain them until he is paid said fees, after which he is directed to deliver them over to his successor. And it is further ordered and adjudged, that the late commissioner has a right to proceed and complete the sales of estates in all cases ordered by the court to be sold by him, and which he has advertised for sale at any time during his continuance in office, and to receive the official emoluments on such sales, accounting for the surplus as heretofore, and complying with the Acts of the legislature in that respect.(a)

HENRY W. DE SAUSSURE,
THOS. WATIES,
WM. D. JAMES.

April 12, 1822.

It having been suggested that the decretal order made in this case has not been sufficiently explicit, as to the extent of the complainant's right to commissions; and it being of great importance to the public interest, as well as to the parties, that such right should be distinctly defined, so as to prevent any further controversy on the subject: it is hereby declared to be the true meaning of the said decretal order, that the right of the late commissioner to commissions on the sales of property heretofore ordered by the Circuit Court, shall be confined to such sales as were actually advertised by him in some public gazette before the expiration of his office.

HENRY W. DE SAUSSURE,
THOS. WATIES,
WM. D. JAMES.

April 13, 1822.

Judge GAILLARD sat at the trial, and at the private deliberation of the court, and would have pronounced a decree, had there been a division.

(a) In Keith v. Gray, Rich. E. Ca., 228, the principle of this decretal order was overruled; and it was held that the master in office should make the sales and take the commissions. 1 Rich. E., 163.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA, MAY, 1830.

JUDGES PRESENT.

Hon. CHARLES J. COLCOCK,
DAVID JOHNSON.

*JAMES WOODSON and Wife v. DANIEL PALMER.

(Columbia. May, 1830.)

[*Costs* ⊂⊃13, 22, 60.]

In equity costs follow the decree, unless otherwise ordered by the court; and where there is no such order, the complainant is entitled to his costs, if the bill has been sustained, however small the amount recovered. But where the demand, when the bill was filed, was less than £100, sterling, the complainant is entitled only to the costs of a petition.

[Ed. Note.—Cited in Bratton v. Massey, 18 S. C. 560.

For other cases, see Costs, Cent. Dig. §§ 21, 47, 271; Dec. Dig. ⊂⊃13, 22, 60.]

On appeal from the order of Harper, Chancellor, at Union, June, 1829.

EVANS, J., sitting for NOTT, J.(*a*) The defendant had been the guardian of the complainant, Nancy Woodson, before her marriage; and during his guardianship he had in his hands cash, notes, &c., belonging to his ward, to the amount of $993.13. Before the filing of this bill he had paid to the complainant $745.90, and on a final settlement of his accounts, the commissioner allowed him other charges and payments, which reduced the

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balance due the complainants to *$5.15. This sum was reported to be due, and the Chancellor confirmed the report, without any order as to the payment of costs. The complainants taxed their costs and issued execution. A rule was obtained at the last sitting of the court for Union district, to shew cause why this execution should not be set aside. This rule the Chancellor, on hearing, discharged; and a motion is made in this court to reverse his decision.

There are several Acts of the legislature disallowing costs to the plaintiff, in an action at law, unless he recovers a certain amount. None of these, however, extend to cases in equity; and the reason is very obvious. The Chancellor has a control over the costs, and may give or refuse them at his discretion. Whatever may be the rule in England on this subject, it is apprehended that in this State the costs follow the decree, unless otherwise ordered by the Chancellor. By the 33 rule of court,(*b*) "when the bill or petition is dismissed, the costs shall be paid by the complainant; when sustained, by the defendant; unless otherwise ordered by the court." In this case, the bill was sustained, and the complainants are therefore entitled to costs. The demand, however, when the bill was filed, was for less than £100, sterling, and the complainants can have only the costs of a petition. It is therefore ordered that the execution be set aside, and that the commissioner retax the complainants' costs, allowing only the costs of a petition.

COLCOCK, J., and JOHNSON, J., concurred.

A. W. Thomson, for the motion.
Herndon, contra.

Motion granted.

(*a*) See note at page 40, ante.—R. Muse v. Peay, Dud. E., 236; Brown v. Wood, 6 Rich. E., 359; Chaplin v. Jenkins, 2 Strob. E., 96; Higginbottom v. Peyton, 4 Rich. E., 314.

(*b*) Mil. Com., 57; De S. E., 62.

Bailey, Eq. 96

SAMUEL CASTON, Administrator of Eli Caston, v. A. PERRY, Administrator of Jason Hickler.(a)

(Columbia, May, 1830.)

[*Appeal and Error* ⇐1106.]

Where the exceptions to the commissioner's report are rendered unintelligible from his neglect to report the evidence upon which his conclusions are founded, the cause will be remanded for trial de novo, although the report has been confirmed by the Chancellor. A party who thinks himself aggrieved by the judgment of the Circuit Court, is entitled under the constitution to appeal from it; and of this right he cannot be deprived by the negligence of a public officer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4394; Dec. Dig. ⇐1106.]

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*On appeal from the decree of De Saussure, Chancellor, at Lancaster, June, 1827.

JOHNSON, J. The object of this bill seems to have been to settle long standing and apparently complicated accounts, between the intestates of the respective parties. The accounts have been twice before the commissioner for adjustment; and we have two reports from him in relation to them, in the last of which he strikes a balance of $108.10, in favor of the complainant. Both of these reports, it appears, were excepted to, and the cause came up before the Circuit Court upon these exceptions. But we look in vain through the reports for one single fact on which the conclusion is founded: and out of the very many items, on both sides, which have been allowed or rejected, there is not one in relation to which there is any title of evidence before us, or to which the exceptions to the commissioner's reports have any relation. The decree of the Chancellor is professedly founded on statements made by the counsel on the argument of the exceptions; and even these are not preserved. The decree itself complains of the want of the necessary information, and of the inapplicability of the exceptions; and the Chancellor is only deterred from sending the case back to the commissioner by the delay which it would occasion. It now becomes a question how this court ought to dispose of it.

I was very much inclined to let the decree stand on the presumption that justice had been done, as the contrary is not shown. But it is the right of the party, thinking himself aggrieved by the judgment of the Circuit Court to have it reversed here. This has become impossible in the present state of the case, in consequence of the delinquency of the commissioner, whose duty it was to have taken and preserved the evidence, and reported it to the court; and the question is, whether the negligence of a public officer shall deprive the party complaining of a legal, nay, a constitutional right, I think not. That officer is under the control of the Chancellor; and, with great deference and respect to the venerable Chancellor who decided this cause, I think it would have been an incalculable public benefit if he had punished the commissioner severely, and ordered the case back for a report of the facts; for even after the delay incident to an appeal to this court, the only alternative is to send it back for a report and for trial in the Circuit Court.

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*It is, therefore, ordered, that the accounts between these parties be referred back to the commissioner, and that he report thereon to the Circuit Court, and that the cause be tried there de novo.

COLCOCK, J., and EVANS, J., concurred.

Cause remanded.

(a) Colding v. Badger, 3 Rich. E., 368.

Bailey, Eq. 98

JOHN McCAW and Wife v. THOMAS G. BLEWIT and Others.(a)

(Columbia, May, 1830.)

[1. *Appeal and Error* ⇐1185, 1194.]

A decree confirming a report of the commissioner is conclusive as to every thing contained in the report, to which exceptions are not sustained, including such matters as might have been, but were not, excepted to; and although the decree is reformed by the Court of Appeals, it remains conclusive, in all respects in which it is not modified or reversed; and if an account is sent back by that court, it is opened only for the purposes specified in the decree. But if the decree of the Court of Appeals leave a matter concluded, which was intended to be left open; or if it be founded on misrepresentation; it will be amended by that court, so as to do justice to the parties, on a subsequent appeal, upon the coming in of the new report, and exceptions thereto.

[Ed. Note.—Cited in Pope v. Frazee, 5 S. C. 272; Asbill v. Asbill, 24 S. C. 359; Morgan v. Morgan, 45 S. C. 336, 23 S. E. 64.

For other cases, see Appeal and Error, Cent. Dig. §§ 4638, 4651; Dec. Dig. ⇐1185, 1194.]

[2. *Executors and Administrators* ⇐104.]

An administrator is chargeable with interest on all sums received by him for the estate of his intestate, and not applied to the purposes of the estate, unless he has retained them in his hands unemployed, for reasons which rendered it proper that he should do so; and, even where such reasons exist, the onus lies on him to show by proof, the amount actually retained.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 423; Dec. Dig. ⇐104.]

[3. *Executors and Administrators* ⇐313.]

An administrator who has refused to settle with a distributee without suit, because his

(a) Ante, 23; Post, 460, 487, 279, 343, 514; Duncan v. Dent, 5 Rich. E., 7; 1 McC. E., 10, 202, 250, 459; 2 Id., 7; Chesnut v. Strong, 1 Hill E., 122; 2 Id., 149; Monk v. Pinckney, 9 Rich. E., 279; Oswald v. Givens, Rich. E. C., 326; Ril. E., 38; Frierson v. Graham, 7 Rich. Eq. 95; McAlister v. Brice, McM. E., 275.

character had been assailed, and he wished an investigation of his conduct, will not be relieved from the payment of interest, on the ground that he retained the funds in his hands to pay the distributee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1271; Dec. Dig. ⇐313.]

Before Harper, Chancellor, at Chester, in June, 1829.

This was a bill for an account of the distributive share of the complainant, Mrs. McCaw, in the estate of her father, Allen De Graffenreid, deceased, of which administration had been granted to the defendant, who had also been appointed guardian of the complainant. The bill was filed in June, 1823, and the case having been referred to the commissioner, a report was made by him, to which various exceptions were filed; and the cause was heard and decided by Thompson, Chancellor, in June, 1826. An appeal was taken from his decree, which was modified in certain particulars by the Court of Appeals; and the account was again referred to the commissioner, to be amended in conformity to the decrees. See the case reported in 2 McC. Eq., 90.

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*One of the defendant's exceptions was, "that he ought not to have been charged with interest on the amount due, from the filing of the bill, inasmuch as he offered to settle and pay the complainants the money, and the funds have been kept for them." On this exception the Chancellor decided, that under the circumstances of the case the defendant ought not to be charged with interest; and the exception was sustained. This part of the decree was appealed from; and in reference to it, it was said in the decree of the Court of Appeals, "On the subject of interest, generally, it is the opinion of my brethren, that the defendant must be charged with it, from the time of receiving the different sums of money to the commencement of this suit; and for all sums since received, with the interest thereon received."

In the amended account, made under the reference ordered by the Court of Appeals, the commissioner arrested the calculation of interest in June, 1823, when the bill was filed; to which the complainants excepted on the ground that the burden of proof laid on the defendant, to show what amount of funds he had collected before the suit, and held for the complainants; and as he had not offered a title of proof on the subject, he was not entitled to exemption from interest on any part of it.

The cause came up before Harper, Chancellor, in June, 1829, on the report and exceptions thereto.

In support of the exception, the defendant's answer was referred to, in which he does not state, that "he had offered to settle with the complainants, and pay them their money," nor that "the funds were kept for that purpose;" but the only allegation is, that "he is now, and at all times has been, ready and willing to render the complainant every account and satisfaction on the administration of the intestate's estate." And in an amended answer, filed in February, 1824, he states, "that he has the whole of the proceeds of the estate in his hands, and that said proceeds are principally in notes outstanding, on interest, for the benefit of the estate." Several letters written by the defendant were also produced, in which although he had one time offered to settle with complainant, "provided he would take his wife's share of the money uncollected;" yet he immediately afterwards, and before the filing of the bill, refused to settle on any terms, until he was compelled by suit.

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*Harper, C. I may observe, in general, that the decree of Chancellor Thompson is final and conclusive, as to every thing contained in the former report, with respect to which the decree has not been reversed, or modified by the Court of Appeals. I do not mean, merely, matters as to which exceptions were taken and expressly decided, but every thing contained in the report, which might have been excepted to. The decree confirmed the report, except so far as exceptions to it were sustained; and the decree of the Court of Appeals opens the account only for the purposes specified.

The complainants' exception now to be considered, relates chiefly, to the amount of two sales of the estate, which are charged as having been received by the defendant when the money became due. I must consider this matter as having been settled by the former decree. These items were charged in the former report, precisely as they are charged now, with the exception that interest was then calculated up to the time of the report. The exception was, that interest ought not to be charged after the filing of the bill, as the defendant offered to settle, and kept the funds for the complainants; and this exception was sustained. I cannot perceive that the decree of the Court of Appeals alters, or reverses, the Chancellor's decree in this respect. The appeal decree mentions the general principle, on which interest is to be calculated: but if it be, as the Chancellor's decree decides, and I must take it for granted, that the defendant had collected, and held the funds, to meet the complainants' distributive share, they are not entitled to share the interest which afterwards accrued on outstanding debts due to the estate. The other distributees will receive that interest. The exception is overruled.

From this decree the complainants appealed.

Johnstone, for the appellants, contended, that the appeal decree did not affirm the decree of Chancellor Thompson, on the point in

question: but merely declared the general principle relating to it, on which the account was to be made up, and left the account itself to be settled by the evidence. The defendant had not brought himself within the principle, and was not, therefore, entitled to the benefit of it. There was not a particle of proof that he ever retained funds for the complainants. All the evidence, and even his own answer showed the contrary; and the

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only pretence that he *ever did retain, is the unsupported statement in his exception to the former report. Indeed, it is palpable, that so far from retaining the funds, they were not collected when the suit was brought, but were out on interest: and the complainants are to be deprived of the interest on their money, for six years, which interest the defendant has actually received, by the contrivance of charging himself in the account with the amount of the debts, long before they were paid to him. The decree of the Court of Appeals was certainly not intended to sanction a fraud of this sort.

Williams, contra, insisted that the question was concluded by the former decree, on which the Chancellor had placed the proper construction. If strict justice had not been done to the complainants on this point, more than justice had been done them on other points in the case; and they ought to be satisfied.

COLCOCK, J. delivered the opinion of the court.

The Chancellor could not have given any other construction to the decree of the Court of Appeals, in this case, than that which he has given, so far as regards the stopping of interest on the filing of the bill. But the court did not mean to say, that interest was not to be calculated on any part of the estate; but on the contrary, the defendant was directed to be charged with "all sums since received, with the interest thereon." What the administrator had in his hands was to be shewn, of course, on the reference: and that by him, for it is obvious that he alone could shew how much of the estate he had received: and although the Chancellor had not the power to reform the decree of this court, yet it now being made to appear, that that decree was founded on a misrepresentation of facts, this court can, and will, amend the decree, so as to do justice to the parties.

It was expressly stated in the report, and so contended on the argument of the case here, that the administrator had been always ready and willing to come to a settlement: and my brethren thought, as he had been improperly forced into court, it was hard he should be made to pay interest. But on the reference it is now proved, that so far from being ready, or willing, to make a settlement, he had determined not to do so until the court should make a decree; assigning as a reason, that he had been aspersed by the complainant, and therefore he wished an in-

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vestigation of his conduct. I do *not profess to use the words of the party, but this is the plain meaning of them; and for this reason he resisted the claim, and refused a settlement. This takes away the ground on which the court said the calculation of interest should be stopped; and the complainants certainly have a right to the benefit of the rule, which is usually applied in such cases, that interest is to be charged on all sums received by an executor, or administrator, and not applied to the purposes of the estate.

It is therefore ordered and decreed, that the commissioner, on the final adjustment of the accounts, calculate the interest on all the money received by the administrator, from the first of January after the receipt of any sums in each year, to the final settlement, according to the repeated decisions of this court: that is, on the balance due at the end of each year.

Decree modified.

Bailey, Eq. 102

JAMES CRAIG, and Others v. GEORGE CRAIG, and Others.

(Columbia, May, 1830.)

[1. *Partition* ⇐107.]

A partition, irregularly made by proceedings at law, will not be disturbed, when the parties interested have acquiesced, and third persons have purchased under it.(a)

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 362–374; Dec. Dig. ⇐107; Equity, Cent. Dig. § 216.]

[2. *Deeds* ⇐26.]

A letter containing these words—"Mother, I would wish you to live upon the land that my father left me. Sell it and make use of it to the best advantage to support yourself."—cannot operate as a legal conveyance; nor is it such a gift as will be enforced in equity. It is, however, an authority to use the land, and enjoy the rents and profits; and continues until revoked, or until the death of the writer; and if he has not since been heard of, he will be presumed to have died at the end of seven years from the date of the letter; when the descent being cast upon his heirs, the authority ends.

[Ed. Note.—Cited in Rush v. Hilton, 83 S. C. 446, 65 S. E. 525.

For other cases, see Deeds, Cent. Dig. § 51; Dec. Dig. ⇐26.]

[3. *Death* ⇐2.]

One who is absent will be presumed to have lived for seven years from the date when he was

(a) McM. E., 480; 2 Rich. E., 99; Sp. E., 385; Post, *343; 1 Strob. E., 96; Thompson v. Dulles, 5 Rich. E., 370; Goodhue v. Barnwell, Rice E., 198.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

last heard of, and to have died at the end of that period.(*b*)

[Ed. Note.—Cited in Corley v. Holloway, 22 S. C. 386.

For other cases, see Death, Cent. Dig. §§ 2, 3; Dec. Dig. ⟸2.]

[4. *Wills* ⟸564.]

A testator devised to his widow "full privilege of the house, and water, and firewood." *Held*—that the widow was entitled to occupy the house, but that the land was not chargeable for the expenses of repairing, or rebuilding it.(*c*)

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1231; Dec. Dig. ⟸564.]

[5. *Partition* ⟸87.]

The testator bequeathed to his widow ten bushels of wheat, and a hundred bushels of corn, annually. She lived with one of her sons, who occupied the land, and maintained her. The payment of this annual legacy was not specially charged on the land by the will; but the devisees having agreed so to consider it, the son was allowed to set up the value of the wheat and corn, as a discount, in an account against him for the rents and profits of the land.(*d*)

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 253; Dec. Dig. ⟸87.]

[6. *Account* ⟸19.]

An account will not be ordered between co-defendants, unless it be necessary to a final settlement, and one at least of the parties interested request it.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 108; Dec. Dig. ⟸19.]

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[7. *Partition* ⟸84.]

*Interest decreed on a sum of money assessed for equality of partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 230–235; Dec. Dig. ⟸84.]

[8. *Partition* ⟸84.]

The court will not declare land to be subject to the lien of an assessment for equality of partition, against a purchaser who has not been made a party; but leave will be granted to amend, and make the purchaser a party.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 230–235; Dec. Dig. ⟸84.]

[9. *Partition* ⟸112.]

Land ordered to be sold for partition, subject to the right of the widow to occupy a house on it, "with privilege of water and firewood;" and the proportion of the proceeds belonging to parties not represented, ordered to be held by the commissioner for them.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 419–423; Dec. Dig. ⟸112.]

This was a bill for partition, filed in Chester district; and came up on appeal from various decrees and orders, which will be sufficiently understood from the opinion delivered in the Court of Appeals.

EVANS, J., delivered the opinion of the court.

The facts of this case, as they appear from the bill, answers, and exhibits, are as follows. On 2 January, 1812, George Craig made his last will, containing, amongst other things, the following clauses: "I bequeath my lands to be divided equally amongst my loving sons, Alexander, James, John, and George Craig." "I bequeath to my loving wife, Mary, ten bushels of wheat, and one hundred bushels of corn, yearly, two cows, and one horse, having full privilege of the house, and water and fire-wood, as long as she lives my widow." The residue of his property he directed to be sold, and the proceeds to be given to his daughters; except some articles for the support of his family for the year, and a negro boy named Harry given to his son Alexander. How much personal estate there was, or what became of it, does not appear.

Immediately after the death of the testator, George Craig moved on to the plantation, where his father died, and has remained there ever since, cultivating the plantation, and residing in the house with his mother. Some two or three years prior to 28 July, 1816, James Craig, one of the testator's sons, enlisted in the army of the United States. On that day he wrote a letter, directed to his mother, and his brother George, wherein among other things he says, "Mother, I would wish you to live upon the land that my father left me. Sell it, and make use of it to the best advantage, to support yourself." Since the date of this letter James Craig has never been heard from. John Craig removed to Tennessee, and was supposed to be dead, leaving a wife and children, prior to 1818.

At the March term of the Court of Com-

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mon Pleas for Chester *district, in the year 1818, a petition was filed in the name of Alexander Craig and others, against George Craig, who was tenant in possession, praying for a partition of the lands, according to the will of George Craig, the testator. The commissioners appointed to divide, subsequently made a return, wherein they stated that the land was incapable of division into four parts, but might be conveniently divided into two parts. One of these parts they valued at $1,860, and the other at $1,452. It seems that Alexander and George took possession of the part valued at $1,860, and sold it to David Boyd. The other tract was left for John's heirs, and James. This was the tract on which the testator lived, and whereon was situated the house, the privilege of which was given to the widow, Mary Craig, during widowhood. Since the death of testator, the old house has rotted down, and George Craig has built another on the land, at a cost of $155, in which he and his mother have continued to reside.

On 26 April, 1826, the complainants, who are the widow and children of James Craig, under the presumption of his death, ten years having elapsed since he was last heard from,

(*b*) Quære. Sims v. Meacham, 2 Bail. L., 101; Chapman v. Cooper, 5 Rich. L., 459; Naisor v. Brockaway, Rich. E. C., 449; Canady v. George, 6 Rich. E., 107; Godfrey v. Schmidt, Chev. E., 57; 2 Mees. & Wels., 894.

(*c*) Whilden v. Whilden, Ril. E., 205; Rivers v. Rivers, 9 Rich. E., 203.

(*d*) Post, 156.

filed the bill in this case, praying for partition of the land according to the will of the testator, George Craig the elder. In this bill, George, Alexander and Mary Craig are made defendants, and it is prayed that "the widow and children of John Craig may, by notice from the court, be ordered to appear and answer." The case came on to be heard at June term, 1827, before De Saussure, Chancellor, who ordered that the partition made under the order or the Court of Common Pleas in 1818, should be confirmed, and that the title of David Boyd to the tract bought by him from Alexander and George Craig, should be confirmed. He also decreed James Craig's part of the land to the mother during her life, under the allegation that he had given it to her by his letter dated 28 July, 1816; and after her death the land was ordered to be sold, the proceeds to remain in the hands of the commissioner: and the decree directs an account of the rents and profits to be taken between George Craig and the heirs of John Craig. Under this last order, various references have been had, and reports have been made, exceptions filed, and decrees made on those exceptions; but under the views taken of the case by this

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court, all the proceedings subsequent to *the decretal order of June, 1827, will be unnecessary to be considered, as they have grown out of a decree which must be reversed..

The proceedings to divide the lands, in the Court of Common Pleas, were altogether irregular, but as the parties before this court have acquiesced, so much of the decree of June, 1827, as confirms that partition, and quiets the title of David Boyd, will not be disturbed by this court.

The letter written by James Craig, to his mother and brother George, on 28 July, 1816, from which all that relates to this subject is extracted in the foregoing statement, is certainly no legal conveyance. It is entirely voluntary, and not such a gift as will be enforced in equity. George Craig, who has been in possession of the land ever since the death of his father, must therefore account with the complainants for one-half of the rents and profits of the land: but not including the house, for that belonged to the mother. The letter of 28 July, 1816, however, although no legal or equitable title, may be fairly considered an authority to her to use the land, and to receive the rents and profits from his brother George, who was in possession. This authority would continue until his death, when his estate was cast by descent upon the complainants. Not having been heard from, he would be presumed dead after seven years. In making up the account, therefore, the commissioner will charge George Craig with one-half of the rent from the time he went into possession, until 28 July, 1816, and will recommence again on 28 July, 1823, omitting seven years from the date of his letter. In the account no charge can be allowed for rebuilding the house. The will gave the widow the privilege of the house, but it does not follow, that the devisees of the land are bound to participate in the repairs, or the restoration of the building. The privilege of occupancy is alone given to her.

The will gives to the widow a yearly allowance of ten bushels of wheat and one hundred bushels of corn. I see nothing in the will charging this specially on the land: but all the parties to the bill seem so to consider it, and this court is not disposed to interfere with their construction of their rights. The commissioner must, therefore, in making up the accounts, charge the complainants with a fourth of the value of the corn and wheat:

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and George Craig *having supported his mother, will be entitled to this credit; but the charge must be omitted during the seven years for which he has not been charged the rent.

The decretal order of June, 1827, orders an account to be taken of the rents and profits of the land between George Craig and the heirs of John Craig. An order that defendants should account among themselves is unusual, and ought not to be made except when it becomes necessary to a final settlement, and where at least one of the parties interested request it. In this case I see no evidence that John Craig's heirs were ever made parties. The bill says he removed to the west, and there died, leaving a widow and some children; but how many, or where they resided, is unknown, and the bill concludes with a prayer that they may be made parties by notice. But they are unrepresented, and their names are not even known; and as the account is objected to by the co-defendant, so much of the decree as orders an account between George Craig and the heirs of John Craig must be reversed.

In the partition of the land made under the order of the Court of Common Pleas, the tract which was taken by Alexander and George Craig was valued at $408, more than the tract left for James and John. The defendants Alexander and George, must therefore pay the complainants $102, with interest from 15 September, 1818, when the partition was made. But the complainants contend that they have a lien upon the land to secure the payment of this difference. This may be so; but the land now belongs to David Boyd, who is no party to this bill, and no decree can be made affecting his interests. If the complainants think proper, they can amend their bill in this particular, and leave to do so is granted to them.(e)

It is ordered and decreed, that so much of the various orders and decrees heretofore made in this case, as are inconsistent with

(e) Anderson v. Hughes, 5 Strob. L., 76.

the principles laid down in this decree, be reversed. And it is further ordered and decreed, that George Craig do account with the complainants for one-half the rents and profits of the land, according to the principles herein contained, and that the commissioner do sell the tract of land whereon George Craig and Mary Craig reside, on the first Monday in January next, or at some convenient time afterwards, on a credit of one and two years, except so much cash as

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*will pay the costs of this suit: but this sale must be made subject to the rights of Mary Craig to the privilege of the house, water, and firewood, under the will of George Craig her husband. One-half of the sales to be paid to the complainants, and the other half to be held by the commissioner, for the heirs of John Craig.

Mills, for appellants.
Eaves, contra.

Decree reformed.

Bailey, Eq. 107

JAMES McCLURE and Wife v. WILLIAM MILLER and Wife, and Others.

(Columbia, May, 1830.)

[1. *Husband and Wife* ⇐8.]

A gift by a woman, on the eve of a second marriage, to her children by a former marriage, is no fraud upon the marital rights of the second husband, if he knew of the gift before the marriage. Nor does it make any difference, that she was indebted, at the time, for the purchase money of the property given, and that the children were interested in the debt, unless it appear that the fact was fraudulently concealed from the intended husband; vide Jones v. Cole, 2 Bail., 331; S. P.(a)

[Ed. Note.—Cited in Jones v. Cole, 2 Bailey, 333.

For other cases, see Husband and Wife, Cent. Dig. § 29; Dec. Dig. ⇐8.]

[2. *Gifts* ⇐47.]

Where property is delivered expressly as a gift, it cannot be presumed to be in satisfaction of a previously existing debt. Satisfaction is presumed only where the delivery is without explanation.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 81; Dec. Dig. ⇐47.]

[3. *Trusts* ⇐198.]

An administratrix cannot avoid a purchase by herself at her own sale, if the distributees are satisfied with it. The rule that a trustee cannot purchase at his own sale, is intended for the protection of the cestuy que trust, only.(b)

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 260; Dec. Dig. ⇐198.]

[4. *Equity* ⇐46.]

Equity will not entertain jurisdiction of a matter which the party has had an opportunity of litigating in another court, and which has there been decided against him; unless it appear, that there existed circumstances, such as accident, or surprise, which prevented his making his defence, or trying the question.(c)

[Ed. Note.—Cited in Kenner v. Caldwell, Bailey Eq., 149, 21 Am. Dec. 538.

For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159–163; Dec. Dig. ⇐46.]

[5. *Executors and Administrators* ⇐315.]

An administrator was cited, at a short notice, to account before the ordinary, and not appearing, a decree was made against him in his absence. Afterwards in an action at law upon the decree, the administrator offered in discount an account for the maintenance of one of the distributees; which was rejected on the ground, that it ought to have been set up before the ordinary, and was concluded by the decree. *Held*, that he could not be relieved in equity, as it did not appear, that there existed any circumstances which deprived him of the opportunity of setting up the discount before the ordinary.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1309; Dec. Dig. ⇐315.]

[6. *Judgment* ⇐459.]

Bill retained, where the defendant consented to an account to which the complainant was not entitled, as a set-off against a judgment at law; but the injunction in the mean time dissolved, and the bill ordered, on payment of the sum

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*found by the account, or crediting it on the judgment, to stand dismissed with cost.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 877; Dec. Dig. ⇐459.]

This was a bill to injoin a judgment at law, with various prayers for relief, which will sufficiently appear from the decree of the Chancellor. It was heard by Harper, Chancellor, at Chester, in June, 1827; and the following decree was pronounced:

Harper, C. The complainant, Mrs. Mary McClure, on the death of her former husband, James Clifton, administered on his estate. The whole of the personal estate was sold by permission of the ordinary, and several slaves, who are in question in this suit, purchased by the widow. Some time afterwards she married the complainant, James McClure; but previously to her marriage, and with her intended husband's knowledge, she conveyed the slaves by a deed of gift to her two children, the defendant Susannah, now the wife of William Miller, and Benjamin W. Clifton. On 14 March, 1825, at the instance of defendant, Susannah's guardian, complainants were cited to appear before the ordinary, on the same day, to account for their administration of the estate of James Clifton. They did not appear, and the ordinary made a decree, which established that there was due to Mrs. Miller, $625.87, for her distributive share of her father's personal estate. An action at

(a) Lyles v. Lyles, Harp. E., 294; contra, Terry v. Hopkins, 1 Hill Eq., 1; Ramsay v. Joyce, McM. E., 249 [37 Am. Dec. 550]; Manes v. Durant, 2 Rich. E., 404 [46 Am. Dec. 65].

(b) Price v. Nesbit, 1 Hill E., 461, 2; Foster v. Brown, 1 Bail. L., 221 [19 Am. Dec. 672]; 1 Hill E., 353; 7 Rich. E., 34; 4 Id., 165; McM. E., 59.

(c) Post, 113, 149, 179, 244, 293, 334, 324; Rich. E. C., 46, 394, 459, 143; 1 Hill E., 14; Forsythe v. McCreight, 10 Rich. E., 308; 1 Id., 41; 2 Id., 63; 3 Strob. E., 44, 145; 6 Rich. E., 287; 1 Id., 276.

law was brought by the defendants, in the name of the ordinary, on the administration bond, and the amount of the decree recovered. On the trial at law, the complainants offered to prove as a set-off against Mrs. Miller, an account for her maintenance and education, and other charges. This set-off was rejected: the Circuit Court deciding, as it appears, that this account was properly cognizable before the ordinary, and should have been produced and proved before him, when the parties were cited to account, and that his decree was conclusive.(*d*) On motion for a new trial, the decision was sustained on this express ground. The objects of the present bill are, to have the conveyance made by Mrs. McClure to her children, before the marriage, set aside as a fraud on the marital rights; or that the property conveyed should be decreed to have been in satisfaction, of what was due to the children from their mother, as administratrix: or, otherwise, that the purchase of the slaves at her own sale may be set aside, she having been incapable to purchase on account of her character of administratrix.

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*The complainants also seek by their bill, to establish their account against Mrs. Miller for board, &c., either as a matter originally pertaining to the jurisdiction of this court, or on the ground of the complainants having been surprised by the decree of the ordinary.

It is hardly necessary to say, that the conveyance could be no fraud on the marital rights, when the husband knew it before the marriage. I will not say but that a case might arise, in which, if the wife, being indebted, should fraudulently conceal that fact, and make a voluntary conveyance of her whole property, or so much of it as to leave her unable to satisfy the debt, the husband, if he should be compelled to pay the debt, might be allowed to stand in place of the creditors and avoid the conveyance, although he knew of it before the marriage. But in such a case, the actual fraudulent intention must be established, and I see no reason to impute any such here. Mr. McClure must have known that his intended wife was the administratrix of her former husband; and indeed the bill does not charge ignorance of that fact, although it charges that McClure was ignorant of her having purchased these slaves at the sale of her intestate's estate. If he knew this, he must have known that she was indebted on account of her administration, as the children were minors, and could not have received their distributive shares. There was at least enough to put him upon inquiry. The ordinary's office afforded him ready means of ascertaining the extent of the debt. At all events, I cannot say that there was a fraudulent concealment by Mrs. McClure.

Then as to the conveyance being a satisfaction. If it had been so intended, the children on coming of age would have had an option, either to accept, or reject it. That which is given and accepted in satisfaction will be so considered by the court. If a person indebted should pay money to his creditor, without specifying for what purpose, it would be natural enough to suppose that it was intended as payment. But this could not be supposed if the party paying expressly made it a gift. Where a father, being an executor, delivered property to his child, who was a residuary legatee, without explanation, this has been presumed to have been intended as in satisfaction of his legacy. But in this case I cannot presume against the express terms of the deed itself, which purports to make a gift. Certainly it was competent for the mother to make a gift to the children,

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*although she was indebted to them; and she has done so.

As to the purchase by the administratrix at her own sale, it has been said in some of the cases, that a purchase by a trustee at his own sale is void, at the option of the cestuy que trust. By this is meant that the cestuy que trust is not bound to shew any fraud, or advantage, gained by the trustee. The chance of fraud without the means of detection is sufficient. But it would be singular indeed that, the trustee should avoid his own purchase, on the score of his possible fraud, when the cestuy que trust is satisfied. The trustee who has purchased may file a bill, calling on the cestuy que trust either to confirm, or avoid, the sale.

I feel bound also to say, that the complainants come too late to establish their account for the maintenance of the defendant, Mrs. Miller. No doubt matters of account pertain to the original jurisdiction of this court, and parties may come here to have an allowance for the maintenance of infants, past or future. But the decision of the Court of Appeals is conclusive, that I must regard this as a matter already adjudicated. But for this, the account would have been proper for the jurisdiction of the Court of Law. The opinion of the court is, that in the parties' accounting before the ordinary, "the charge now made became a proper and indispensable matter of account; and from their acquiescence in the decree of the ordinary, it will be presumed, that all matters properly cognizable there, were fully adjusted, and settled." That which has been once adjudicated, is final and conclusive beeween the same parties. The rule goes further. In the case of Le Guen v. Gouverneur and Kemble, 1 John. C. R., 436, a case which deserves much respect, from the great ability with which it was argued and determined, the rule was held to be, that what the parties have once had an opportunity of

(*d*) Ordinary v. McClure, 1 Bail., 7 [19 Am. Dec. 648].

litigating, in the course of a judicial proceeding, they shall not bring into question again. In this doctrine I most fully concur. It does not apply, of course, if there existed circumstances, such as give jurisdiction to this court, to prevent the party's making his defence, or trying the question. Such might be accident or surprise. Surprise is alleged in this case; but I think not sustained. The citation to appear before the ordinary, to be sure, gave but a very short notice. But the evidence was, that the parties resided across the street, in the immediate vicinity of the ordinary's office, and there was nothing to

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shew *that they might not have attended. If they had attended, and asked for further time to make out their accounts, and it had been refused, this might have formed a different case.

I should have dismissed the bill at once, had not the defendants, by their solicitor, submitted to credit any amount that the complainants may have expended for the education of Mrs. Miller; that is to say, actual, disbursements for her expenses, exclusive of her board and maintenance at their own home. This must be matter of reference; but as I order it only on the consent of the defendants, I cannot, against their wishes, continue the injunction. The complainants must run the risk of their forbearance to enforce these expenses, or of recovering it back after they shall have paid the judgment. The defendants also submit to credit the payment of $220.50 made on the judgment. Indeed, this credit has been already given on the execution.

It is ordered and decreed, that it be referred to the commissioner to report the amount expended by the complainants for the education of the defendant Mrs. Miller; and that upon the defendants giving credit on their judgment at law, for the amount that shall be found due on the coming in of the said report, or refunding and paying to the complainants the said amount, if their judgment shall have been previously satisfied, the bill stand dismissed with costs: otherwise to remain subject to the order of this court.

From this decree the complainants appealed.

Williams, for the appellants, contended, that if the gift were not void as a fraud upon the marital rights of the husband, it must be taken as a satisfaction of the claims of the distributees upon the wife, for their share of the purchase money of the property given. This was unquestionably the intention; and it is not pretended, but that the property was an adequate satisfaction, and more than adequate. Indeed, it is obvious, that the purpose of the donor was nothing more than to release to the distributees her interest in the estate of their father. If this were the intention, then it is clearly a satisfaction. The inclination of the court is, to regard gifts as a satisfaction of previously existing demands, even when they purport to be mere donations, unless the idea of satisfaction is expressly negatived. Wood v. Briant, 2 Atk., 522; Hinchcliffe v. Hinchcliffe, 3 Ves., 516; Myers v. Myers, (ante, *23.)

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*Under any circumstances, the complainants have a strong equity to set aside the sale; and it is a mistake to say, that an administrator cannot avoid his own sale. Teague v. Dunlap, Harp. E., 97.

The decree of the ordinary is not conclusive as to the accounts in this court, although it was so at law. Equity will not enforce the judgment of a court of Ordinary, but will simply decree an account. McCullough v. Daniel, Harp. E., 255.

Mills, contra. There is no case where an express gift has been held a satisfaction. In all the cases of satisfaction, there was wanting a clear expression of the intention to make a mere gift; and the cases turn upon that point. In this case there is no room for doubt or construction.

It would be exceedingly dangerous, if an administrator, or other trustee, were permitted to avoid his own sale. The rule that a trustee shall not purchase the trust property, is clearly intended for the benefit of the cestuy que trust: but it will be a very questionable benefit, if the trustee is also allowed to avoid the sale. In this case, however, the administratrix was under no disability to purchase. She was one of the distributees, and therefore had a right to purchase at the sale.

As to the discount. If neither the decree of the ordinary, nor the judgment of the Court of Appeals is to conclude the question it is impossible to assign any limits to litigation. Interest reipublicæ ut sit finis litium is a sound maxim and applies if any where, to such a case as this.

J. Johnstone, in reply, cited Burges v. Mawbey, 10 Ves., 327, as to satisfaction. The complainants' discount was a demand against one of the distributees, and therefore inadmissible in her account of the administration of the estate. Regularly, the ordinary could not have taken jurisdiction of it, and therefore his decree could not conclude it.

COLCOCK, J. This court concurs with the Chancellor, in the very clear and correct view which he has taken of this case; and his decree is, therefore, affirmed.

JOHNSON, J., and EVANS, J., concurred.

Decree affirmed.

Bailey, Eq. *113

*WILLIAM HENDERSON v. DANIEL A. MITCHELL.(a)

(Columbia. May, 1830.)

[1. *Judgment* ⇐446.]

Equity will not relieve against a judgment at law, on the ground of after-discovered evidence, which the party might, by ordinary diligence, have obtained in season; nor upon any other ground, of which he might have availed himself at law, but neglected, or omitted to do so.

[Ed. Note.—Cited in Wilks v. Davis, Rich. Eq. Cas. 390, 397.

For other cases, see Judgment, Cent. Dig. § 846; Dec. Dig. ⇐446.]

[2. *Insane Persons* ⇐100.]

It is no ground for relief against a judgment at law, that the defendant was a lunatic, unless it appear that he was not represented.

[Ed. Note.—Cited in Ex parte Roundtree, 51 S. C. 412, 29 S. E. 66; Ex parte Kibler, 53 S. C. 463, 31 S. E. 274.

For other cases, see Insane Persons, Cent. Dig. §§ 182, 183; Dec. Dig. ⇐100.]

[3. *Judgment* ⇐426, 551.]

Where the condition of a penal bond has been submitted to a jury, under the Act of 1792, 7 Stat., 280, the determination is final, and concludes the jurisdiction of the Court of Equity to relieve against the penalty.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 804, 996; Dec. Dig. ⇐426, 551.]

[4. *Judgment* ⇐467.]

Objection to the jurisdiction sustained, after an account taken under a decretal order, from which the defendant ought to have appealed sooner; the account, however, sustained as to what was admitted by the answer, but without costs.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 905; Dec. Dig. ⇐467.]

The complainant was a co-obligor, with others, in a joint and several bond, to the defendant, as sheriff of Union district, the condition of which was, that one Lewis McElmurry should faithfully discharge the duties of a deputy-sheriff. On this bond the defendant recovered a judgment at law against the complainant, to the amount of $1,121.45, for several defaults of McElmurry, in failing to pay over moneys collected by him. And this bill was filed to be relieved from the judgment, on the grounds: that the complainant, who had been a lunatic, was not sufficiently recovered, at the time of the trial of the action at law, to be capable of properly defending it; that the verdict had been obtained fraudulently; that since the time, evidence had been obtained from McElmurry, who had left the State before the trial, which evidence proved clearly, that the defendant had recovered more than he was entitled to; and that as the judgment was upon a penal bond, the complainant had a right to come into equity for relief upon the condition. The defendant, by his answer, admitted an error in the verdict, to the extent of $130, which McElmurry had received, but which, as the defendant had since discovered, had been paid over to the parties entitled. He denied, however, that there was any other error in the verdict; and alleged, that McElmurry had received other moneys, which he had not paid over, and which were not included in the verdict: and these moneys, it was insisted, should be set off against the $130.

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*The cause came on for hearing at Union, in August, 1827, before De Saussure, Chancellor, who, by his decretal order, sustained the jurisdiction, and directed the Commissioner to take an account of the sum which the defendant was justly entitled to recover.

In June, 1829, the case came up before Harper, Chancellor, on the exceptions to the commissioner's report upon the accounts. One exception was, that the bill showed no ground of jurisdiction for relief in equity. The Chancellor held, that the question of jurisdiction was concluded by the decretal order, and overruled the exception; and on this ground, among others, the defendant appealed from the several orders made in the cause.

Herndon, for the motion. Although Chancellor Harper was concluded by the decretal order, this court is not; and it is now open to the defendant, for the rule of court prohibited his appealing from it sooner. It is clear that the bill contains no ground for relief. It is nothing more than a motion for a new trial; and equity will not interfere to relieve a party from a judgment at law, on a ground of which he might have availed himself there, but omitted to do so. Ware v. Horwood, 14 Ves., 30. If injustice has been done to the complainant, which, however, is emphatically denied, it was his own fault. It is said he had been a lunatic; but he had a committee, and he had counsel, and his interests were sufficiently protected. The after-discovered evidence might have been obtained before the trial: for McElmurry remained here for a considerable time after the action was commenced, and all the evidence said to have been furnished by him afterwards, might have been readily obtained before. As to the alleged fraud in obtaining the verdict, it consists in nothing more, than in submitting the condition of the bond to a jury, as required by the Act of 1792, instead of taking judgment for the whole penalty. If this be a fraud, it is one for which the legislature are responsible; for they have required it. Act of 1792, 1 Faust., 213. There is no part of complainant's defence to the bond, of which he might not have availed himself on the trial at law; and if he is now allowed to come into equity, it will be to throw all appeals into that court.

(a) This case was approved, Wilks v. Davis, Rich. Eq. Ca., 392, 397. Ante, 107, note c.

A. W. Thompson, contra. The question of jurisdiction is concluded by the decretal order. It was in its nature final, and the defendant was bound to appeal if he was dis-

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satisfied. It is too *late after a decree, to object to the jurisdiction. McDonald v. Crockett, 2 McC. C., 130. And more especially where, as in this case, the defendant has, by his answer, not merely submitted to the jurisdiction, but admitted a fact which gives jurisdiction. Underhill v. Van Cortlandt, 2 John. C. R. 339; Foster v. Wood, 6 Id., 87. Duncan v. Lyon, 3 Id., 350. The latter case is peculiarly strong; because, whilst deciding against interfering with a judgment, three exceptions are admitted, within every one of which the present case comes. That equity will relieve against a judgment at law, upon after discovered evidence, is too well settled to be disputed. Gainsborough v. Gifford, 2 P. Wms., 424; and see the authorities collected in 1 Mad. C., 77, 78, et seq. It will be done wherever the verdict is unconscientious, and the defendant had no sufficient opportunity to prevent it. Blackwell v. Combs, 2 P. Wms., 70; Hankey v. Vernon, 2 Cox., 12; Taylor and Knight, 2 Eq. Ca. Abr., 161; Billon v. Hyde, 1 Atk., 126; Lyon v. Tallmadge, 14 John. C. R., 501. The bill brings the complainant's case clearly within settled rules; and, as far as it depends upon testimony, it was fully proved, as is established by the decretal order.

But it is said, that the defendant was negligent. Negligent of what? He was a lunatic, or nearly so; and although he had a committee, yet the committee had ceased to act, and knew nothing of his affairs. Counsel was retained, but not in season to communicate with McElmurry, and obtain evidence from him in time for trial. They did not attend to the verdict, because they did not intend to deny the bond; and they did not submit the condition to the jury, because they were not prepared with evidence to rebut the plaintiff's demands. If the plaintiff chose to submit the condition, that cannot deprive the defendant of his right to relief from the penalty in equity. This is the true construction of the Act of 1792, which was never intended to divest the jurisdiction of the Court of Equity: and on this ground, independently of every other, the jurisdiction in this case must be sustained.

Johnstone, same side. Where the jurisdiction is doubtful, and the defendant has answered, instead of demurring, he cannot object to the jurisdiction at the final hearing. Wilson v. Cheshire, 1 McC. C., 233. The bill and the evidence fully sustain the propriety of the decretal order: but independently of

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the injustice done to complainant *by the verdict, he was entitled to come into equity upon the condition of the bond. The Act of 1792 has not divested the jurisdiction of equity in the case of penal bonds, unless the defendant has submitted the condition to the jury. Mitchell v. Humphries and Dawkins, Harp., 479. The extension to courts of Law of matters of equity jurisdiction does not divest the jurisdiction of courts of Equity. Kemp v. Pryor, 7 Ves., 249. And how does it appear that even the plaintiff submitted the condition to the jury? The declaration does not set out the condition, nor is there any suggestion of breaches; neither is there any order to submit the condition, and the only evidence that it was submitted, is the verdict. If such a verdict can oust the right of the defendant to come into equity, it operates a most injurious surprise; such an one as would, of itself, give jurisdiction.

COLCOCK, J., delivered the opinion of the court.

I am not disposed, in considering this case, to call in question the general doctrines of the counsel for the complainant. Fraud is a subject of equity jurisdiction; and the discovery of written evidence after verdict, is, according to circumstances, a ground for a new trial, or of equity jurisdiction. But neither of these positions, nor any others, that I am aware of, will support a direct appeal from the decision of a court of Law, having co-extensive jurisdiction of the subject matter. If the negligence of a party, or of those concerned for him, in the management of a cause, were a ground of equity jurisdiction, I should not doubt the right of the complainant to come here for relief; for it is obvious, that this was a simple case, involving no sort of difficulty, either as to the facts, or the law. I will consider the objections made, in their order.

It is said, the defendant was a lunatic. Then he was, or was not, liable to a suit, according to circumstances. If he was not represented, he could not be sued. If he was, then the suit was legal. But it is left doubtful whether he was sufficiently recovered to attend personally to his affairs; although it is admitted, that if he was not so recovered, his committee was still in commission, and consequently he was represented. But it is asked, what could the committee know of the transactions of the complainant? The answer is, that in such a case as the present, they could, and did know, as much as the complainant could have known if he had not

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been a lunatic: and that any one *man was as well qualified to defend the action as any other. What could the surety know of the defalcations of his principal? When the bill of particulars was filed, the information was immediately afforded which was necessary for the defence. The complainant, or his committee, might have summoned the parties, plaintiffs, and defendants, if necessary, to say how much the deputy had received

from the one, and paid to the other. As to the principal, he was in the State when the suit was commenced, and might have been detained here.

Next it is urged, that the action was on a penal bond, and that no verdict was had, that is, legally taken on the condition of the bond. There was a verdict in fact, but it is insisted to have been a fraudulent one. In a case settled at law according to the provisions of the Act of 1792, 7 Stat., 280, the determination must be final, and the jurisdiction of the Court of Equity concluded, or otherwise the Act was a work of mere supererogation. And if the proceeding was irregular, what was there to prevent the party from taking advantage of the informality, by pleading, or appeal?

Again: It is said that the defendant, by answering, and not appealing from the order of the Chancellor, directing a reference, admitted the jurisdiction of the court. As to the answer, although it admits the fact of recovering too much in the Court of Law, it does not follow that the jurisdiction was admitted. Indeed, it is said by the defendant's counsel that it was disputed. On the question, whether the defendant should have appealed, we have only to remark, that it has been found difficult, in all cases, to apply the rule of this court, that no case can be brought up until a final decision; and, therefore, the counsel might well doubt in this case. But this is a two-edged argument; for if the defendant should have appealed on the reference, it was much more the duty of the complainant to appeal on the dissolution of the injunction, for then he was clearly left at the mercy of the defendant.

The court, feeling great reluctance to turn a party round after a long litigation, consented to by both parties, have gone, it must be admitted, great lengths, but, I think, not so far as to sustain entirely such a bill as this. In that spirit, we will suffer the complainant to have the benefit of the admission of the defendant, but without costs.

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*EVANS, J., concurred.

JOHNSON, J., absent, from indisposition.

Decree modified.

Bailey, Eq. 118

SILAS ANDERSON v. BURWELL CHICK.

(Columbia. May, 1830.)

[1. *Frauds, Statute of* ⟸103, 116.]

The rule, that an auctioneer must be considered the agent of both purchaser and vendor, and his entry a sufficient memorandum, within the provisions of the statute of frauds, applies to sales of lands, as well as to sales of personal property.(a) But it extends only to sales made by persons exercising the public business of an auctioneer, and will not apply to a sale made by the mere private agents of the vendor.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 202, 258; Dec. Dig. ⟸ 103, 116.]

[2. *Frauds, Statute of* ⟸129.]

Part performance, to take a case out of the statute of frauds, must be such as operates a fraud, or hardship, on the party claiming performance, if the agreement is not enforced; and the act of part performance must, moreover, appear to have been in pursuance of the agreement, and in execution of it.(b) Payment by the vendee, of an execution against the vendor, will not entitle the latter to insist upon specific performance; for if intended as a payment on account of the purchase money, it operates no hardship on the vendor, if the agreement is not enforced. And although delivering and taking possession is a sufficient performance, yet the vendee's renting a part of the land, as agent of the vendor, is not such a part performance as will entitle the vendor to specific performance, as it does not purport to be in pursuance and execution of the agreement. The mere declarations of the vendee, that he had purchased the land, and was the owner, unaccompanied by any act in pursuance of them, want all the essential attributes of part performance. They are merely parol evidence of the agreement.

[Ed. Note.—Cited in Hatcher v. Hatcher, McMul. Eq. 318; Geigers v. Kaigler, 9 S. C. 403.

For other cases, see Frauds, Statute of, Cent. Dig. § 307; Dec. Dig. ⟸129.]

[This case is also cited in Christie v. Simpson, 1 Rich. 408, on the application of statute of frauds to judicial sales.]

At Union, June, 1829.

Harper, C. This was a bill to compel specific performance of an agreement for the purchase of land. The bill alleges that the land was sold at public auction, and bid off by the defendant, at the price of $2,000. The answer denies the agreement. It admits that the land was bid off by defendant, but states that it was only as the agent, or bidder, of complainant: and the statute of frauds is pleaded. It appears that the complainant, for the purpose of selling his goods and land, offered them at public outcry, at his own house, on the land in dispute. There were written terms of sale, but what advertisement was made of them, does not appear.

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*A person who was present, acted as clerk, and set down in writing the various sales; and, among other things, made the following memorandum: "Dr. B. Chick, 1 tract of land, $2,000." Complainant had no other land than that in dispute.

The first question is, whether this was a sufficient memorandum, in writing, signed by the party, or person by him lawfully authorized, to satisfy the requisitions of the statute. (c) The case of Gordon v. Sims, 2 McC. Eq. 163, was relied on to show that in sales at auction, the auctioneer must be considered the agent of both parties, and his entry a sufficient

(a) 2 Stat., 525; Wetmore v. Rhett, Charleston, April, 1860; Gordon v. Sims, 2 McC. E., 163; Jenkins v. Hogg, 2 Tread. E., 821; Church v. Wiley, 2 Hill E., 590 [30 Am. Dec. 386].

(b) Goodhue v. Barnwell, Rice E., 198, 236; Hatcher v. Hatcher, McM. E., 311.

(c) 2 Stat., 525.

memorandum. It is said, in that case, to be settled that the auctioneer is the agent of both parties; but that was not the point involved in the case, and perhaps, I ought only to regard it as the dictum of the Judge who delivered the opinion of the court. This was the case of a sale by the commissioner of the Court of Equity, which has been always held to stand on a different footing. The point was first decided by Lord Hardwicke, in the case of Attorney General v. Day, 1 Ves., 221. He puts it expressly on the ground that a judicial sale, under a decree, is not within the statute: and this is recognized by Sir William Grant, in Blagden v. Bradbear, 12 Id., 472. It seems sufficiently obvious, that such a sale is not within the mischief contemplated by the statute. The officer of the court is indifferent between the parties; he is responsible to the court for the fairness and regularity of his proceedings: and, perhaps, no transaction can be less exposed to the danger of fraud, or perjury, than such a sale. The officer is under no temptation to be accessory to either, but, on the contrary, is restrained by the strongest considerations. But it is in vain to say that the auctioneer is thus indifferent. He is selected and employed by the vendor, who reposes confidence in him: and as observed in the argument of Blagden v. Bradbear, "how can it be contended that the auctioneer is the agent of the purchaser? What confidence, what connection, is there between them?"

I shall not venture to express an opinion of my own, on a subject on which eminent Judges have differed; and certainly I should have much hesitation in differing from the Judge who delivered the opinion of the court in Gordon v. Sims. I shall, however, with much deference, throw out some suggestions, which may have a bearing on the question, if the point should again arise.

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*On the footing of authority, the argument seems to stand thus: In Simon v. Metivier, or Motivos, Bull. N. P., 280; 3 Bur., 1,921; 1 Bl. R., 599; it was decided in a case of sale of goods at auction, that the auctioneer was the agent of both parties, and his entry a sufficient memorandum. This case has been followed by others; and is not questioned as to this point. In Walker v. Constable, 1 Bos. & Pul., 306, Lord Chief Justice Eyre was of opinion, that the case of Simon v. Metivier, applied to the sale of goods only, and not to lands. The same thing was decided in Stansfield v. Johnson, 1 Esp. R., 101; and by Sir William Grant, master of the Rolls, in Buckmaster v. Harrop, 7 Ves., 344. In Coles v. Trecothick, 9 Id., 249, Lord Eldon seems to be struck with the incongruity between the case of Simon v. Metivier, and the cases on sales of land. The point is not decided, however, nor does he express any distinct opinion. The words of Lord Eldon, as reported, are: "Much perplexity has arisen by the case of auctions; for in Simon v. Metivier, it was held, as to goods, that the auctioneer taking down the name, was a signing within the statute: and it is very singular, that after, and without disturbing that, it was held at Nisi Prius, by Lord Ch. J. Eyre, that it would not do as to land. Why not? The form of the two clauses is not the same; but the terms, as to the memorandum in writing, are exactly the same. That case was followed, certainly without much argument or discussion upon the bench, according to the report, in Walker v. Constable. Unless some distinction can be pointed out, the law is very inconvenient as to sales by auction; particularly if the auctioneer is to be considered the agent of one only; and if, putting down the name, and ascertaining the sum, and putting that down upon the conditions of sale, which ascertain all the other terms, it is competent after that to the vendor to say, according to Payne v. Cave, that though the other party is bound, in a degree, by knocking down the hammer, he may, at that moment, revoke the authority. Upon such terms, mankind will not readily engage in these transactions."

There seems to me something equivocal in this passage. The inconvenience Lord Eldon alludes to, seems to be, that the vendee should be bound by the act of a supposed agent in knocking down the hammer, while, according to the case referred to, the vendor is not bound, but may then revoke the authority.

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Upon the case of *Buckmaster v. Harrop coming before Lord Chancellor Erskine, he remarks that he agrees with the observation of Lord Eldon, and cannot see why the construction should not be the same with respect to land as to goods; but he adds, that after the adjudged cases, it would be too much for him to decide according to his own impression, without the decision of a court of Law. 13 Ves., 472. Then came the cases of Emmerson v. Heelis, 2 Taunt., 38, and White v. Proctor, 4 Id., 209, in which the former cases were overruled, and the auctioneer was held to be the authorized agent of the vendee, in a sale of lands, as well as of goods. After these came the case of Kemeys v. Proctor, 3 Ves. and Bea., 57, before Sir William Grant, who says, he feels bound to follow the law, and, therefore, submits to the cases of Emmerson v. Heelis, and White v. Proctor; otherwise he would have adhered to his own opinion. Chancellor Kent, in McComb v. Wright, 4 John. C. R., 665, follows the later decisions: and this case is supported by others decided in New York.

On this statement of authorities, I venture to remark, that if the question had arisen in our court, before the case of Emmerson v. Heelis, they, probably, would have felt bound, by the adjudicated cases, to decide against the auctioneer's authority. But if our courts are at liberty to follow the fluctuations of English doctrines since the English law was

established by our constitution, they certainly are not bound to do so, further than they are convinced, or induced, by their reason and convenience. The only argument, so far as I can gather from the cases, against the earlier decisions, with respect to lands, is the incongruity and absurdity of giving a different construction to the same words, used in different clauses of the statute. Now, with respect to this, it may be remarked, that if the law established by the case of Simon v. Motivos, be too firmly settled to be shaken, the cases which established a different rule, with respect to land, conform more nearly to the statute. It seems to be a very constrained construction, to say no more, that an auctioneer is made the lawfully authorized agent of the vendee, to sign an agreement. In the common understanding, he is the exclusive agent of the vendor, who employs him; and there is, in general, neither confidence nor communication between him and the vendee. The question seems then to be, whether we shall overrule decided cases, which conform

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*to the plain expression of the statute, for the sake of congruity with other adjudged cases, which construe the statute more loosely. But is there such incongruity, and absurdity, to the extent supposed? In some cases, which concern another law doctrine, it has been frequently remarked, that it is not unreasonable, nor absurd, that the same words should receive a different interpretation, when applied to a different subject matter, real, or personal estate. If before the statute the law had required a written authority to sign an agreement respecting lands, while it was otherwise as to goods, the words "lawfully authorized" would have been construed with reference to the previous law, and would, of course, have received a different meaning when applied to land, or goods. But a parol authority is sufficient for either purpose. What constitutes a parol authority? I know of no precise rule upon the subject. It is a matter for testimony, and depends on the intention of the party granting it, and is evidenced by his words, or acts. There does not appear to me any intrinsic absurdity, in requiring fuller and more unequivocal evidence of the party's intention to grant an authority to bind himself in an important transaction, than would be requisite in a trifling one. Sales of land are generally of more consequence, and are transacted with more form, and circumstance, than those of goods; and deciding as a juror would do, I should require more evidence of the intention to grant an authority in one case than the other. There seems to be a distinction requiring, or, at least, rendering highly convenient, a different rule in the two cases. In sales of goods, a great number of articles are usually offered, many of them of trifling value; and it would be almost impracticable to obtain the signature of every purchaser, to a memorandum of his purchase. If every bidder for goods might complete his purchase, or not, at his pleasure, sales at auction would hardly be used. It seems almost a matter of necessity, that the auctioneer's memorandum should bind in such instances. The same necessity does not appear to exist with respect to lands. These are not bid off, like casks of sugar, or packages of dry goods. I can see no inconvenience in requiring that the purchaser should sign a memorandum, before the transaction shall be considered as complete; but, on the contrary, much fairness and equality; especially if, as Lord Eldon observes, the vendor may revoke his authority.

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after the hammer is knocked *down. If otherwise, it is to be recollected that you put it in the power of one who is, in truth, and effect, the agent of the one party only, chosen and paid by him, to fix the terms of the contract for both. Chancellor Kent, in the case of McComb v. Wright, observes, that from the publicity of sales at auction, there is no great danger of fraud or mistake. Sir William Grant, on the contrary, says, in Blagden v. Bradbear, "from the public nature of sales at auction, it does not follow that what passes there must be matter of certainty: so far from it, I never saw more contrary swearing than in these cases, when attempts were made to introduce evidence of what was said, or done, in the course of the sale."

As I before observed, however, I do not intend to be understood as expressing a definite opinion on this point, or deciding the case upon it. My opinion is, that in the present case there was no sale at auction, within the meaning of the decisions. By referring to the English cases, it will be apparent, that the sales at auction spoken of, are those made by persons exercising the public employment of auctioneers. The same thing appears in McComb v. Wright. Now, there is the most manifest difference between the sales made by such persons, and that which was made in this case. A person exercising the public business of an auctioneer, licensed in this State, is, in general, known to the public; he holds himself out as the agent of the public; his success in his business may be supposed to depend on his character for fairness and honesty: the business of an auctioneer can only be carried on successfully in populous towns, and his sales are necessarily made in places of resort and notoriety; and in the case of a public officer, the law, and in that of an auctioneer, custom, prescribes that a certain notice of sales shall be given by advertisement. But all this is different, when a party thinks proper to make an auction, as it is called, for himself, and sell his property at public outcry. He may select as private a situation as he pleases; and no rule prescribes what notice of the sale he shall give. If he is disposed to practice a fraud, he may easily pack a company of witnesses, and se-

lect a suitable instrument for his auctioneer. Besides, who was the auctioneer in this case? One of the witnesses acted as clerk; another as cryer. I do not know that one of these can be called the auctioneer, rather than the other. The business of the auctioneer is to

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negotiate, and superintend all *the transactions relative to the sale. It seems to me that the complainant himself, who was present superintending, came nearest to discharging the functions of an auctioneer.

It was also relied on in the case, that although no written memorandum was shown, there were sufficient acts of part performance, to take the agreement out of the statute of frauds. The only circumstances, which can be relied on as acts of part performance, seem to be, the paying off, by the defendant, of an execution for $100, affecting the land, testified by Capt. Hunter; and renting to Mrs. Huson a portion of the land. With respect to the first of these, I do not think it necessary to inquire, whether the payment of purchase money, is to be reckoned such part performance as will take a case out of the statute. The law is clear, that it can only be so in favor of him who has paid. Part performance is allowed to take a case out of the statute, on the score of the fraud, or hardship, to which the party performing will be subject, if the agreement be not enforced. But the party who has received the money will sustain no hardship. "In general, the party seeking a performance must show a performance on his part, as a reason for the interference of the court in his favor; for the ground upon which complainant acts, is fraud in refusing to perform, after performance by the other party." Per Sir William Grant, in Buckmaster v. Harrop. As to the transaction with Mrs. Huson, it is equally clear, that the act relied on as an act of part performance must appear to have been in pursuance of the agreement, and intended to be in execution of it. The delivery of possession is held to be a sufficient part performance; but it must be in pursuance, and execution of the agreement. Clerk v. Wright, 1 Atk., 12; Charlewood v. Bedford, Id., 417; Lacon v. Mertins, 3 Id., 1; Cooth v. Jackson, 6 Ves., 38, and many other cases.(d) Now, whatever agreement there may have been, this was not intended to be in execution of it. This appears from the answer, and the testimony of Mrs. Huson herself; which is all the evidence we have on this point. Defendant authorized her to take possession, not as of his own land, but as the tenant of complainant. As to the circumstances testified by Mr. John Rogers, in relation to the defendant's granting him permission to put a family from Ireland on the land, they were mere declarations; no act was done; no possession taken in pursuance

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of the permission given. It must be *an act prejudicial to the party claiming performance, that will take a case out of the statute. So of the several conversations testified to by other witnesses, as to his having bought the land, and his being the owner of it. All this was inadmissible evidence, it was parol evidence, to establish an agreement, as was all the rest of the testimony offered in the cause.

It is ordered and decreed, that the bill be dismissed.

From this decree the complainant appealed.

Herndon, for appellant, cited McComb v. Wright, 4 John. C. R., 659; Clason v. Bailey, 14 Id., 484; Buckmaster v. Harrop, 13 Ves. 456; Gordon v. Sims, 2 McC. C., 151; Hinde v. Whitehouse, 7 East, 558; Emmerson v. Heelis, 2 Taunt., 38; White v. Proctor, 4 Id., 209; Kemeys v. Proctor, 3 Ves. & Bea., 57; Coles v. Trecothick, 9 Ves., 234.

A. W. Thomson, contra, cited 1 Mad. C., 376; Philips v. Thomson, 1 John. C. R., 131; Parkhurst v. Van Cortlandt, Id., 273; Jackson v. Catlin, 2 Id., 248; Simonds v. Catlin, 2 Caines, 61; Meadows v. Meadows, 3 McC., 458.

COLCOCK, J., delivered the opinion of the court.

In this case, we concur with the Chancellor, in the result of his decree; for we are perfectly satisfied, that it is not a case which comes within the meaning of "a sale at auction." It is a misapplication of terms, to call the sale in this case a public sale; or to suppose that the mere private agents of a man, appointed to sell his property, should be considered as auctioneers, in the legal sense of that word.

But we wish to be distinctly understood, as not concurring with the Chancellor, in the suggestions which he has thrown out, on the doctrine of sales at auction, as regards land. I do not mean to intimate that there is any want of force in them. They are entitled to the highest consideration, as coming from him, and are cogent in themselves; but I consider the question as at rest. It has been decided by both our courts of Law and Equity.

I have often regretted that any departure was made from the statute, because I think, that as to all sales, its provisions might, by a proper arrangement, have been literally complied with, without any impediment to the conduct of sales. But as the words of the statute are the same as to both personal and

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real property, I confess the absurdity *of a different construction of them, when applied to different things, had great weight with me. Nor is it lessened by the recollection, that we are still guilty of a like absurdity on

(d) Hatcher v. Hatcher, McM. E., 318; Smith v. Smith, Id., 136; 1 Rich. E., 130; Massey v. McIlwain, 2 Hill E., 421; Poag v. Sandifer, 5 Rich. E., 170; 9 Rich. L., 219.

another subject. So far from its furnishing any reason why we should persevere in the decision, that the same words in a will may create a good limitation over as to one kind of property, and a void one as to the other kind, I think it should lead us to discard the absurdity in the latter, as we have done in the former case.(c)

Having once left the statute, why should this feudal distinction be adhered to? Why all this legal form and parade as to land, when we know it often happens, that a bale of goods, sold by an auctioneer with little ceremony, and perhaps in ten minutes, is oftentimes of more value than half of the farms in the country. A bale of broad cloths, or a box of linens, will oftentimes sell for more money than would be sufficient to buy two thousand acres of good land. My only object, however, in these remarks, is to avoid any misunderstanding as to our views of the general doctrine. The motion is dismissed, and the decree affirmed.

JOHNSON, J., and EVANS, J., concurred.

Decree affirmed.

(c) Vide Mazyck v. Vanderhorst, ante, 48.

Bailey, Eq. 126

DAVID ROWE, and Others v. JOHN COCKRELL, and Others.

(Columbia. May, 1830.)

[1. *Fraudulent Conveyances* ⟸295.]

The testimony of one witness is sufficient to prove fraud, although denied by the answer, if corroborated by the circumstances of the case.(a)

[Ed. Note.—Cited in Ex parte Simmons, 69 S. C. 386, 48 S. E. 279.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867–875; Dec. Dig. ⟸295.]

[2. *Execution* ⟸230.]

A fraudulent sale will be declared void at the suit of creditors; and a sale by the sheriff, under execution, for an inadequate price, may be avoided by the creditors of the defendant, upon proof, that the purchaser combined with a third person, who claimed the property under a fraudulent bill of sale, and forbade the sale by the sheriff; or prevented competition, by fraudulently deterring other persons from bidding. And it is fraudulent to deter even a deputy sheriff from bidding, although he is prohibited from purchasing, by the Act of 1823; for it is optional with the parties interested, to confirm, or set aside his purchase. But where a sale by the sheriff is set aside, the purchaser is entitled to be refunded the purchase money, from the proceeds of a re-sale.(b)

[Ed. Note.—Cited in Mathency v. M'Donald, 5 Strob. 84.

For other cases, see Execution, Cent. Dig. § 648; Dec. Dig. ⟸230.]

(a) Ante, 1; post, 382, 463; 2 Rich. E., 4; 2 Strob. E., 143; 3 Rich. E., 418.

(b) Farr v. Sims, Rich. E. C., 122; Hamilton v. Hamilton, 2 Rich. Eq. 355 [46 Am. Dec. 58], and Martin v. Evans, 2 Rich. E., 368; Carson v. Law, Id., 296; Holmes v. Holmes, 3 Id., 61; 2 Strob. E., 286; 10 Rich. E., 253; 4 Strob. E., 133; Manning v. Dove, 10 Rich. L., 395.

[3. *Equity* ⟸337.]

Bills in equity are not evidence against the complainants, of the facts stated in them, although they were formerly so regarded. At present, it is evidence only of the fact, that it

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was filed, and of such matters as are the *subject of reputation, and hearsay evidence, as the complainant's pedigree, and the like, and even of these some doubts exist.(c)

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 680; Dec. Dig. ⟸337.]

[4. *Witnesses* ⟸92.]

The plaintiff, in an execution, is entitled to the proceeds of property sold under it although the defendant's title to the property is disputed; and he is not, therefore, an incompetent witness in a suit, in which the defendant's title is brought in question; although an action at law may be pending against the sheriff, for levying on the property, by a third person, who claims to be the owner. It would be otherwise, if the plaintiff had indemnified the sheriff, or there were any equitable circumstances which would authorize the latter to retain the money in his hands, as an indemnity, until the action against him was determined, in either of which cases the plaintiff would then be interested, and, therefore, an incompetent witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 250, 262; Dec. Dig. ⟸92.]

[5. *Sheriffs and Constables* ⟸90.]

A sheriff is not bound to risk becoming a trespasser; and if the title to property levied on be disputed, he has a right to demand ample indemnity before he proceeds. He is not bound to act, even if indemnity be tendered, but he may leave the parties to their remedy in equity. If, however, he does levy and sell, the execution creditor is entitled to the proceeds of the sale; unless the sheriff has levied without notice of the disputed title, and is sued before paying over the money, in which case he may, perhaps, retain it as an indemnity.(d)

[Ed. Note.—Cited in Perry v. Williams, Dud. 46; Matthews v. Nance, 49 S. C. 398, 27 S. E. 408.

For other cases, see Sheriffs and Constables, Cent. Dig. §§ 129, 130; Dec. Dig. ⟸90.]

[6. *Witnesses* ⟸109.]

A witness interested in one part of a case, and therefore incompetent, may, nevertheless, be examined as to other points, in which he is not interested.(e)

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 211; Dec. Dig. ⟸109.]

[7. *Witnesses* ⟸98.]

Where property has been sold on execution, the execution creditor is a competent witness to support the title of the execution debtor where the property is claimed by a third person.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 334; Dec. Dig. ⟸98.]

This was a bill to set aside certain sales, as fraudulent; and came on for hearing, at Fairfield, in June, 1829, before Harper, Chancellor, from whose decree the case will be fully understood.

(c) Cooper v. Day, 1 Rich. E., 26; Jaudon v. Gourdin, Rich. E. C., 251; Drake v. Ramey, 3 Rich. L., 38, 40.

(d) Approved Perry v. Williams, Dud. L., 46.

(e) 2 McC. E., 185; Etheredge v. Partain, 10 Rich. E., 207, 214; Farr v. Sims, Rich. E. C., 122 [24 Am. Dec. 396]; Glenn v. Wallace, 4 Strob. E., 149 [53 Am. Dec. 657]; post, 311; Capehart v. Huey, 1 Hill E., 408.

Harper, C. On 23 February, 1827, Hugh Y. Neil executed a bill of sale, of four slaves, to the defendant, James Cockrell. The consideration stated in the bill of sale, is $760. These slaves, on some suspicion that the sale was fraudulent, were afterwards levied on by virtue of sundry executions of some of the complainants, against Hugh Y. Neil, and exposed to sale by the sheriff of Fairfield, when they were bid off by the defendant, John Cockrell, at the price of $375. The bill is filed by judgment creditors of Hugh Y. Neil, charging both the sales mentioned to have been fraudulent, and claiming the slaves to be resold, for the satisfaction of their demands. The sale to James Cockrell is impeached, as having been colorable with a view to defeat creditors. At the sheriff's sale, the bidding is said to have been prevented, by a fraudulent combination between John and James Cockrell; by means of which the former was enabled to purchase the property at a price far below its value.

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*We are to examine, in the first place, the sale of 23 February, 1827, to James Cockrell. There is no doubt that Hugh Y. Neil was largely indebted at the time, and became totally insolvent soon after. The determination as to the character of that sale, must depend principally on the testimony of Henry Jones, who was sworn on the part of the complainants. His testimony was, that he was present on 24 February, 1827, at the store, a sort of grog shop, of John Tidwell, when the defendant, James Cockrell, ostensibly paid to Hugh Y. Neil, $600, said to be the balance of the purchase money of the slaves in question, which Cockrell stated he had the day before purchased of Neil. According to the answer, $100 of the purchase money had been paid on the previous day, 23, when the bill of sale was executed; and Cockrell had given his note to Neil for the balance, $600, the amount paid on 24. After the payment, Neil gave the money to the witness, who returned it to Cockrell. Cockrell had borrowed of the witness $200, to enable him to make this pretended purchase, which witness received back on the same day. It was Hugh Y. Neil's own money which was thus lent. The witness' mother had purchased a negro of Neil for $500. She settled part of the price, by paying off attachments against Neil; and paid him $380, or $385 in money, which Neil left in the hands of witness to keep for him. Cockrell borrowed part of the money, to make the payment, from old Mr. Tidwell, which witness saw paid back to him, or some of his family, the same day. Witness, some months after, paid the $380, or $385, to Mr. McDowell, for the creditors of Hugh Y. Neil, by an order of Neil.

This was the substance of the witness' testimony, with respect to this transaction; and if we are to rely upon it, it is certain that the sale and payment were colorable and fraudulent. Against the effect of this testimony, it was argued that the fraud was explicitly denied by the answer of James Cockrell, and that more than one witness is requisite to discredit a defendant's answer; at all events, a single witness must be supported by strong circumstances. It was also urged that the credit of Jones was lessened, and that of the answer supported by other testimony in the case.

The rule is, that a single witness must be supported by strong circumstances, to discredit the answer; but it appears to me that

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*there are such in this case. The circumstances that go to impeach the credit of Jones, will afterwards be considered. I refer, in the first instance, to the testimony of Adam Hassan, an unexceptionable witness. His statement is, that after the sheriff's sale, when the negros were bid off by John Cockrell, he heard James Cockrell say, that the negros were his; and that he would sue the sheriff, and make him pay up the difference between the amount bid and their value. He said, "now, I ask no odds; I have Hugh Y. Neil's title, and will have the sheriff's." Now, this is competent testimony against James Cockrell, whatever it may be against John; and goes directly to show, that the purchase by John was made on James' account, or, at all events, upon some concert or understanding with him. In this respect, Hassan agrees with Jones, who states, that on the day of sale, he heard James Cockrell say, that John had purchased for him. Here are the requisite two witnesses to disprove the denial of James Crockrell's answer of combination with John. This denial, to be sure, is somewhat evasively made; but the impression that it was intended to make, that he had no interest in the second purchase, cannot be mistaken. The evidence detracts materially from the credit of the answer. That he should be concerned in purchasing the slaves at an under value, when he was giving notice of his alleged title to prevent the sale, and expected to recover their value from the sheriff, gives no favorable impression of the fairness of his conduct.

I draw inferences to the same effect from circumstances in the testimony of Hugh Y. Neil, who was examined, on the part of the defendants. I think it hardly necessary to say, that I place no reliance on the veracity of this witness. Both the substance and manner of his testimony, shew him to be utterly undeserving of the smallest credit. I only refer to what came from him as circumstantial evidence; the effect of which depends in no degree, on the credit due to the witness. Such a circumstance is, his being unable to give any account as to how he disposed of the $600, which he stated himself to have received from James Cockrell; as he

certainly could have done, if the money had been his own, and disposed of by him. He said, to be sure, it had been taken from him; but by what means he did not know; a suspicious story in itself. But he said the same thing with respect to the $500, he had a

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short time *before received from Mrs. Jones; a coincidence altogether improbable. In addition to which we have the testimony of Mr. Nott, and Mr. McDowell that when he was examined respecting the money, before the commissioner of special bail, on his application to be discharged under the Prison Bounds Act, he prevaricated, and said he had paid debts with it, but could not specify the debts; and finally made out the story of his having lost it.

Another circumstance struck me with some force in the testimony of this witness. When he was asked whether it was a fair sale or a sham, he replied, (and I think I have taken down his words verbatim,) "It was a fair sale to Mr. Cockrell. There was no incumbrance on the negros; he had sold land to pay off all executions against him." The witness must have been aware, that the fraud inquired after was on his own creditors. To this he evaded answering, but with some dexterity made the impression of his having denied the fraud; in fact only denying a fraud on Cockrell, which had never been suggested. I suppose that some remains of conscience induced the witness, anxious as he evidently was to support the sale, to evade this question. Those who are very capable of crime, will often scruple to commit one unnecessarily, and the most hardened perjurer will avoid direct falsehood, when he can make evasion serve his purpose. A course recommended no less by prudence than conscience.

It was a circumstance which made some impression on me, that the defendant, James Cockrell, attempted to prove, that he had a short time before received money, in order to shew that he had the means of making this payment. Lewis Tidwell stated, that he had a short time before paid him $60, and that on the day of the payment he lent him $36, and his (Tidwell's) father, $75. The witness Martin said, he had a short time before paid him $233. These sums together make $404, and added to the $200, which Jones states himself to have lent, would precisely enable Cockrell to make the ostensible payment of $600; supposing the alleged payment of $100, on the day before to have been apochryphal. If Cockrell had this money on the previous day, when he made the contract and took the bill of sale, no reason appears why he did not then pay it, but gave his note instead, to be paid one day afterwards. Or if he had it not, no account is given of his obtaining

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it in the interval. If in *this short interval he made up so considerable a sum, it is not likely that he should be unable to shew any source from which it was obtained, beyond what was lent to him by the Tidwells. These circumstances tend to confirm Jones' testimony.

The testimony of Jones is attacked first, from what is stated by himself, that he was accessory to the fraud by his own account, and had given evasive answers, and such as were likely to mislead, when questioned on this transaction. Next, the proof of his having made statements formerly, inconsistent with his present evidence, is relied on; and lastly, contradictory circumstances testified by other witnesses. He certainly stated himself to have been an accessory to the fraud; and under ordinary circumstances, I should think that this detracted much from the effect of a witness' testimony. But in the present instance, when so many witnesses, themselves of the highest character, have concurred in giving so uncommonly good a character to this young man, I cannot prevail on myself to allow much weight to the objection. I must consider it as one of those casual lapses from a generally correct conduct which do not materially affect subsequent character, provided they are held in mind as remembrancers to adhere with more firmness and vigilance to a course of integrity. He was very young too at the time, and with the facility of his age, may have been led by an artful and plausible person, who was also a family connection. At all events, he is far more deserving of credit than any of the witnesses, whose testimony comes in collision with his. Having so far lent himself to the fraud, he naturally judged it matter of consistency, and in some degree of good faith, not to betray it. This he could effect in no other way than by evading, when he was questioned. Several of the witnesses, however, testify to more than evasion: to direct contradiction between his former statements and present evidence. These are Hugh Y. Neil, Lewis Tidwell, and McCullough. Of the testimony of the first I have already expressed my opinion. Tidwell could not tell whether he was drunk or sober when he heard Jones say it was a fair sale. And Mr. John Harrison, an unexceptionable witness, testified to direct and repeated contradictions between what he had formerly stated, and has now sworn. As to McCullough, the testimony of character is not decided. It is enough to say, that in balancing between the two, I think Jones' evidence to be decidedly preferred.

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*The other circumstances relied on, are hardly worth commenting upon. Several of the witnesses who were present at the payment, swore they saw nothing unfair. This was to be expected. If the parties had a fraud in view, they went to this place of public resort, to give an ostentatious publicity to a transaction apparently fair. I place no

reliance either, on the testimony of the witness Stone. He does not speak very positively; the circumstance was one in which he was likely to be mistaken: and from the testimony of his habits and character, the accuracy of his recollection, if not his credibility, is questionable. The testimony of Cohen, that while Jones was yet at the store, Neil stated he had no money, is quite as conclusive on the other side. In some particulars in which the testimony of Jones has been questioned, it has been confirmed in a way which will hardly admit of mistake. Hugh Y. Neil denied that Jones had any money of his in his hands. Here Jones supported himself by having paid the money to Neil's order. Jones stated that his mother had bought a negro of Neil, for $500, that she had paid off some attachments against Neil, and that the balance of the money, amounting to $380 or $385, was deposited in his hands. Mr. McDowell testified, that in his examination before the commissioner of special bail, Neil was able to specify two attachments against him, amounting to $118, which had lately been paid off. If these were paid off by Mrs. Jones, it would leave the precise balance (between $380, and $385, or $382,) which Jones stated to have been in his hands. I cannot doubt of the fraudulent character of the sale to James Cockrell. We come next to consider the sheriff's sale to John Cockrell.

The title of James Cockrell to the property being fraudulent and invalid, it is not doubted that it was fraudulent in him, to give notice of his pretended title, with a view to prevent bidders. But it is contended, that John Cockrell's purchase cannot be affected by this, unless combination between himself and James Cockrell be shewn: or he is proved to have done something to prevent fair competition at the sale, of which it is urged there is no sufficient legal evidence. Perhaps a question might be made, how far a purchaser of property, for an adequate consideration, by means of the fraud of another, should be permitted to avail himself of that fraud by reclaiming his bargain, though there was no combination or fraud on his part. Certainly if the matter rested in agreement, this court

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would not *decree a specific performance under such circumstances. At all events, James Cockrell, if he be of ability, is liable to make good the loss that has been occasioned by his fraudulent act. I am of opinion, however, that there is sufficient evidence of combination and fraud on the part of John Cockrell.

The testimony of John Neil, who was one of the judgment creditors of Hugh Y. Neil, is direct to both purposes. His testimony is, that he would have bid for the property $550, or $600, but was prevented by John Cockrell, who told him "if he would not run up the negros he should be secured in his money." He talked several times with James Cockrell, and said, "we must not make a particular bargain, or it will vitiate the sale, but you know our understanding." Now this is evidence enough against John Cockrell, that he acted in concert with James to prevent bidding, and that he obtained his bargain by that means. It is hardly necessary to notice the objection, that John Neil was a deputy sheriff, incompetent to purchase at a sheriff's sale, under the Act of assembly, and therefore it was no fraud to deter him from bidding. It was a fraud to deter him by this inducement. The object of Cockrell, and the effect as to the complainants, were the same. If Neil had bid off the property, those who were interested would have had an option to confirm the sale, or set it aside.

The principal objection, however, is again, that here is but a single witness; and something more is necessary to prevail against the express denial of the answer. I think there are sufficient circumstances to give the preponderance to the witness. John Cockrell states, in his answer, that he was informed, and believes, that James purchased the slaves honestly, and for a full consideration, without fraud. Now, either this allegation is false, and then his answer is discredited; or he was willing to give $375, for the slaves, which he states was near two-thirds of their value, believing that another had a good title and he might lose them, which is incredible; or he was acting in concert with his brother, or as his agent. Whichever of these alternatives be adopted. I think it is so strong against the defendant, as to give the preference to the testimony of the witness. I cannot but think the last, however, the probable and true one. All the circumstances of the case seem, I think, to indicate that both the Cockrells were conscious of the invalidity of

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the first title, but *hoped to make such use of it as to secure them a good bargain on the second sale.

John Cockrell, in his answer, states, that he has sold all the negros but one; but that they are still in his possession. No proof, however, is given of this sale, and I must regard them as in his power, and decree them to be delivered up. Upon my conviction of a combination, the decree must be against both John and James Cockrell.

It is therefore adjudged and declared, that the sale, purporting to have been made on 23 February, 1827, by Hugh Y. Neil, to the defendant, James Cockrell, of the slave Temah, and her children, Harriet, Jane and Maria; and also the sale of the same slaves, made by William Moore, sheriff of Fairfield district, on the first Monday in August of the same year, to the defendant, John Cockrell, were fraudulent and void; and it is ordered and decreed, that the said defendants John and James Cockrell, deliver up the said slaves with their increase, to the sheriff of Fairfield district, to be sold under execution

for the satisfaction of the complainant's demands, and that the said John and James Cockrell pay all the costs of this suit.

From this decree the defendants appealed, and moved that it might be reversed, on the following grounds:

1. That the evidence was not sufficient to warrant the Chancellor's conclusion, that the sale from Hugh Y. Neil to James Cockrell was fraudulent.

2. That the evidence was not sufficient to warrant the conclusion, that John Cockrell was guilty of combination and fraud, in his purchase at the sheriff's sale.

3. That the Chancellor ought not to have rescinded the sheriff's sale, without requiring the purchase money to be refunded to John Cockrell.

4. That John Neil was an incompetent witness, and having been objected to, ought not to have been examined; and, therefore, even if the decree is not reversed, a rehearing should be ordered.

Gregg, for appellants. There is no rule by which to measure the strength of the circumstances sufficient to corroborate the testimony of one witness, so as to overthrow an answer. In general it must be left to the judgment of the Chancellor to decide as to

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*their weight; but to bring them within the rule at all, it is certainly essential, that the circumstances should directly conflict with the answer. Here the Chancellor has contrasted a part of the answer with testimony, not relating to it, but to another part of the case; and this is held to be a circumstance to discredit the answers of both defendants. This it is submitted is inconsistent with the whole spirit and principle of the rule. Savage v. Brocksopp, 18 Ves., 335.

The evidence to fix John Cockrell with the charge of combination, in contradiction of his answer, stands upon a still more slender foundation. It rests, in fact, only upon the evidence of John Neil, that John Cockrell induced him not to bid. But John Neil was forbidden by law to purchase at the sale; and the Chancellor is mistaken in supposing that Neil's purchase was capable of confirmation; for by the Act of 1823, it was not merely voidable, but absolutely void. Acts of 1823, p. 51. If, however, Neil could have lawfully bid, the inducing him not to bid, cannot vitiate the sale. Not bidding is not a sufficient consideration to support an assumpsit; but no case can be found in which a sale has been set aside, because the purchaser induced other persons not to bid. Jones v. Caswell, 3 John. C. R., 29. Thompson v. Davis, 13 Id., 112. It is analogous to the employment of puffers, which it is well settled, will not affect the sale. Jenkins v. Hogg, 2 Tread., 821; Bramley v. Alt., 3 Ves., 623; Sug. on Ven., 19.

On the third ground it is unnecessary to make a remark. The right of the defendant to be refunded does not require argument; and the omission of an order to that effect in the decree was clearly an oversight.

That Neil was not a competent witness is equally clear. He had indemnified the sheriff against the title of James Cockrell, and was, therefore, directly interested to defeat his title. It is said that there was no proof of this indemnity: but the proof is to be found in the complainant's bill, in which the fact is distinctly alleged. Besides, it is conceded, that John Neil is the oldest execution creditor of Hugh Y. Neil, and therefore entitled to the money arising from the sale, if the sale to James Cockrell is set aside. In fact an action is now pending at law against the sheriff by James Cockrell, for a trespass in making the levy; which action it is doubtless the object of this bill to supersede. In both respects, therefore, John Neil was an interested and incompetent witness, and ought not to have been examined.

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*Clarke, contra. The Chancellor's commentary upon the evidence needs no argument to support it. It is clear and conclusive throughout. But if we were to weigh the force of circumstances anew, what circumstance could we regard as more effectual to corroborate a witness who contradicts one statement of an answer, than proof that the answer is false in all its other allegations? It is the rule of law, and of common sense, that if an answer be discredited in one particular, it is discredited throughout.

To permit John Cockrell to retain his purchase, obtained, at a grossly inadequate price, by the means brought home to him by the proof, would be contrary to all the law that has ever been written. 4 Dall., 218; Newland on Con., 352. It is said that a purchase by Neil would have been void; but as a creditor he had a right to see that the property brought its value; and whether he could lawfully bid or not, he intended to do so; and John Cockrell's interference prevented competition.

As to the competency of John Neil it is sufficient to say, that he had not indemnified the sheriff; and he was entitled to the proceeds of the sale, whether James Cockrell succeeded in his action at law, or not. He had no interest in this suit, therefore, and was very properly received as a witness.

EVANS, J., delivered the opinion of the court.

This court is satisfied with the Chancellor's decree in this case so far as it goes; but it was due to the defendant, John Cockrell, that in ordering him to deliver up the negros to be resold by the sheriff, the money, paid by him for the purchase of them, should have been ordered to be refunded. The decree therefore in this particular is amended, and the sheriff is ordered to refund to John Cockrell out of the money aris-

ing from the re-sale of the said negros the sum of $375.

The fourth ground of appeal was pressed with much earnestness on the court, and it thought proper to discuss the principle upon which it is founded. The objection is that John Neil was an incompetent witness, and therefore should not have been sworn. The witness is said to be incompetent for two reasons: 1. that he had indemnified the sheriff; 2. that being a judgment creditor he was interested in the result of the suit.

The fact upon which the first ground is

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predicated, is denied, and *there is no evidence of its truth, except that it is so stated in the bill. Formerly indeed it was held, that bills in chancery were evidence, against the complainant, of the facts stated in them; but this notion has been overruled, and they are now held to be evidence only of the fact of filing the bill, and of such other matters as are the subject of reputation, and hearsay evidence, as the complainant's pedigree, and the like; and even of this some doubts have been made. Peake's Ev., 85. This ground of objection cannot therefore prevail.

In the second ground there is a seeming difficulty, but it is believed that the difficulty is only in appearance. It is said, that the witness, John Neil, is interested in procuring a decree of the Court of Equity, which will put an end to an action at law, upon the decision of which depends his right to receive the money in the sheriff's hands. Now, in the first place, John Neil's right, as the oldest judgment creditor, to receive the money in the hands of the sheriff, does not depend on the decision of the action at law between James Cockrell and the sheriff. The sheriff has sold the interest of H. Y. Neil in the negroes; and upon this interest the creditors had a lien. This lien the sheriff has extinguished by the sale, and substituted the money arising from the sale in lieu of the lien; and shall the sheriff extinguish the lien of the creditor, and not give him the proceeds of it? I apprehend not. The sheriff is not bound to risk becoming a trespasser; and if the title to property levied on be disputed, he has a right to demand ample indemnity before he proceeds. He is not bound to act even if indemnity be tendered to him, but may leave the creditor to his remedy in the Court of Equity, where he will find ample relief against the fraudulent claims, usually interposed to protect the debtor's property against the just claims of his creditor. If the sheriff does however act, the execution creditors will be entitled to the money arising from the sale; and the sheriff must look to the indemnity, if he has taken one, and if he has not, it was his own folly to act without. It does not follow as a consequence of this, that the sheriff will not be allowed to retain the money, where he has become involuntarily a trespasser, and had no notice of the adverse claim until after the sale. It may be, that in such case, if he be sued before he has paid over the money, he would be allowed to retain it as his indemnity.

But even admitting that John Neil's right to demand the money in the sheriff's hands depended on the decision of the action at law between James Neil and the sheriff, still he would be competent to prove what he was called to prove. The decision of the action at

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*law depends on the question, whether the sale by H. Y. Neil to James Cockrell, was fraudulent, or not? John Neil's testimony has no relation to this question; and should it be rejected, and the bill dismissed as to John Cockrell, yet the decree as to James Cockrell, depending on other testimony, would not be interfered with. It follows from the reasoning, that admitting John Neil to be interested in the question depending at law, between James Cockrell and the sheriff, and that he might be incompetent to testify on that point, as the decree in this case would put an end to the action at law; yet the fraudulency of the sale from H. Y. Neil to James Cockrell, being established by other testimony, and his right to the money in the sheriff's hands being clear and unquestionable, he had no interest in the other question, whether the purchase of John Cockrell was set aside or not. The money in the sheriff's hands will pay his debt, and he has no interest in increasing it by a resale of the negroes.

Decree modified.

Bailey, Eq. 138

ELIAS HENDERSON v. JOHN DODD, and Others.

(Columbia. May, 1830.)

[1. *Sales* ⇐234.]

The defendant, who was a purchaser of a slave from the tenant for life, for a valuable consideration, having, in his answer to a bill, by a party claiming under the limitation over, denied notice of the fiduciary character of the tenant for life, and notice to him not having been sufficiently proved, the bill as to him was dismissed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 670; Dec. Dig. ⇐234.]

[2. *Evidence* ⇐419.]

Although parol evidence is inadmissible to add to, or explain a deed, yet if a conveyance, purporting to be voluntary, is impeached for fraud, it is competent to the party claiming under it to show, that in fact it was made upon a valuable consideration. It being voluntary does not render it void, but is merely evidence of a fraudulent intent; and any evidence is admissible, which shows that no such intent existed.

[Ed. Note.—Cited in Walker, Evans & Cogswell v. Bollmann Bros., 22 S. C. 526, 528; Smith v. Smith, 24 S. C. 315, 316; Featherston v. Dagnell, 29 S. C. 48, 6 S. E. 897; Ferguson v. Harrison, 41 S. C. 345, 19 S. E. 619.

For other cases, see Evidence, Cent. Dig. § 1913; Dec. Dig. ⇐419.]

[3. *Fraudulent Conveyances* ⟸74.]

A voluntary conveyance cannot be avoided by a subsequent creditor, without proof of its having been made with a view to future indebtedness, or of circumstances from which actual fraud may be inferred.(a)

[Ed. Note.—Cited in Walker, Evans & Cogswell v. Bollmann Bros., 22 S. C. 528; Smith v. Smith, 24 S. C. 315.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 189; Dec. Dig. ⟸74.]

[4. *Fraudulent Conveyances* ⟸218.]

If tenant for life sell a slave absolutely, his liability to the person entitled by a limitation over, is contingent upon the slave's surviving him; and the remainderman, therefore, is not such a subsisting creditor, as is entitled to avoid a voluntary conveyance, by the tenant for life, even of his whole estate, merely because it is voluntary.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 643; Dec. Dig. ⟸218.]

On appeal from the decree of Harper, Chancellor, at York, June, 1829.

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*EVANS, J. The facts of this case, so far as they are necessary to be stated, are as follows: Daniel Henderson, by his will, executed in 1794, gave a negro woman, named Sal, to his wife, with a limitation over to other persons, for whom, and in whose right, the complainant claims. This negro woman had a child, named Lot, whom Mrs. Henderson sold in 1799, to her son, Thomas Roach, who sold him in the lifetime of Mrs. Henderson, to one Cunningham, in North Carolina, in whose possession he is now supposed to be. In 1811, Mrs. Henderson made a deed, whereby she conveyed all her estate to another son, named John Dodd. This deed, on its face, purports to be made upon the consideration of natural love and affection; but it requires John Dodd, the donee, to give to one of the donor's grand-daughters, a negro girl, or $200, and to another $50, on their respectively attaining the age of twenty-one years. Mrs. Henderson died in 1816.

This bill was filed against Roach, to compel him to pay the value of Lot, on the ground that he was a purchaser, with notice of complainant's title. Roach, by his answer, denied all notice of the fiduciary character of Mrs. Henderson; and there being no sufficient evidence to disprove the answer, the Chancellor dismissed the bill as to Roach's representatives, he having died during the pendency of the suit. The complainant has appealed, but this court is satisfied with the decision of the Chancellor.

The bill also claims relief against John Dodd, on the allegation that the complainant is a creditor of Mrs. Henderson, to the value of the negro boy, Lot; and that Dodd's title to the property being founded on a voluntary conveyance, is fraudulent and void. Dodd, by his answer, denies that the deed to him was merely voluntary, and alleges that it was on the further consideration, that he was to maintain and support his mother during her life.

The Chancellor dismissed the bill as to Dodd also; and one of the grounds of appeal is, that the Chancellor improperly admitted evidence to prove the allegation of the answer as to the consideration. It is true that parol evidence is inadmissible to add to, or explain a deed; but it must be recollected, that a voluntary deed is not necessarily void. Its being voluntary was only evidence of the fraudulent intent. Here the question was, whether the deed was fraudulent; and any evidence which went to show, that no such fraudulent intention existed, was admissible. The Chancellor, therefore, correctly admitted this evidence.

The main question, however, and upon which it is thought necessary to express the

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opinion of this court, is, whether this *deed, admitting it to be entirely voluntary, is fraudulent as to the complainants. The statute of 13 Elizabeth does not declare every voluntary deed fraudulent, but only such deeds as are made with intent to defraud creditors. P. L., 67, 2 Stat., 496. The construction of this statute has been very liberal, and has given rise to an obvious distinction between positive, and presumptive frauds. Positive fraud must be proved; but presumptive fraud is an inference deduced from the facts of the case. Hence, if a man, being indebted at the time, makes a voluntary conveyance of his property, so as thereby to put it out of his power to pay his debts, such voluntary conveyance is presumed to have been made with the intent to defraud his creditors: but if he be in prosperous circumstances, as in the case of Jacks v. Tunno, 3 De S. E., 1; or if he reserve the greatest abundance to pay all his debts; in such cases, the intent to defraud creditors cannot fairly be inferred, although it may in the end turn out, that his creditors are not all paid. The facts and circumstances, however, which are to rebut this presumption of fraud, must be clear, full, and satisfactory; or otherwise the presumption should prevail.

It is not proposed here, to discuss fully the question, how far, and in what cases, a voluntary conveyance will be set aside in favor of, or prevail against, the claims of creditors; but only so far as to extract from the cases the general principle applicable to this case. These principles are, that the presumption of fraud may be rebutted by the facts and circumstances of the case, Taylor v. Heriot, 4 Desaus. E., 232; Hamilton v. Greenwood, 1 Bay, 173 [1 Am. Dec. 607]; and that the creditor seeking to set aside a conveyance, merely because it is voluntary, must be a subsisting creditor. In the case

(a) Post, 141, 228 and note.

of Iley v. Niswanger, 1 McC. Eq. 521, the court say, "such a settlement or transfer, cannot be impeached by a subsequent creditor, unless made with a view to future indebtedness, or attended with some other circumstances of fraud than what arises from its being voluntary." In this case, the conveyance was of the donor's whole estate: and if she had been indebted at the time, the inference could not be rebutted, that she intended to defraud her creditors. But what is the nature of the complainant's demand? Was he a creditor of Mrs. Henderson? Did any liability accrue during her lifetime? She was entitled to the negro for life; and if the negro had died before her, the complainant's demand was gone forever. But even after her death, no liability existed, except the right of complainant to go against her estate, instead of suing Cunningham for the negro. This contingent liability was not such,

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in my opinion, *as to authorize the court to set aside the conveyance from Mrs. Henderson to her son, John Dodd, merely because it was voluntary.

The decree of the Chancellor is, therefore, affirmed, and the motion dismissed.

COLCOCK, J., and JOHNSON, J., concurred.

Williams, for appellant.
Hill, contra.

Decree affirmed.

Bailey, Eq. 141

JOHN H. BLAKE and Wife v. ABRAHAM D. JONES, Administrator of James Goodwyn, Deceased, and Others.(a)

(Columbia. May, 1830.)

[1. *Fraudulent Conveyances* ⇐74.]
A voluntary conveyance is fraudulent and void as to existing creditors, who are unable to obtain satisfaction of their demands; but if the debts were contracted subsequently to the conveyance, or the conveyance was founded on a valuable consideration, there must be proof, or circumstances, to establish an actual fraudulent intent. Post [Izard v. Middleton] 228.

[Ed. Note.—Cited in Smith v. Smith, 24 S. C. 315.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 188, 189; Dec. Dig. ⇐74.]

[2. *Fraudulent Conveyances* ⇐315.]
On a bill against an administrator, to establish a gift by his intestate, he may insist that the gift is fraudulent and void as to creditors; but if the gift is established, the decree will bind only such creditors as are parties to the suit.(b)

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 973–975; Dec. Dig. ⇐315.]

[3. *Evidence* ⇐236.]
Where a donor has repeatedly declared his intention to give, his subsequent admissions that he had given, are sufficient evidence of an actual delivery to complete the title of the donee, where it does not appear that the declarations were loose and playful; and particularly where the donor was under a moral obligation to make the gift. Nor is the force of his admissions weakened by the fact, that the donor remained in possession, if it be accounted for; and proof of an agreement to pay hire, not only accounts for his possession, but corroborates the evidence of a delivery.

[Ed. Note.—Cited in Bennett v. Cook, 28 S. C. 363, 6 S. E. 28.

For other cases, see Evidence, Cent. Dig. § 880; Dec. Dig. ⇐236.]

[4. *Gifts* ⇐17.]
What constitutes a sufficient delivery to perfect a gift, is not accurately defined; but it seems, that whatever would authorize the donee to take possession, without committing a trespass, may be so regarded.(c)

[Ed. Note.—Cited in Bennett v. Cook, 28 S. C. 363, 6 S. E. 28.

For other cases, see Gifts, Cent. Dig. §§ 28–42; Dec. Dig. ⇐17.]

[5. *Sales* ⇐157.]
A parol agreement to pay hire for slaves, if satisfactorily established, is a sufficient declaration of trust to vest the equitable title in the cestuy que trust; and the obligation of a father to provide for his daughter, is a good and meritorious consideration to support such a trust, although not as against creditors.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 372; Dec. Dig. ⇐157.]

[6. *Corporations* ⇐65.]
A certificate of stock in a land company is not a legal title to the land, but a mere chose in action; and if it belonged to a married woman, it devolves, upon her death, to her administrator, although by the laws of the State, in which the lands lie, the jus mariti would have attached, if she had been entitled to the land itself.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 166; Dec. Dig. ⇐65.]

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[7. *Estoppel* ⇐70.]
*If a husband receive payment for property, in the character of administrator of his wife, it may be doubted, whether he could afterwards deny it to be hers, or claim it jure mariti.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 183–187; Dec. Dig. ⇐70.]

[8. *Fraudulent Conveyances* ⇐156.]
Decree made against a purchaser, who paid a valuable consideration, but does not deny notice.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 495, 496; Dec. Dig. ⇐156.]

[9. *Husband and Wife* ⇐116.]
[A certificate of stock in a company, for the purchase of land, was given to a woman

(a) See case between same parties, 2 Hill E., 629, affirming this case.

(b) Vose v. Hannahan, 10 Rich. L., 465.

(c) Pringle v. Rhame, 10 Rich. L., 72 [67 Am. Dec. 569]; Jaggers v. Estes, 3 Strob. E., 34, 379; Miller v. Anderson, 4 Rich. E., 1, 5, 6; Busby v. Byrd, Id. 9, 13; Yancey v. Stone, 7 Id., 18; 2 Hill E., 600; McM. E., 115; 1 Rich. E., 301; 2 Id., 78; 1 Strob. E., 283; 7 Rich. E., 509; Dud. E., 14; 2 Bail. L., 588; Ril. L., 291.

while sole, who afterwards married, and died before the husband obtained possession of the land; but afterwards, by act of congress, United States stock was granted to the husband, as administrator of the wife, in compensation for the stock owned by the wife. *Held*, that the United States stock belonged to the wife's heirs.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 414; Dec. Dig. ⟸116.]

At Fairfield, July, 1829.

HARPER, C. The principal object of this bill is to compel the delivery of certain slaves mentioned in it, and to have an account of their hire. These slaves are charged to have been legally transferred and delivered to the complainants, by the defendant's intestate, Major James Goodwyn, who was the father of the complainant, Mrs. Blake, in the latter end of the year 1824. The charge is, that the slaves were delivered in satisfaction of a precedent debt, which was due by the intestate to his daughter, for a part of her deceased mother's estate; which consisted of a chose in action, not reduced into possession by the intestate, during the life of his wife. The intestate had administered on the estate of his deceased wife, and was guardian of his said daughter. If the transfer of the property should not be established, the bill seeks to recover this demand, which is claimed to be ranked as a bond debt.

The principal points made in the case were, whether there was any actual delivery of the slaves, so as to transfer the legal title: whether if there was evidence of this, it was a gift, voluntary, or for a valuable consideration, in satisfaction of a previous debt: whether, in fact, any such debt existed, and whether that, which is supposed to be a chose in action, was not property in possession, on which the intestate's marital rights had attached.

It may be observed here, that much of the evidence, and of the argument, seemed to be directed to this point; whether, if there be sufficient evidence of the gift, or transfer, as against the intestate himself, or those claiming under him, as volunteers, it may not still be fraudulent and void as to creditors. This question seems to me hardly to be sufficiently made by the pleadings, although the defendant, Abraham D. Jones, in his answer, prays that, if the gift, or transfer, be established, it may be subject to the claims of creditors. If a gift or conveyance be made by a person indebted at the time, it will, from the mere fact of its being voluntary, be held fraudulent as to existing creditors, who are unable to obtain satisfaction of their demands. Now, there is no distinct allegation that the debts, at present existing against the estate of Major Goodwyn were due at the time of the alleged transfer; or that the estate will not be sufficient to pay all debts, independently

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of the property claimed by *the complainants. From the amount of debts, I suppose I may take it for granted, however, that a considerable portion of them existed at the time of the transfer; and if I should suppose the transfer voluntary, but good against the intestate, and his personal representatives, such decree might be made as is suggested, namely, that it should be confirmed, subject to the claims of creditors. I, therefore, regard the point of the transfer, being voluntary, or founded on consideration, to be before me, so far as regards the parties to this suit. It is unnecessary to say, that creditors, not parties to the suit, will not be bound by this decree. But a voluntary conveyance may be fraudulent against creditors, whose debts were contracted after its execution; or though it be founded on a valuable consideration. The difference is, that in such instances there must be proof, or circumstances, to establish the actual fraudulent intention. No charge of fraud, of this sort, is made in the pleadings; nor was the testimony offered, which would be necessary, to enable the court to decide on such charge. I do not, therefore, consider the point in issue.

I shall first consider whether there was a sufficient delivery of the slaves claimed, to transfer the legal title. The defendant, Abraham D. Jones, in his answer, admits his intestate to have expressed his intention to give the complainant ten negros; but states that no particular slaves were specified, and supposes the intention was never carried into effect by an actual gift, or delivery. Similar declarations of a future intention are testified by the witnesses. The only evidence we have of the transfer having been actually made, and of the slaves included in it, are the declarations of the intestate, testified to by Mrs. Howell and Col. Chappell. The former, after mentioning that she had frequently heard Major Goodwyn, before the marriage of the complainants, express his intention to give his daughter, the complainant, the negros, Aggy, and her family, and Betty, and her family, whom he had got with her mother; stated, that after the marriage, she had heard him say he had given them; but that the complainant, Blake, had said he could not then take them, as he could only hire or sell them: that Major Goodwyn stated himself to have replied, "when you get a plantation I will send them to you, and in the mean time I may as well pay you hire as any one else." The hire was to be settled by the Jones'. Major Goodwyn said every one of his family knew the negros that were Eliza's. Col. Chappell testified to repeated conversations with the intestate, in which he expressed his intention to give to his daughter the negros he had obtained with her mother;

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*that in contemplation of complainants' mar-

riage, he had declared his intention to give them the negros, among whom the witness thinks he enumerated the women, Agnes and Betty: and that, after the marriage, the witness understood from Major Goodwyn, that he had given the negros, in pursuance of his promise. Witness thinks he recollects him to have said, that he had told them, "there they are, take them." Witness' clear impression was, that he had given. Major Goodwyn enumerated all the individual negros he had given. The witness recollected but a few of the names from the conversation, but had learned them since. The women Aggy and Betty, their husbands and children, and Martha, were the negros specified. The witness was struck with the circumstance, that more than ten negros were enumerated, the number Major Goodwyn had promised to give. Major Goodwyn related the conversation he had had with the complainant, Blake, and said he had agreed to pay him hire, to be fixed by the Jones'. Witness is as certain as of anything that ever happened, that Major Goodwyn distinctly said he had agreed to pay hire for the negros enumerated.

The question is, whether this testimony is sufficient to establish a delivery. It appears to me so. A delivery is to be proved in the same way as any other fact. It seems to me, that the deliberate admissions of the donor, that he had delivered, are about as satisfactory as his calling witnesses to the transaction at the time. As is said in repeated adjudications, Brashears v. Blassingame, 1 N. & M., 223, note and Reid v. Colcock, Id., 602 [9 Am. Dec. 729], when a party says he has given, he may be fairly presumed to have known what is necessary to a gift, and to have observed the requisite ceremonies. What shall constitute a delivery has not, perhaps, been very accurately defined. In Davis v. Davis, 1 Nott & McC. 225, note reported in a note to Brashears v. Blassingame, 1 N. & M., 223, note, the idea is, that any act will do, which is significant of the donor's intention, that the transfer shall take effect at the time. The same thing is to be found in other authorities. In Reid v. Colcock, (supra,) and in Fowler v. Stuart, 1 McC., 505, that seems to be regarded as a sufficient delivery, which would authorize the donee to take possession without committing a trespass. Now, when Major Goodwyn said, with reference to these slaves, there they are, take them, the complainant could not have committed a trespass by taking possession of them, whether they were present or not. The words seemed to indicate, however, that they were present, and then it would constitute a delivery, in the strictest sense of the law, even applied to livery of land. Blackstone says, livery in law is when the same is not

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made on the *land, but in sight of it only; the feoffer saying to the feoffee, "I give you yonder land, enter and take possession." 2 Bl. Com., 316.

As observed in the case of Reid v. Colcock, parol gifts are regarded with jealousy by the courts, and only established on the most satisfactory proof, because it frequently happens, that men make loose or playful declarations of having given, or intending to give, property to their children. I perceive nothing of this character in the declarations now in evidence. Major Goodwyn's conversation, with both the witnesses, seems to have been circumstantial, and detailed; particularly that with Col. Chappell, with whom he had repeatedly conversed on the subject of making such a provision for his daughter. It seems to me, that he went designedly into the detail, for the purpose of making a witness of a transaction, which had happened to pass without the presence of a witness. There would be more reason to suspect such declarations, if the gift were made to one for whom the donor was under no obligation to provide; or if it appeared to be a sudden act, and not in pursuance of any previously expressed intention. But it appears, that he had a deliberate purpose, for years, to make some such provisions. The defendant admits, that he expressed such intention. He was under a natural obligation, and according to the testimony of Col. John Taylor, as well as Col. Chappell, under the obligation of his honor, and promise, to do so. It is true, the provision is somewhat larger than he expressed his intention to make: but if it were necessary to account for that, it might be done, perhaps, by the circumstance, that the negros, Aggy and Betty, with Martha, were those, specifically, that he intended to give, and in giving them, it would have been necessary to separate the families, unless he had given them entire. That the complainant did not take possession of the slaves is sufficiently accounted for. That they were left in the intestate's possession, might be a material circumstance, if we were considering the claims of creditors; but so accounted for, it is not material as between the parties themselves. If the intestate were in debt to his daughter, that would be a circumstance to corroborate the testimony respecting his declaration, of having made satisfaction; and he certainly believed and acknowledged himself to be so.

The agreement to pay hire is a strong evidence of the transfer. This agreement is admitted by the defendant; but he supposed it to relate to future hire, after the contemplated gift should have been completed. Col. Chappell, as I understand him, is positive,

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that it *related to the hire then accruing. This seems to me the more probable. It is unlikely, that, for two consecutive years, he

should be making arrangements to have the hire valued, for the purpose of ascertaining what he should pay after some future period. If he had actually paid hire, this would be conclusive evidence of the transfer. It is to be observed, too, that although delivery be necessary to transfer a legal title, it is not so with respect to an equitable one. A declaration of trust does not imply any delivery, but the contrary. Now, if the agreement to pay hire be sufficiently established, I regard that as a sufficient declaration of trust. It was an agreement to hold to the use of the complainant. To be sure, as observed by Lord Thurlow, in Colman v. Sarel, 3 Bro. C. C., 12, there must be a valuable consideration, or, at least, a meritorious one to raise a trust. The testator's relation to his daughter, and his obligation to provide for her, was a good and meritorious consideration; but that would not prevail against creditors. A valuable consideration would, if bona fide, and uninfected with any actual fraud.

We come to consider the question of a valuable consideration. Col. Green, the first husband of complainant's mother, held certain Yazoo stock, or scrip; to one-half of which his widow became entitled on his death. It appears that the scrip, or certificate of stock, never came into the possession of Major Goodwyn, during the life of his second wife; but after her death, in pursuance of the Act of Congress, making compensation to holders of Yazoo stock, the intestate as administrator of his wife, and guardian of his child, surrendered this stock, and received United States stock to the amount of $3,080. The debt to his daughter is supposed to have originated out of this transaction.

On the part of the defendant, it was argued, that the grant of the Legislature of Georgia to the Yazoo Company, was of land; that the certificate of stock was not a chose in action, but constituted a legal title: and that the marital rights of Major Goodwyn attached upon it under the law of Georgia, which gives to the husband the real estate of his wife, in the same way as the personal. The original certificate was not produced, nor could it have been, being deposited in a public office at Washington. Testimony, however, was offered of the form of such certificates, and of this particular certificate: and they expressed that Col. Green was entitled to so many shares, or acres of land, granted to the Georgia Company, &c., and was signed by the president of the company. This would not have been competent evidence, if it had been

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objected to; for *although the original certificate could not have been produced, a copy might, and would have been the next best evidence. Certainly such an instrument as that described could not have operated as a legal conveyance. There are no words of granting, bargaining, or selling, nor any consideration expressed. If the company was incorporated, the common seal is wanting; if not, the members of the company were joint tenants, and the president could not convey in behalf of the rest. It was argued, however, that Col. Green may have been a member of the company, and the land vested in him by the original grant. The testimony was, that he was not a member; but if he were, it would make no difference. The claim which Major Goodwyn surrendered, was derived not from the original grant, but from the certificate. If the testimony were competent, I should have no doubt, that this certificate could have been nothing more than an equitable agreement, a chose in action, which was not reduced into possession during the life of his wife. Mrs. Goodwyn was domiciliated in this State at the time of her death, and her estate must be distributed according to our laws. If the testimony, however, were not competent, we know nothing more, than that United States stock was granted to Major Goodwyn, as administrator of his wife. This is evidence enough of its being her estate. Indeed, if it were expressly shewn, that the property, for which this stock was obtained, was wholly and exclusively Major Goodwyn's, I should be inclined to think that his taking the stock, as administrator, made it her estate. Certainly, it would be evidence enough against him. The conclusion would be, that he intended, in this way, to make a provision for his children.

But on this point I have, perhaps, said more than is necessary. There can be no doubt, but that a debt was due from the intestate to his daughter, and as little doubt that the transfer of the slaves was intended as a satisfaction of it. This would be the presumption of law, if it were not shown by evidence; but it is amply proved by the testimony of Col. Taylor, and Col. Chappell.

The claim to the girl Martha stands on a somewhat different footing from that to the other slaves. I am inclined to think there was evidence enough of a gift of her by the intestate to complainant in her infancy; but as she was included in the transfer of the other slaves, I have not thought it necessary to consider the case with respect to her, particularly.

The slaves are now in the possession of Mrs. Lucy Goodwyn. She states that they were purchased at the administrator's sale by her father, and given to her. Exhibit A, of

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the answer of the de*fendant, Jones, the account of sales, shews them to have been purchased for her. They are set down in her name. But she does not rely on being a purchaser without notice, and indeed admits, that, previously to the sale, she had understood, that complainants had forbid the sale.

It is, therefore, ordered and decreed, that

the defendant deliver up to the complainant the slaves claimed by the bill, and account for the hire from 1 January, 1825; and that it be referred to the commissioner to report the value of the hire.

From this decree the defendants appealed, and the appeal was argued by Pearson, solicitor, for the appellants, and by Gregg, contra.

COLCOCK, J., delivered the opinion of the court.

We concur with the Chancellor in the view which he has taken of this case. It is one of no ordinary complexity, but the very elaborate opinion, which he has delivered, renders it unnecessary for this court to do more than express our concurrence.

JOHNSON, J., and EVANS, J., concurred.

Decree affirmed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA, DEC., 1830, AND JAN., 1831.

JUDGES PRESENT.

HON. DAVID JOHNSON.
" JOHN B. O'NEAL.
" WILLIAM HARPER.

*SAMUEL E. KENNER and Others v. DAVIS CALDWELL and Others.(a)

(Columbia. Dec., 1830.)

[1. *Principal and Surety* ⇐163.]

Equity will not relieve against a judgment at law, upon a guardianship bond, against the guardian and sureties, for the amount of a decree by the ordinary against the guardian, on the ground that the sureties were not cited before the ordinary, when the decree was made: neither is it a ground for relief, that a gift by the guardian to the wards, previous to the decree, was intended, and accepted by the wards, as a satisfaction of their demands; nor that the decree was, in part, for money which the guardian received as administratrix. If these defences could have availed at law, the parties were bound to have made them there; and if they could not, then they furnish no ground for coming into equity; vide McClure v. Miller, ante, 107 [21 Am. Dec. 522].

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 454; Dec. Dig. ⇐163.]

[2. *Guardian and Ward* ⇐182.]

[A decree against a guardian by the ordinary, though the sureties in the guardian's bond were not cited to appear, is evidence against the sureties.]

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 655; Dec. Dig. ⇐182.]

[3. *Judgment* ⇐713.]

[A judgment or decree rendered in a former suit is conclusive between the parties as to all matters presented and litigated therein, and as to all matters which might have been litigated and determined.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. ⇐713.]

(a) Ante, 107, note c; post, 334, note a.

This was a bill to be relieved against a judgment at law upon a guardianship bond; *150 and was heard at Newberry, in July, *1830, by Harper, Chancellor, from whose decree the case will be fully understood.

Harper, C. The complainant, Mrs. Nancy Henderson, who was also the administratrix of her deceased husband, Nathaniel Henderson, was, in February, 1820, appointed by the ordinary for Newberry district, the guardian of her infant son, William D. Henderson, and entered into bond for the faithful discharge of the duties of her appointment, with the other complainants, Samuel E. Kenner, and John Hancock, as sureties. She received, as guardian, a sum of money, being her said son's distributive share of his father's estate. On 8 May, 1820, Mrs. Henderson executed a deed, by which, in consideration of love and affection, "and also for divers good considerations," she conveyed to her said son, and to her daughter, Jemima Henderson, whose distributive share of her father's estate she had also received, a tract of land, a female slave, and a bed and furniture, being her whole property derived from her husband's estate. In a subsequent part of the deed is added, "I do freely and voluntarily give, as aforesaid," the property in question to her children, which she binds herself to warrant. The bill charges that this conveyance was made and intended as a full satisfaction to her said children, for the money she had received on account of their shares of their father's estate, and was so accepted by Jemima, who

was of age; and that William, who was under age, also accepted, and confirmed the transaction, when he came of age.

About the time of his coming of age, William D. Henderson removed to the State of Georgia, and died, leaving a wife. Administration of his goods and chattels, rights and credits, within this State, was granted to the defendant, Davis Caldwell. In 1829, on the petition of the said Davis Caldwell, the said Nancy Henderson was cited to account before the ordinary, who made up an account against her. The bill states, that in this account, the ordinary "charges her, as guardian, with having received $594.65, principal and interest; and charges the said Nancy with having received $42.94½, as well as $6.76, interest thereon, as administratrix of the estate of the aforesaid Nathaniel Henderson, deceased; and also the sum of $19.96, costs, which accrued on the settlement of the said administration, and charged the complainants, Samuel E. Kenner, and John Hancock, as sureties to the guardianship bond aforesaid, with the payment thereof; which last items, they submit, are not chargeable to them, but if to any person, to the sureties of

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*the administration bond." Suit was brought on the guardianship bond, and judgment recovered against the complainants, in the sum of $626.92, besides interest and costs.

The complainants, Kenner and Hancock, further state, that they were not cited before the ordinary when the account against Mrs. Henderson was taken, and claim that they ought not to be bound by the account. They state, further, "that they were entirely ignorant of the existence of the aforesaid deed from the said Nancy Henderson, to the said William D. Henderson, or the contents thereof, or the objects for which the same was executed, which was executed a few days after they became the sureties of the said Nancy, as aforesaid."

The bill prays, that the complainants may be relieved from so much of the judgment as is founded on the charges made against Mrs. Henderson, as administratrix; that the conveyance to Jemima, and William D. Henderson, may be decreed to have been in full satisfaction of William's claim on his mother as guardian; and that defendants may be enjoined from enforcing the judgment.

The bill originally contained another charge, to wit: that if the conveyance from Mrs. Henderson to her children, was not held to be in satisfaction of William's claim on her as guardian, it must be considered as voluntary, as to him, and fraudulent as to her sureties; complainants, Kenner and Hancock, alleging, that they were no parties to the said deed. As the proper parties, however, were not made for the trial of this question, so much of the bill as relates to this charge, was struck out by the complainants.

The defendant, Davis Caldwell, in his answer, relies, by way of pleading, on the decree of the Court of Ordinary, and the judgment of the Court of Law, in bar to the relief claimed by the complainants, and pleads to the jurisdiction of the court. The matter of these pleas is to be examined.

The complainants, Kenner and Hancock, allege that they were not cited to attend before the ordinary. In the case of Lyles v. Caldwell and Cowley, 3 McC., 225, the Court of Appeals decided, that it was not necessary to cite the sureties to an administration bond before the ordinary; and that the decree against the principal was, notwithstanding, evidence against the sureties. So in Glenn v. Conner, State R., Harp. Eq., 267, where the sureties were made parties to a bill against an administrator, for an account, the bill was dismissed as against them. The principle of these cases seems to apply to

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the present. The complainants appear *to go on a notion of this sort: that in general a person ought not to be bound by a judgment in a cause to which he was not a party, but that they were bound, in the Court of Law, by the ordinary's decree, and could not impugn it, and that this furnishes a ground for coming into equity. With respect to the charges which are alleged to have been made against Mrs. Henderson, as admininstratrix, the case of Cureton v. Shelton, 3 McC., 412, seems to be an authority, that the complainants might have gone into their defence in the Court of Law. In that case, a decree in equity against an administrator, found partly on demands against him personally, and partly in his representative character, was given in evidence in an action against the sureties; and the Court of Appeals held, that it was competent for him to go into the decree, for the purpose of showing how much of the decree was founded on demands against the administrator, in his representative character, for which alone the surety was responsible. This seems to be the same case. Complainants allege, that certain charges were made against Mrs. Henderson, as administratrix. Perhaps it may be questioned, whether complainants could not have availed themselves in the Court of Law, even of the alleged satisfaction. In Lyles v. Caldwell, (supra) it is observed, that the decree of the ordinary is evidence against the sureties, to shew the amount of damages, and is, at least, prima facie evidence. Might not the alleged satisfaction have been given in evidence, if not in bar of the action, to reduce the damages to mere nominal ones? Now, if these defences might have been offered, the settled rule is, that the parties were bound to make them, and cannot come into equity to be relieved from the judgment. "It is a settled principle, that a party will not be aided after a trial at law, unless he can impeach the verdict, or report, by facts, or on grounds, of which he

could not have availed himself or was prevented from doing it by fraud, or accident, or the act of the opposite party, unmixed with negligence, or fault, on his part. Per Chancellor Kent, in Duncan v. Lyon, 3 John. C. R., 356. See also, Winthrop, Todd and Winthrop v. Survivors of Lane, 3 DeS., 324, 325, and note; and Le Guen v. Gouverneur and Kemble, 1 John. C. R., 436. It is alleged in the bill, to be sure, that complainants were ignorant of the existence of the deed, but the allegation is too loose, and seems to be evasive. It is not alleged, that they were ignorant at the time of the trial; nor is the ground taken in the bill, that they were prevented by this ignorance from making their defence. It may mean, as well, that they were ignorant at the time the deed was ex-

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ecuted; and so I *am inclined to understand them, from its being elsewhere alleged in the bill, that they were not parties, or privies to the deed: nor was this ground urged at the hearing.

But if the complainants could not have been permitted to make their defence at law, it does not follow that they may come into equity. If they could not enter into the defence, it must have been on the ground, that the decree of the ordinary against their principal was binding and conclusive on them, although they were not parties before him. But if it be thus at law, I know of no reason or principle on which it is less binding and conclusive in equity, unless fraud, or collusion were alleged. It is observed by Chancellor Kent, in King v. Baldwin, 2 John. C. R., 557, referring to the People v. Jansen, 7 Id., 332, "that there is nothing in the nature of a defence by a surety to make it peculiarly a subject of equity jurisdiction; and that whatever would exonerate the surety in one court, ought also in another." In the case of Foster v. Wood, 6 John. C. R., 87, a party against whom a judgment at law had been recovered, made a payment of $76 on it. He was afterwards sued on the judgment, arrested, and gave bail; and on the trial neglected to prove the payment, and a second judgment was recovered for the whole amount of the original judgment. Suit was then brought against the bail, and judgment to the same amount recovered. On a bill filed by the bail, and by persons to whom he had sold lands, bound by the judgment against him, it was held that no relief could be had in equity. Now, I take it to be pretty clear, that in this case the judgment against the principal debtor was conclusive against the bail, and that he could not have defended himself in the suit, on the recognizance, although the Chancellor spoke as if he might have been guilty of neglect in not defending himself at law. But whether he could, or could not, there was no ground for coming into equity.

It is ordered and decreed, that the bill be dismissed, but without costs.

The complainants appealed, and now moved that the decree might be reversed, and the relief prayed by the bill granted.

Caldwell, for the motion.

Per Curiam. JOHNSON, J. This court concurs with the Chancellor, for the reasons assigned by him. The motion to reverse his decree is, therefore, dismissed.

Decree affirmed.

Bailey, Eq. *154

*A. D. McDOUGALD, Administrator of John King, v. JAMES KING, ROBERT WILLIAMSON, and Others.(a)

(Columbia. Dec., 1830.)

[1. *Wills* ⟸762.]

The testator, by his will, directed that his estate should be kept together, and managed, for the benefit of his family who should live with his wife, until his youngest son arrived at the age of eighteen years, and then distributed among his wife and children; but, subsequent to the date of his will, he made advancements to two others of his children. The parties advanced consenting to bring in their respective advancements, as in case of intestacy; *held*, that they were chargeable with interest thereon, from the time when the estate became distributable, and not from the death of the testator.

[Ed. Note.—Cited in Rainsford v. Rainsford, Speers, Eq. 392.

For other cases, see Wills, Cent. Dig. § 1972; Dec. Dig. ⟸762.]

[2. *Wills* ⟸758.]

The law on the subject of advancements applies only to cases of intestacy; but where the children of a testator have been advanced by him, after making his will, it may be made a question, whether such advancements are not to be taken in satisfaction of legacies to the children advanced; and if they agree to bring in their advancements, as in cases of intestacy, they are chargeable with interest by a fair analogy to the law on the subject of advancements.

[Ed. Note.—Cited in McFall v. Sullivan, 17 S. C. 511.

For other cases, see Wills, Cent. Dig. §§ 1957–1960, 1976, 1977; Dec. Dig. ⟸758.]

Before De Saussure, Chancellor, at Cheraw, February, 1830.

John King, the complainant's testator, by his will, directed, that his estate should be kept together, and managed, for the benefit of his family, who should live with his wife, until his youngest son Noel King, should arrive at the age of eighteen years, and then be distributed among his wife and children, in certain proportions. Subsequently to the date of his will, he made advancements to his son, James King, to the value of $755; and to his son-in-law, Robert Williamson, to the value of $300; and died in July, 1818, leaving his will unaltered. Noel King attain-

(a) Rainsford v. Rainsford, Sp. E., 392; Youngblood v. Norton, 1 Strob. E., 125, 127; Hamer v. Hamer, 4 Strob. E., 124.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ed the age of eighteen years in 1826; and administration, with the will annexed, having been committed to the complainant, this bill was filed to settle the estate.

The defendants, James King and Robert Williamson, having consented to bring in their advancements, as in cases of intestacy, it was referred to the commissioner to ascertain the value of the estate, and to state the accounts of the several legatees; and in stating the account, he charged James King and Robert Williamson with interest on their respective advancements, from the death of the testator. This charge was excepted to by these defendants, but the exception was overruled by the Chancellor, and the report confirmed by his decree.

The defendants appeal, on the ground that

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they were liable *only for the principal of their several advancements, and not for interest; and they moved that the decree might be reformed according to the exception.

Ervin, for the motion.
McIver, contra.

HARPER, J. The law on the subject of advancements, applies only to cases of intestacy: the question of satisfaction of a legacy may arise when there is a will. But we understand that the legatees, who have been advanced, in this case, consent to bring in, and account for their advancements, in analogy to the case of distribution under an intestacy. We have doubted whether we ought to take cognizance of the point thus made. As the bringing in of the advancements depended on the consent and agreement of the parties, it was for them to prescribe the terms of their consent, and they ought to have made the agreement complete. As it is easy, however, to reach the justice of the case, we shall proceed to give an opinion.

In cases of intestacy, under the Act of 1791, 1 Faust., 26; 5 Stat. 162, 3, advancements are to be estimated as of the time of the intestate's death. The distributees, who have been advanced, are regarded as having received so much on account of their distributive shares, at the time of the death; and when a settlement is to be made, at a subsequent period, with the other distributees, who have received nothing, it is fair and equal that interest should be estimated on the amounts received by the advanced distributees, from the time when they are supposed to have received them. They have had the use of these amounts in the meantime. An intestate's estate is distributable as of the time of his death; and we may suppose the statute to be founded on an equity of this sort. The children who remain in the family of the father are supported by him. Advancements are made to those who leave his family, for the purpose of their support. Up to the time of the death, advantages are equal; both have received a support from the father's estate, and the advancements are estimated as having been made when the estate became distributable.

By the will in question, the testator's estate was distributable when his son, Noel King, should arrive at the age of eighteen years; and, in the meantime, the use of it, was given to such of his family as should continue to reside with his wife. This was equivalent to the use of the advancements by those of the children, who did not constitute a part of the wife's family. By natural equity, and fair analogy to the case of intestacy, I think the advancements ought to

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*have been estimated as of the time when the estate was distributable; that is, when Noel King arrived at the age of eighteen years; and that interest ought to have been calculated only from that time. And it is ordered and decreed, that the decree of the Chancellor be modified accordingly.

O'NEALL, J., concurred. JOHNSON, J., absent from indisposition.

Decree modified.

Bailey, Eq. 156

THOMAS P. FALCONER, and Others, v. E. POWE, Administrator of William Falconer.

(Columbia. Dec., 1830.)

[1. *Executors and Administrators* ⟸266.]

An administrator, being in advance to the estate, for several successive years, and being indebted, by bond, to the commissioner, for the purchase money of land of the intestate, which had been sold for partition, consented, upon a bill by the distributees for an account of his administration, that his bond should be brought into the account. *Held*, that he was not entitled to a separate account for interest, on the annual balances in his favor, up to the time of accounting for his administration; but that his advances for the estate, were to be applied, as they were made, first to the payment of the interest, and then of the principal of the bond, pro tanto, as in cases of discount. The court, upon a bill properly framed, would have ordered such discount, independently of the consent of the defendant.(a)

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1026; Dec. Dig. ⟸266.]

[2. *Set-Off and Counterclaim* ⟸41.]

Equity will enforce a discount of mutual demands between the parties really interested, although the demands are not in the same legal right, and, therefore, could not be set up in discount at law.(b)

[Ed. Note.—Cited in Abercrombie v. Abercrombie, 25 S. C. 52; Edwards v. Williams, 39 S. C. 95, 17 S. E. 457.

For other cases, see Set-Off and Counterclaim, Cent. Dig. § 81; Dec. Dig. ⟸41.]

(a) Ante, 102; Capehart v. Huey, 1 Hill E., 405; post, 168, 207.

(b) Kerr v. Webb, 9 Rich. E., 369; Goodhue v. Barnwell, Rice E., 239.

Before De Saussure, Chancellor, at Cheraw, February, 1830.

This was a bill by the distributees, for an account of the defendant's administration of the estate of his intestate. The defendant had, from time to time, advanced sundry sums of money, over and above the assets which came to his hands, for the payment of debts due by his intestate, and for the support and education of his children, the present complainants. He was, however, indebted, by his bond, to the commissioner, for the purchase money of land of his intestate, which had been sold by order of court, for partition; and the complainants, being the heirs-at-law of the intestate, were entitled to the money due on this bond. The bond was dated 10 June, 1811, and the condition was for the payment of $2,600, with interest, from 1 January, 1812, in three equal instalments, payable respectively, on 1 January, 1814,

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1815, and *1816. The defendant consented that the amount due by him, on this bond, should be brought into the account prayed by the bill, and an account was ordered accordingly, to be stated by the commissioner.

On taking the account, it appeared, that the defendant was in advance to the estate, as administrator, in the year 1817, $1,125.06, in the year 1818, $374.76, and in the year 1824, $945.47; and he claimed interest on these annual balances, to be computed from the end of each year, respectively, to the time of taking the account. The commissioner, however, applied the sums advanced by the defendant to the payment, first of the interest, and then of the principal sum, due on his bond, at the time when the advances were respectively made; and stated the account accordingly in his report. The defendant excepted to the report, on that ground; but the exception was overruled, and the report confirmed by the decree of the Chancellor.

The defendant appealed, and now moved to reform the decree, and account, conformably to the exception, on the ground: that the demands in this case were, not in the same right, and therefore not the subject of discount; and that the defendant's consent to bring the amount due on the bond, into the account, did not debar him of the right to claim interest on the annual balances due him, in the same manner, as if he had insisted on leaving the parties to their remedy at law upon the bond, by an action in the name of the commissioner.

Ervin, for the motion.

Blanding, contra.

O'NEALL, J. In this case, we are satisfied, that the commissioner has pursued the proper course, in applying the sums, which the defendant had advanced for his intestate's estate, in the years 1817, 1818, and 1824, as payments upon the defendant's bond.

It is true, that the bond formed no part of the defendant's account, as administrator; and he might, if he had thought proper, have compelled the complainants to amend their bill, so as to bring all parties, legally interested in the bond, before the court: but having consented to bring the amount due upon it, into the account before the commissioner, he must abide by that consent; and we consider that debt as now standing, in the account, precisely upon the same footing, as if the complainants had called upon the court, to compel the defendant to permit his advances for the estate to be considered as payments on his bond.

If this claim had been made, by a bill

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properly framed, with all *necesssary parties, the court would not have hesitated to have so ordered. For it was the duty of the defendant to have paid his bond to the commissioner, as the instalments became due; and if he had not funds of the personal estate, sufficient to meet the exigencies of the estate, it was his duty to have applied to the court, for a part of the proceeds of the real estate, sufficient for this purpose. Being himself the purchaser of the real estate, and at the same time, administrator, he has paid the demands on the estate, out of his own funds; and the simple question is, whether this ought not to be regarded as a payment, pro tanto, of his bond for the purchase money of the real estate. It is unquestionable that it ought. It is a performance of his duty, without the intervention of the court.

It is true, that at law these payments could not have been set up in discount;(a) for the demands would not have been in the same right, nor even between the same parties. There, the defendant must have been sued in his own right, and not as administrator; and the commissioner, and not the present complainants, must have been plaintiff. But in this court, we look to the parties really interested. The complainants, are the persons to whom the proceeds of the bond belong; and the advances made by the defendant were for their benefit. It is, therefore, a clear case of mutual demands, existing in equity, between the parties to the suit; and they are to be adjusted in the same way as in other cases of discount.

The Chancellor's decree, confirming the report of the commissioner, is therefore affirmed.

HARPER, J., concurred. JOHNSON, J., absent from indisposition.

Decree affirmed.

(a) Act of 1759, P. L., 246; 4 Stat., 76.

*WILLIAM C. GUERRY v. GABRIEL CAPERS, and Others.(a)

(Columbia. Dec., 1830.)

[1. *Executors and Administrators* ⟸96.]

The creditor of an executor, or other trustee, has, in general, no right to resort to the estate of the testator, or trust estate, for payment of purchases made, or contracts entered into, for the benefit of the trust; and the only recognized exception to the rule is confined to cases, where, if the executor, or trustee, had paid the debt with his own funds, he would be in advance to the estate, and would be entitled to be reimbursed out of it; in which case, if the executor, or trustee, be insolvent, the creditor will be allowed to take his place, and be paid out of the estate, to the same extent. Where the executor, or trustee, has received funds of the estate, sufficient to pay the debt, and has not applied them to the purposes of the trust, the creditor cannot resort to the estate for payment.

[Ed. Note.—Cited in Alexander v. Heriot, Bailey, Eq. 224; Manigault v. Holmes, Id., 284, 290; Henshaw v. Robertson, Id., 311; Ex parte Chappell, 34 S. C. 103, 104, 12 S. E. 934.

For other cases, see Executors and Administrators, Cent. Dig. 410; Dec. Dig. ⟸96.]

[2. *Executors and Administrators* ⟸96.]

A decree in favor of a creditor against an executor, for purchases made by the latter for the benefit of the estate, binds the executor, only, although it directs him to pay the debt "out of the estate of the testator;" and if the executor has received assets of the estate, for which he has not accounted, more than sufficient to satisfy the decree, the estate cannot be made liable to it in the hands of an administrator de bonis non.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 410; Dec. Dig. ⟸96.]

[3. *Executors and Administrators* ⟸263.]

A debt contracted by an executor, for the rent of lands, or hire of slaves, for the benefit of the estate, stands upon no higher ground, in regard to the right of the creditor to be paid out of the estate, than any other debt contracted by the executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 975–1000; Dec. Dig. ⟸263.]

Heard by De Saussure, Chancellor, at Sumter, February, 1830.

This was a bill for the administration of the estate of Legrand Guerry, who died in the year 1811, leaving a will, by which, after a specific legacy to his wife, he devised and bequeathed the residue of his estate, real and personal, which was very considerable, to be equally divided among his three children, of which the complainant was one, all of whom were then minors. The testator appointed several executors of his will, but one only of them, Gabriel Capers, qualified: and the others have refused to assume the duties of executors. The bill charges, that the executor, Gabriel Capers, had greatly mismanaged the estate, and misapplied the assets; and that in the year, 1827, or 1828, he abandoned his trust, and left the State, leaving several debts which he had contracted on behalf of the estate, unpaid, although largely indebted for assets, which had come to his hands. The bill further charged, that some of the creditors, with whom the executor had contracted, had instituted suits to render the estate liable to their demands: and that suits were threatened by others of them: and that as the other executors nominated, had refused to qualify, the complainant had

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sued out *letters of administration de bonis non, in order to protect the estate. The bill prayed an account against Gabriel Capers: that the debts, for which the estate was justly liable, might be ascertained, and paid, and all persons claiming to be creditors, enjoined from further proceeding against the estate; and that partition might be made of the residue, after payment of debts, conformably to the provisions of the will.

The case being at issue, the matters of account were referred to the commissioner, who was directed to call upon the creditors of the estate to come in, and establish their demands before him. On taking the account, it appeared, that the executor was in debt to the estate, for assets received by him, over and above his disbursements, to the amount of $4,831.53, exclusive of interest. Various claims were set up by creditors, of which it is necessary to notice, only those of John Humphrey, J. K. Douglass, and William Mayrant, amounting, together, to $1,748.82. The two former were for purchases of supplies, made by the executor, for the use of the estate; and the creditors, in a suit in equity against the executor, had obtained a decree, by which he was ordered to pay these demands, "out of the estate of the testator." The claim of William Mayrant was for the rent of a rice plantation, and the hire of a negro driver, which were contracted for by the executor, and made use of by him for the estate. The complainant objected to these demands, on the ground, that the executor alone was responsible to the claimants; and as he was indebted to the estate in a larger amount, they had no right to resort to the estate for payment. The commissioner, however, reported in favor of the claims; and an exception to that part of his report was overruled by the Chancellor, who, by his decree, ordered these debts to be paid out of the funds of the estate, generally.

The complainant appealed, and now moved to reverse so much of the decree as established the debts due to Humphrey, Douglass, and Mayrant, against the estate in the hands of the administrator, de bonis non,

(a) Post, 284; Hastie v. Baker, 3 Rich. E., 208; Magwood v. Johnston, 1 Hill E., 232; Brown v. Postell, 4 Rich. E., 71; Mayer v. Galluchat, 6 Id., 1; Adams v. Mackey, 6 Id., 75; 1 Strob. E., 72, 27; Tupper v. Fuller, 7 Rich. E., 170; McLure v. Askew, 5 Id., 162.

on the same ground which was relied on in the exception to the report.

Haynesworth, and Blanding, for the motion.

James G. Holmes, and W. F. De Saussure, contra.

O'NEALL, J. In this case, I propose to discuss the single question, how far the testator's estate, in the hands of the complainant, is liable for the debts contracted by Gabriel Capers, the executor.

By operation of law, all the personal estate of the testator is vested in his executor; and this legal right would, at law, necessarily

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*subject it to his entire control and disposition. Before the Act of 1824, he could even sell it without the order of the ordinary. (Vide Acts of 1824, p. 24, 6 Stat., 238.) But in equity he is the trustee for the legatees; and in that character he is bound so to manage the estate, that his cestuys que trust shall sustain no injury from his neglect. As a general rule, I would say, that he should take as much care of it, as a prudent man would of his own. This general rule still leaves a great deal to the discretion of the executor, in the management of an estate committed to his care; but that discretion is not entirely arbitrary, for it may be fairly deduced, as a consequence of the general rule, already laid down, that the expenditures for current expenses should not, unless in cases of inavoidable necessity, exceed the current income. This inference, from a general principle has, by repeated adjudications of this court, been established as a fixed rule, by which executors, and trustees should regulate their trusts. McDowell v. Caldwell, 2 McC. Eq. 58 [16 Am. Dec. 635]; Teague v. Dendy, Id., 211 [16 Am. Dec. 643]; Boggs v. Reid, at Columbia, May, 1829, Car. L. J., 327; and Smith and Brown v. Killingsworth, MS.(*b*)

The income being the fund for expenses, the executor, in his disposition of it, ought to exercise a sound and honest discretion. If his disbursements from it have been made prudently, they will always be supported; if made extravagantly, or for purposes not necessary, they would be disallowed. These rules relate to the account between the trustee and cestuys que trust; and they necessarily suppose, that he has either paid out of the funds of the trust, or substituted his own credit in lieu of them. Persons dealing with the executor can therefore have no right to look to the estate for remuneration, except in an extraordinary case, and that I shall have occasion more particularly to designate hereafter. In Boggs v. Reid, the learned Judge, who delivered the opinion of the court, distinctly affirms this position, and says, "they are the creditors of the trustee, and not of the estate." In Smith and Brown v. Killingsworth, another equally able and learned Judge says, "the general rule, that a trustee cannot bind the cestuy que trust or create a burthen on the trust estate, is so familiar as almost to have become an axiom." In addition to what has already been said, and to these decisive authorities, a few words will demonstrate both the reason and justice of the rule, that, in general, the creditor of a trustee has no right to resort to the trust estate for the payment of his debt.

Both in law, and in equity, every contract, to be binding, must be between parties able to contract, and actually contracting, on a good consideration. As between the trustee

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and his creditor, all these *essential parts of a contract do exist; but as between the cestuy que trust and the creditor, none of them can be found. They are not only not parties, but are frequently legally incapable from infancy, or coverture, to become so; and between them and the creditor, there is no actual privity of contract, nor is there any legal, or implied privity; for their funds, for the purchase of the thing contracted to be bought, are in the hands of the trustee. When he pays it, and puts it to their use, they have paid him for it; and hence no implication can be raised, that they agree, in consideration of receiving the thing bought, to pay the creditor of the trustee for it. This, however, it may be said, is rather technical reasoning, than the application of equal justice, which is said to be equity. If it is technical reasoning, it is reasoning based upon the principles of the law, which I am called upon to administer, and not my own notion of abstract justice. I am, however, perfectly willing to test the rule on the principles of equal justice. The trustee has the right to receive, and if necessary, to expend the income; and if the creditor looks beyond the trustee, when he makes the contract, it is to this fund alone he looks for payment. He knows, that at the end of the year it will be in the trustee's hands, and if he does not take the necessary steps to procure payment, it is his own fault, and there is no injustice done him. But if the trustee were allowed to bind the trust estate, the effect might be ruinous to the cestuy que trust; and in thus seeking to do justice to the careful and prudent man of business, we might carry irremediable injury, and ruin, into the very cradles of infancy. With such a security before him, a creditor might be willing to extend the credit to the trustee from year to year, until the whole capital of the trust would not more than suffice to pay it; and in the meantime the trustee may have received, and squandered, the income, and his insolvency leave to his cestuy que trust not even the consolation of hope.

(*b*) Post, 290; 3 Rich. L., 450.

The effect of the rule, when applied, will prevent these consequences, and even afford security to the creditor. If the trustee is not punctual, and prudent, he will be compelled to pay as he buys; and if he is both prudent, and punctual, the creditor will hardly give him an opportunity of forfeiting his credit, by tempting him with indulgence to speculate on the funds of another. The annual bill will generally wait promptly on the punctual trustee.

I have said that an extraordinary case may exist, in which the creditor might be permitted to be paid out of the trust estate. It is necessary now to designate that case as well as we can. As a general guide, it may be laid down, that whenever the trus-

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tee, if he *had paid the debt out of his own funds, would be in advance to the trust estate, and would be entitled to be reimbursed out of it, his creditor may, if the trustee is insolvent, be allowed to take his place, and be paid out of the estate, to the same extent. This constitutes, however, the only exception to the general rule, which we are prepared to recognize.

The case before us, shows the necessity of rigidly adhering to the rule, and allowing no other exception to be made to it, than the one which I have stated. The executor, Gabriel Capers, had the management of the estate, consisting of a valuable tract of land in Sumter district, and a gang of seventy negroes, from 1810 to 1827. During this time, the family of the testator, to be provided for by his executor, consisted of three children. From his returns he appears to have received in income, over and above his payments, $4,831.53, exclusive of interest; and notwithstanding this fund was in his hands, he contracted, and left unpaid, the debts to John Humphrey, J. K. Douglass, and William Mayrant, amounting together, exclusive of interest, to $1,748.82. He is now insolvent, and has abandoned his trust, and left the State; and these creditors now seek to make the income of the estate, realized since he abandoned his trust, liable for their debts. In common justice have they any claim to such relief? The cestuys que trust have already lost, by the mismanagement of their trustee, upwards of $4,000; and is nearly a half more to be added to that loss? And for what? Is it merely because their trustee was imprudent, and unfaithful; and that they were minors, incapable of guarding against the consequences of his misconduct, while the creditors were more careful, prudent, and vigilant, in, and of, their own interests? The answer never can be, that under these circumstances the infant must suffer, in order that the creditor may be indemnified. If loss must fall any where, let it fall on those, who might have guarded against the mischief, but who neglected to do so.

It is however contended, that the decree of the Court of Equity, in favor of Humphrey, and of Douglass, makes the estate, in the hands of the complainant, liable for the payment of their demands. The decree is in the usual form, "that the executor, Gabriel Capers, do, out of the estate of the testator," pay these debts. This is a judgment against the fund properly applicable to the payment of the debts; and that fund being in the hands of the executor, he alone is liable under the decree. It may be enforced against him; but if he were now in the possession of the whole estate, and Humphrey, or Douglass, were proceeding to enforce their decree, by

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an *execution against, and a sale under it, of the testator's estate, I apprehend that the cestuys que trust would, on an application by bill, showing that the debts were contracted by the executor, and that the income in his hands was sufficient to pay them, be entitled to an injunction. Here the creditors have become the actors. They come in under a bill for the administration of the assets of the estate, and undertake to set up their demands, as a charge against the estate, now out of Capers' hands; but before they can be allowed to do this, they must show that Capers had not assets of the estate in his hands to pay the debts, and that the debts due to them were necessarily contracted for the benefit of the estate. This cannot be done, and it follows that the estate cannot be so charged.

The debt due to Mr. Mayrant, it is contended, rests upon a still higher ground. It is said that the estate has had the benefit of this contract with him, and ought therefore to be bound for it. But it is worthy of remark, that whatever may have been the income derived from the use of Mr. Mayrant's plantation, and driver, the cestuys que trust did not receive any part of it. The whole was received by Capers, and he ought, out of it, to have paid Mr. Mayrant. Like the rest of his contracts, this debt ought to have been paid out of the current income. But I am by no means satisfied, that the rent and hire of Mr. Mayrant's plantation, and driver, were necessary for the estate. In relation to that part of the case, I am very much disposed to concur with the commissioner in the opinion, that it was a mere speculation of the executor, and not required by any paramount necessity, or even expediency. But the observations made on the other parts of the case, dispose of Mr. Mayrant's claim without resorting to any inquiry on this point.

So much of the Chancellor's decree, as charges the income of the estate, since it was abandoned by Capers, with the payment of the debts due to John Humphrey, J. K. Douglass, and William Mayrant, is clearly erroneous; and it is therefore ordered and

decreed, that the decree of the Chancellor, in these respects, be reversed.

JOHNSON, J., and EVANS, J., sitting for HARPER, J., absent from indisposition, concurred.

Decree modified.

Bailey, Eq. *165

*ROBERT OWEN v. WILLIAM FOREMAN.

(Columbia. Dec., 1830.)

[1. *Equity* ⇐404.]
A party is not bound, on notice, to attend the examination of a witness in the country; and it is a good exception to the commissioner's report, that it was founded on evidence so taken; but the case ought to have been referred back to the commissioner for further evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 886–892; Dec. Dig. ⇐404.]

[2. *Equity* ⇐404.]
The commissioner's office is the proper place to take evidence on a reference, and if a witness is aged, or infirm, and cannot attend, the examination must be, by commission, or interrogatories.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 886–892; Dec. Dig. ⇐404.]

Per JOHNSON, J., on appeal from the decree of De Saussure, Chancellor, at Chester, June, 1829.

O'NEALL, J., and HARPER, J., concurred.

Decree opened.

Bailey, Eq. 165

ELIZABETH BAKER v. WILLIAMSON BAKER, and SAMUEL RED.(*a*)

(Columbia. Dec., 1830.)

[*Husband and Wife* ⇐205.]
The 16 section of the Act of 1712, authorizing a feme covert to prosecute a suit in her own name, by appointing an attorney, applies only to suits in courts of Law. In equity, she must sue by prochein amy. Vide P. L., 103, 104; 2 Stat., 587.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 744; Dec. Dig. ⇐205.]

Before Harper, Chancellor, at Newberry, July, 1830.

The complainant, who was a feme covert, had filed a bill in this court against her husband, Williamson Baker, and Samuel Red, to restrain them from selling a family of slaves, claimed to be her separate property. Since the last continuance, her prochein amy had died; and the defendants now moved that the complainant be ordered to substitute the name of a responsible person as prochein amy. The motion was resisted, on the ground, that the complainant having constituted an attorney, under her hand and seal, she had a right under the 16 section of the Act of 1712, P. L., 103,(*b*) 104, to prosecute her suit in her own name.

His Honor, the presiding Chancellor, was of opinion, that the Act of 1712 did not dispense with the necessity of a prochein amy. Before that Act, a feme covert could not sue at law, at all, without joining her husband; and the principal object of the Act was to enable her to do so. She might always have sued alone in equity, but only by a prochein amy, who should be responsible for costs. The provision of the Act of 1712, is not in-

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consistent with the practice *of this court. The feme covert may appoint an attorney to conduct the suit, but there is nothing to forbid such attorney's being prochein amy. A contrary construction would leave femes covert at liberty to bring all suits they might think proper, without a responsibility for costs any where.

His Honor, therefore, granted the order conformably to the motion.

The complainant now moved to rescind the order, but the motion was refused by the unanimous judgment of the court.

Dunlap, for the motion.
Higgins, contra.

Appeal dismissed.

(*a*) The principal case is reported Rich. E. C., 191; Bellinger v. Thomson, 2 Rich. E., 30.

(*b*) 2 Stat., 587.

Bailey, Eq. 166

JOHN M. WITHERSPOON and Wife v. DANIEL DUBOSE.(*a*)

(Columbia. Dec., 1830.)

[*Husband and Wife* ⇐18.]
After the death of the wife, the husband cannot be made liable, in equity, for debts contracted by her before the marriage, where judgment has not been recovered against him in her lifetime, although he received with her a fortune sufficient to pay all her debts.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 118; Dec. Dig. ⇐18.]

Heard by De Saussure, Chancellor, at Darlington, February, 1830.

This was a bill to render the defendant liable for a debt contracted by his deceased wife, prior to his marriage with her, on the ground, that he had received with her a fortune more than sufficient to pay all her debts. The debt was upon a bond to the wife of the complainant, dated in January, 1818, and became due in October of the same year. The defendant intermarried with the obligor on 4 March, 1819; and she died on 15 November, 1820, no judgment having been

(*a*) S. C., Car. L. J., 366, with remarks p. 363; Terry v. Hopkins, 1 Hill E., 7.

recovered, or suit instituted against the defendant on the bond, in her lifetime. The defendant, in his answer, stated that he had no notice of the existence of this debt until December, 1823; but that, on the contrary, at the time of his marriage, the debts due by his wife were enumerated, and he was assured that the debts enumerated were all that were due by her, and that this debt was not among them; and that in consequence of this assurance, he had consented to give up a part of his wife's property to her children by a former marriage; and that he had surrendered property to them, accordingly, since her death, and before notice of complainants' demand. He admit-

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ted, however, that he *had retained, of the fortune received with his wife, more than sufficient to pay all her debts, including that claimed by the complainants.

His Honor at the hearing dismissed the bill, and the complainants now moved to reverse his decree.

Blanding, for the motion.
Wilkins, contra.

JOHNSON, J., delivered the opinion of the court.

This court concurs with the Chancellor in his decree in this case. In the case of the Earl of Thomond v. the Earl of Suffolk, 1 P. Wms., 460, the rule was established to be, in equity, as at law, that if a woman contract debts dum sola, and afterwards marry, the husband is liable during coverture; but if the wife die, the liability of the husband ceases, unless judgment has been obtained against him in her lifetime, in which case it then became his own debt; but if no judgment has been recovered, he cannot be made liable, although he had received a fortune with her. In Heard v. Stamford, 3 P. Wms., 411, and Cas. Temp. Talb., 173, S. C., Lord Talbot reiterated the rule, and said, that he was unable to see how any thing but an Act of parliament could alter the law. Our own Court of Equity adopted the same rule in Buckner v. Smyth, 4 De S. E., 371; and although that was merely a circuit decision, it has received the approbation both of the bar and the bench.

It is impossible to reconcile the case of Moon v. Herndon, reported under the title of Moone v. Henderson, in 4 De S. E., 459, to this rule: but however it may have been actually violated under the peculiar circumstances of that case, it is very clear from the note of the reporter, who was one of the members of the court, that the rule was intended to be preserved. The case professes to be one of peculiar circumstances, but these are not stated. My own knowledge of the parties enables me to state, certainly, that the defendant's wife, the executrix of Andrew Lee, was also one of his children; and it may be, that by the terms of the will she was entitled, in common with the other children, to a portion of the estate, and had committed a devastavit, to the extent of her interest, and the husband, nevertheless, claimed an equal dividend of what remained of the property bequeathed. If that were the case, the amount of the devastavit was properly chargeable to her, as so much of her dividend, and the other legatees were entitled to the residue. See Phælon v. Houseal, 2 McC. Eq. 432.(*b*)

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*The motion to reverse the Chancellor's decree in the present case is dismissed.

O'NEALL, J., and EVANS, J., sitting for HARPER, J., absent from indisposition, concurred.

Decree affirmed.

(*b*) See Capehart v. Huey, 1 Hill E., 410; Rich. E. Ca., 59.

Bailey, Eq. 168

JOHN D. BEERS, and Others, v. GEORGE T. HEARSY, RICHARD MAYNARD, and Others.

(Columbia. Dec., 1830.)

[*Banks and Banking* ⇐77.]

The debtor of an insolvent bank is entitled to set off against his debt to the bank such of its bills as were held by him at the time when the bank stopped payment. And where, by mistake, the account of the cashier had been credited with a sum to which he was not entitled, and, after paying the balance which appeared against him on the books, he had parted, at a sacrifice, with bills of the bank, which were in his possession at the time when the bank stopped payment, more than sufficient to have paid the actual balance due by him, including the amount of the erroneous credit; held, that he was entitled to set off, against that amount, other bills of the bank, which he had subsequently procured, although a receiver had been previously appointed, upon a bill filed by the creditors of the bank: and it made no difference, it seems, that the erroneous credit had been entered by the cashier himself.(*a*)

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 174; Dec. Dig. ⇐77.]

Before De Saussure, Chancellor, Darlington, February, 1830.

This cause came up upon exceptions to the commissioner's report, on a bill filed by the creditors of the bank of Cheraw against the president, directors, stockholders, and others, to obtain payment of their demands out of the assets of the bank, which had stopped payment; to which bill the defendant, Richard Maynard, the cashier of the bank, was made a party, on the allegation that he was a debtor to the bank, and a defaulter to a considerable amount. In February, 1828, a receiver was appointed, and shortly afterwards the defendant, Maynard, delivered to

(*a*) Ante, 156.

the receiver all the assets of the bank in his hands; and at the same time he payed the balance which appeared on the books to be due by him to the bank; whereupon his account was balanced in the books. This payment was made in bills of the bank, which were in his hands at the time when the bank stopped payment. At a meeting, on a reference of the accounts to the commissioner, in August, 1829, it appeared, that the defendant had been erroneously credited in his account, with a sum to which he was not entitled;

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and the error being corrected, he *remained indebted to the bank to the amount of that credit. The circumstances were these. A check on New York, drawn by the bank of Cheraw, had been endorsed by one Lazarus, and the defendant, and transferred to the Tarborough bank, of North Carolina; and this check not having been paid when the bank of Cheraw stopped payment, the defendant, supposing that the endorsement of Lazarus and himself was a joint endorsement, and that they were jointly, and equally, liable, credited his own account with $1.200, being half the amount of the check, and at the same time credited the account of Lazarus with the other half. At the meeting in August, 1829, the check was produced by Lazarus, who was in fact the first endorser, and who had in consequence taken it up at the Tarborough bank; and he now claimed a credit for the whole amount. This was assented to by the defendant, who admitted that the credit in his account was erroneous, and that he was indebted to the bank for the amount; but he tendered in payment an equal amount of the bills of the bank. This was objected to, on the ground, that the bills now tendered by the defendant, were not in his possession when the bank stopped payment, but had been recently purchased, and at a great discount, for the purpose of making this tender. The fact, of the recent acquisition of the bills tendered, was conceded by the defendant, but he produced evidence to show, that when the bank stopped payment, he was in possession of bills of the bank, more than sufficient to have discharged the entire balance due by him, including the $1.200 erroneously credited; and that after he had paid the balance, which appeared against him on the books of the bank, he had disposed of the residue of these bills, at a great sacrifice. The facts in evidence were set forth in the report of the commissioner, who submitted the matter for the decision of the court.

Blanding, for the creditors. The bills tendered, cannot be received in payment of the balance, admitted to be due by the defendant. It would be going very far, in any case, to permit debts, bought up at a discount, after a notorious insolvency, to be set up in discount against debts due by the purchaser. It must lead, necessarily to a disgraceful and injurious scrambling in all cases of insolvency, and defeat every effort to obtain a fair and just distribution of the insolvent's effects, through the instrumentality of this court. But if it were allowed in other cases, it certainly will not be tolerated, where the debts were bought up after the appointment of a receiver. By the appointment of a receiver, the equitable property of the assets is, in

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fact, changed. From that time, they *belong to the receiver, as the agent of the court, and creditors, whether parties or not, are entitled to nothing more than their equal dividend; nor can a debtor to the insolvent, by purchasing a creditor's claim, entitle himself to more than the dividend to be paid upon it.

The circumstances of the defendant's case cannot make it an exception, to what must be regarded as the general rule. If he had bills of the bank in his possession, at the time of the failure, he might have paid his debt with them, or he might have disposed of them as he pleased. He chose the latter, and must abide the consequences. It is said he was misled by the books of the bank; but he himself made the entry by which he alleges that he was misled. Admitting that he was without fault, yet all that he can ask is, that he should be allowed to do now, what he might have done at first, to pay his debt with bills, of which he was the owner, when the bank stopped payment. But he asks more than this. He asks not merely to correct his mistake, but to gain from it a right which he did not possess before; namely, to pay his debt with bills, purchased since a receiver was appointed. It would be dangerous in the extreme to comply with such a request.

Graham, contra. It is clear, from the evidence, that when the bank stopped payment, the defendant was in possession of its bills, to an amount more than sufficient to discharge the whole of the debt due by him; and it is conceded, that he was entitled to have paid his debt with these bills. This being the case, it is obviously a matter of indifference, whether his debt is paid with these bills, or bills subsequently acquired; inasmuch, as the surplus bills, after the payment of the debt, no matter when acquired, could only be used by the defendant to obtain a dividend of the estate, in common with the other creditors. The whole argument, therefore, founded on the injury to creditors, in permitting subsequently purchased bills to be set up in discount, falls to the ground. So, too, it is a mistake, to say that the defendant claims a new privilege, in consequence of the error in the account. He asks no new privilege, but merely to be protected against the consequences of a mistake, which has worked, and can work no injury to the creditors; and he claims to be permitted to do now, only that, which it would never have

been questioned, but that he might have done, if he had not been led, by the mistake in the account, to dispose of the bills originally in his possession. It is true, that the mistake originated with the defendant himself; but that is immaterial. It is of no consequence who made the mistake as it has

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injured no one. It *is sufficient, that it is a mistake, and not fraud, which is not surmised; and that being the case, the defendant is entitled to be relieved.

De Saussure, C. The question in dispute involves many circumstances, which require a minute examination, in order to come to a sound conclusion. The facts in evidence are very fully set forth in the commissioner's report; and, after a careful consideration of them, I am of opinion, that the defendant, Maynard, ought not to be charged with the balance claimed of him, by the creditors of the bank. That was extinguished by the entry, crediting him with half the amount of the check endorsed by himself and Lazarus. At that time, he had bills of the bank of Cheraw in his hands, of his own property, which he could have applied to the payment of the balance due by him, if that had not been already effected by his being credited as stated. The entry of that credit, however, was an error, as Lazarus was his endorser, and therefore liable to him. But the correction of that error ought not to prejudice the defendant. He is entitled to be placed in the same situation that he would have been in, if it had not been committed, when it is conceded that he was at liberty to have paid off the balance he owed to the bank with its bills which he had in his hands.

This case is distinct from the general one of debtors of the bank seeking to pay their debts, by buying up its notes after failure. I decide nothing as to that. My decision rests upon the special circumstances of this case. In my view, if it be correct, the defendant, Maynard, has settled his account as cashier of the bank of Cheraw; and having delivered over to the receiver appointed by the court, all the funds of the bank in his hands, it is ordered and decreed, that the receiver deliver up to him his bond, given for the faithful performance of his duty as cashier, to be cancelled.

From this decree, the complainants appealed on the grounds urged in the Circuit Court.

JOHNSON, J. This court concurs with the Chancellor, in the view which he has taken of this case; and the appeal is, therefore, dismissed.

O'NEALL, J., concurred. HARPER, J., absent from indisposition.

Decree affirmed.

Bailey, Eq. *172

*DAVID RICE, Guardian, v. JOHN CANNON, and Others.

(Columbia. Dec., 1830.)

[1. *Executors and Administrators* ⇐261.]

In the administration of the estate of a deceased administrator, a sum of money, due by him as administrator to the estate of his intestate, ranks as a bond debt.(*a*)

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 967; Dec. Dig. ⇐261.]

[2. *Executors and Administrators* ⇐418.]

Parties claiming a fund in court, are not concluded by an order to which they were not parties, making a different disposition of the fund; and if they are entitled to the fund, and the order has not been carried into effect, it will be rescinded, at their instance, on a proper proceeding for that purpose.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1656; Dec. Dig. ⇐418.]

[3. *Executors and Administrators* ⇐283.]

[In a suit to establish the order of payments out of an administrator's estate, the money being in court, and all persons interested parties, the court decreed payment to the bond creditors, instead of turning them around to a suit on their bonds.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1129; Dec. Dig. ⇐283.]

This cause was heard at Newberry, in July, 1827, before De Saussure, Chancellor, from whose decree an appeal was taken, and argued at a former sitting of the Court of Appeals, but the judgment of the court was not delivered until the present term.

The case will be sufficiently understood from the opinion delivered in the Court of Appeals.

JOHNSON, J., delivered the opinion of the court.

The case upon which this motion is made, as it is understood, is briefly this: John Smiley died in 1806, and administration of his estate was granted to Ephraim Cannon, Jr., who, in that character, received and retained in his hands, on account of Joseph and Mahala Smiley, the wards of the complainant, Rice, the distributees of that estate, the sum of $4,093. Ephraim Cannon, the administrator, died in 1818, without having accounted for the amount; and administration of his estate was granted to Henry Ulmer, and his widow, Eleanor Cannon. In 1822, a proceeding in equity was instituted, which eventuated in an order, that certain negros, belonging to the estate of Ephraim Cannon, should be sold, and the proceeds distributed among his heirs. These negros produced $1,250, and that sum is now in the hands of the commissioner of the court. In the report of the commissioner, made upon a reference of this cause, he comes to the conclusion, that the estate of Ephraim Cannon is "insolvent

(*a*) Glenn v. Caldwell, 4 Rich. E., 190.

to a large amount;" and the leading object of this bill was to arrest this fund, and to appropriate it to the payment of the sum due to the complainant's wards. Samuel Cannon, one of the defendants, claims to be reimbursed out of it a sum of money, which he had paid as the security of Ephraim Cannon, on a simple contract debt; and the sole question arising out of the circuit decree, and the several grounds of the present motion is, whether the complainant's demand, above stated, is entitled to rank as a bond debt, in

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administering the assets of the es*tate, and, therefore, entitled to a precedence over the claim of Samuel Cannon.

It is difficult to conceive of any solid foundation for the distinction, which the legislature has thought proper to make, in the distribution of an insolvent estate, amongst the various classes of creditors, or in what its equity and justice consists; except when actual liens have been created, and except also, as to the necessary expenses, of the administration. But a rule has been established, and that is imperative. A bond debt is entitled by the express provision of law, to take precedence of a simple contract debt. The demand of the defendant, Samuel Cannon, confessedly falls within the latter; and if the complainant's falls within the former class, it must, of necessity, be preferred. The case of McDowell v. Caldwell, 2 McC. Eq. 56 [16 Am. Dec. 635] is decisive of this question. That was a bill against the executors of the guardian, for an account of the estates of his wards; and it was held, that in the administration of the assets of his estate, the balance due to the wards ranked as a bond debt; and this, on the principle, that upon the breach of the condition of his guardianship bond the penalty became a debt by specialty, and stood as a security for what might be found to be due. Its analogy to the case under consideration, is so striking, as to render it almost identical. On the grant of administration of the estate of John Smiley, to Ephraim Cannon, he entered into a penal bond, conditioned for the faithful discharge of his duty, as administrator; and although that bond is not now the subject of suit, it is the substratum of the complainant's claim to this fund, and gives rank and character to his demand. It must, therefore, be preferred to the demand of Samuel Cannon.

It appears, however, that in the proceeding in equity, before referred to, an order had been obtained, that Samuel Cannon's demand should be paid out of this fund; and, it appears, also, that the administrator had drawn an order in his favor, on the commissioner of the court, directing him to pay it; and this, it was contended, was, pro tanto, an appropriation of the fund, which the court would not control. The defendants, the distributees of the estate of Ephraim Cannon, also, further contend, that the order for partition, before referred to, was an appropriation of the residue of the fund; and that the complainant ought to be left to his remedy against the sureties to the administration bond.

The commissioner has reported, and in the absence of proof to the contrary, it will be taken for granted, that the estate of Ephraim Cannon is insolvent. It follows, that what-

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ever may be the state of *things now, the complainant was, in the due course of administration, entitled to the fund. He was no party to the proceeding in equity referred to, nor were the interests of his wards represented by any one; and they could not, therefore, be concluded, either by the order to pay the amount due to Samuel Cannon, or the order for distribution; nor did the order drawn by the administrator in favor of Samuel Cannon, vary the rights of the parties. And the fund being still in the possession of the court, the question now is, whether the court possesses the power to order it to be paid to the complainant.

One of the objects of chancery jurisdiction, is to prevent circuity, and multiplicity of action; and one of the most efficient means is, to order the rightful and proper disposition of the funds in its possession: and it is the common practice to do so. If Samuel Cannon had actually received the amount due him, and the residue of the fund, had been distributed amongst the heirs of Ephraim Cannon, in pursuance of the order of court, still, ex æquo et bono, they were not entitled to retain it; and according to well established principles, the complainant might, in the event of every other remedy failing, have recovered it back, as money paid in fraud, or by mistake. If the complainant had recovered of the sureties to the administration bond, they, on the same principle, would be entitled to recover it from the defendant.

The parties are now all before the court, and their rights fully understood; and it is clear that in the end, the complainant will be entitled to the fund. It saves, therefore, the delay, and expense of pursuing the circuitous course which this part of the defence indicates to order it to be paid over to him at once.

It is, therefore, ordered and decreed, that the decree of the Circuit Court, be reformed according to the principles of this opinion.

Decree modified.

*GEORGE F. CALDWELL, Executor of James Caldwell, v. JOHN D. WILLIAMS, and Others.

(Columbia. Jan., 1831.)

[1. *Gifts* ⇐25.]

A conveyance will not be decreed against the heirs of the donor, upon proof of a parol gift of land to his son-in-law, where there is no evidence of any agreement, or promise, made before the marriage; although possession was delivered to the donee, upon his marriage, and he, and those claiming under him, were suffered to remain in possession until after the death of the donor. Nor will it make any difference, that improvements have been placed upon the land, by the donee, if they are only such as he was likely to have made with a view merely to the present use of the land.

[Ed. Note.—Cited in De Veaux v. De Veaux, 1 Strob. Eq. 290.

For other cases, see Gifts, Cent. Dig. § 46; Dec. Dig. ⇐25.]

[2. *Specific Performance* ⇐49.]

No agreement can be enforced, either in law, or in equity, which is not founded on a consideration. Some agreements, which are termed voluntary, are executed in equity, when made in favor of a wife, or children; but this is done only where the agreement is under seal, which imports a consideration, and renders the agreement valid at law: and there is no instance of an agreement being enforced, which is not only voluntary in the equity sense of the word, but is also nudum pactum at law.(a)

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140–151; Dec. Dig. ⇐ 49.]

[3. *Estoppel* ⇐93.]

Standing by, and permitting another to build on his land, without giving notice, will not affect the right of the proprietor to the land, unless the buildings are of such a character as to shew, that the party erecting them, placed them there in the confidence of his being the owner of the land.(b)

[Ed. Note.—Cited in Sullivan v. Moore, 84 S. C. 432, 65 S. E. 108, 66 S. E. 561.

For other cases, see Estoppel, Cent. Dig. § 264; Dec. Dig. ⇐93.]

[4. *Injunction* ⇐26.]

[This court will not enjoin a suit at law, for the recovery of land, on the ground of any claim arising under the statute of limitations, that being a matter peculiarly proper for the consideration of a court of law.]

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 48; Dec. Dig. ⇐26.]

This case, which was heard by Harper, Chancellor, at Laurens, in July, 1830, will be fully understood from his decree.

Harper, C. The bill charges, that James Caldwell, deceased, married the daughter of Washington Williams, now also deceased; that in consideration of the marriage, and as an advancement to his daughter, the said Washington Williams put the said James Caldwell in possession of a tract of land in Laurens district; that James Caldwell continued in possession until his death, six or seven years afterwards, and, by his will, devised the said land to the complainant, David R. Caldwell, appointing the other complainant, George F. Caldwell executor of his will; and that the said Washington Williams having since died, the defendants, his heirs-at-law, have commenced an action to recover the lands: and the bill prays, that the said action may be injoined, and the defendants compelled to convey the land.

The amount of the testimony, on the part of the complainants, was, that upon the marriage of Caldwell, he went into possession of the land, and that he, or his executor, have

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retained possession *ever since. Several witnesses testified to declarations of Washington Williams, made after the marriage, that he had given the land, in question, to his daughter, or to Caldwell. There was a good deal of conflicting testimony on both sides, which I do not think it necessary to examine minutely, as the case seems, to me, a clear one.

So far as respects any claims that the complainants may have, by virtue of the length of possession, under the statute of limitations, that is a matter peculiarly proper for their defence in the Court of Law, and can furnish no ground, for coming into this court.(c)

It is hardly necessary to say, that a parol gift of land transfers no right. In general, evidence of such gift, is not admissible, although it has been received, in particular cases, to shew the character of the subsequent possession. Then, regarding it as an agreement to convey, which is sought to be enforced on the ground of part performance, no agreement can be enforced, either in law, or in equity, which is not founded on a consideration. Without a consideration, it is, in fact, no agreement. No consideration appears here. There is no evidence, at all, of any promise, or agreement, before the marriage, which might have been an inducement to it. All the expressions of Washington Williams, which are in evidence, were made after the marriage, and prove only a gratuity. "He had given the land to his daughter, or to Caldwell." I cannot presume, against the effect of complainants' testimony, that it was founded on the consideration of marriage. Some agreements, which are termed voluntary, are executed in this court, when made in favor of a wife, or children; but these are always agreements by deed, or covenant; agreements under seal, which imports a consideration, and renders them valid at law. See the cases referred to by Maddock, in his treatise on chancery, 1 vol., 326, 327. There is no instance of an agreement being enforced, which is not only voluntary in the equity

(a) Cabeen v. Gordon, 1 Hill E., 51, 7; 7 Rich. E., 19, 385; Id., 15; Deveaux v. Deveaux, 1 Strob. E., 290.

(b) Tarrant v. Terry, 1 Bay, 239; 2 Atk. E., 83.

(c) Hunter v. Parsons, 2 Bail. L., 59; Sumner v. Murphy, 2 Hill L., 488 [27 Am. Dec. 397]; McElwee v. Martin, Id., 496; Lyles v. Lyles, Harp. E., 290, 239; 1 Hill E., 84.

sense of the word, but is also nudum pactum at law.

It is argued, on other grounds, that the defendants ought to be compelled to execute the will of James Caldwell; for that he made improvements on the land, and Washington Williams having stood by, and acquiesced, it would now amount to fraud, to reclaim the land. The testimony of the witness was that Caldwell cleared about fifty acres of the land, for cultivation, and erected some inconsiderable buildings, a stable, and an addition to a barn. I cannot think, that these improvements are of such a character, as to shew, that Caldwell made them in confidence of being the owner. They are such as he would have been equally likely to make; with

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*a view either to the present use of the land, or to the permanent ownership. If a man stands by, and sees another build a house on his land, without giving notice, he will lose his land; but I am not satisfied, that the same consequence would follow, if he should see him clear and cultivate it for a year, or two, and erect such temporary buildings, as might be necessary, for the purposes of that cultivation. Besides, taking the whole of the testimony together, it is not sufficient to convince me, that Caldwell had any positive promise, or agreement, that the land should be conveyed to himself, or his wife. He must have known the necessity of writing, to transfer a title to land, and that he had no legal title; and if he made improvements, without any such provision, or agreement, he must have known that he was making them at his own risk.

It is, therefore, ordered and decreed, that the bill be dismissed, with costs.

The complainants gave notice of appeal, and now moved to reverse the decree of his Honor.

Irby, for the motion. There can be no question, that equity will, under circumstances, compel the performance of a parol agreement, to convey land. Stockley v. Stockley, 1 Ves. & Bea., 23. It is said, that there must be a consideration, but a good consideration is sufficient; and the advancement of a child, in marriage, is a consideration, of the most sacred character. The principles of the case of Stockley v. Stockley, are conclusive of this; and it would be, in the highest degree, inequitable, after the donee had been permitted, for so long a time, to regard himself as the owner of the land, and to act upon that conviction, expending his money in improving its value, now to deprive him of it, and defeat his will.

A. W. Thomson, contra. The agreement in Stockley v. Stockley, was a compromise, and, therefore, founded on a valuable consideration. Here the alleged gift is purely voluntary, and even if it were in writing, could not be enforced. The possession of the donee cannot avail to alter the legal character of the supposed agreement. If the possession were such as to give a title by the statute, then it would avail at law, and the complainants have no business in this court: and if it were not sufficient for that purpose, it is wholly unavailing. The title to land does not pass by delivery, nor can an agreement, for the conveyance of lands, be established by parol evidence. In Westbrook v. Harbeson, 2 McC. C., 117, it was held, that parol evidence could not be received to show, that a release of dower was intended to be a release of the

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*inheritance. Even where the agreement is admitted by the answer, yet the defendant may protect himself by the statute of frauds. Thompson v. Tod, 1 Pet. Cir. C. R., 388; Pym v. Blackburn, 3 Ves., 34; and see the cases collected in note (a), page 38. But a fatal objection, if there were no other, exists in the uncertainty of the alleged agreement. The land, it is alleged, was to be conveyed to James Caldwell, or to his wife; but there is a material difference in the effect of a conveyance to the one or to the other, and this is sufficient to prevent a conveyance being ordered, either to the one or the other. Equity will never decree a specific performance, unless the terms of the agreement are so precise, that neither party can reasonably misunderstand them. Colson v. Thompson, 2 Wheat., 336. Moreover, a specific performance will not be enforced, when, from a change of circumstances, it would be unconscientious to do so. Mechanics' Bank v. Lynn, 1 Pet., 376. If an absolute gift were in fact intended, the object of the donor must have been to provide for his daughter and her family; and that object has been entirely frustrated, by the death of his daughter and her husband. And yet it is now insisted, that the Court of Equity shall decree a conveyance, without consideration, and without motive, when it was, most probably, for the express purpose of avoiding this, that the donor never executed a deed of gift.

Waddy Thompson, in reply. The case of Stockley v. Stockley, has not been answered; nor are its principles reconcileable with the decree in this case. There are other cases, in which the court will enforce a promise to convey land; as where, as in this case, there has been a part performance, and the other party has acted in the confidence, that it would be completed. It is abundantly proved, that there was an agreement to give; and that the donor repeatedly declared, that he had given, and that he had done so, in order to put his children upon an equal footing, as to advancements. The same course was pursued, as to the negros, with regard to whom no question has been made. On the death of his wife, Caldwell offered to the donor, to return the property he received with her, but

this was refused. He retained possession, long after his wife's death, cleared parts of it, and built houses; and all this, without any opposition or interference by the donor. These acts are inconsistent with the character of a mere tenant, and establish James Caldwell to have been the owner. Buckmaster v. Harrop, 13 Ves., 456.

Any performance, in part, is sufficient to entitle the party to a full performance. There is no rule, designating the degree of

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per*formance necessary; and from the very nature of the subject, there can be none. But it is said, this is a mere voluntary promise. It is not so. A provision for a child, on marriage, constitutes a meritorious consideration; and, under the circumstances of this case, it partakes of the pecuniary character. The donor was accustomed to provide for his children, on marriage, to the same extent, that he provided on this occasion. This was a law of his household, and one from which he would not depart: and, as his son-in-law had, doubtless, regulated his expenditure, with reference to this property, he refused to take back the property, when tendered to him, on the death of his daughter. This was acting upon a principle of justice, and courts of Equity act upon the same principle, by enforcing a complete performance, where there is a meritorious consideration, and a performance in part.

JOHNSON, J. This court concurs with the Chancellor, for the reasons expressed in his decree; and the motion is therefore dismissed.

HARPER, J., concurred. O'NEALL, J., having been of counsel in the cause, expressed no opinion.

Decree affirmed.

Bailey, Eq. 179

AMELIA S. O'KEEFE, Administratrix of William O'Keefe, and Others, v. WILLIAM RICE, Ordinary.

(Columbia. Jan., 1831.)

[1. *Executors and Administrators* ⟸537.]

A judgment at law against an administratrix, and her sureties, on her administration bond, will not be injoined, on the ground, that the estate of her intestate is insolvent, and that she had neglected making her defense at law, as well from her ignorance and incapacity for business, as from being misinformed and misadvised by her counsel.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2578; Dec. Dig. ⟸537.]

[2. *Judgment* ⟸437.]

If one having matter proper for a defence at law, neglect to make it, equity will not, in general, relieve against the judgment; nor are the mistakes or negligence of counsel, in the conduct of a defence, a sufficient ground for relief.(a)

[Ed. Note.—Cited in Hunt v. Coachman, 6 Rich. Eq. 287.

For other cases, see Judgment, Cent. Dig. § 827; Dec. Dig. ⟸437.]

This was a bill by an administratrix, and the sureties to her administration bond, to be relieved against a judgment at law upon the bond, recovered against them in an action instituted for the benefit of certain creditors of the estate, who had previously recovered judgments against the administratrix, for their respective demands. The bill stated, that as soon as the administration had been granted, the administratrix advertised for

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creditors, sold the effects of her *intestate, by permission of the ordinary, and paid off all the demands of which she had notice; that subsequently, she was notified of several other large demands against her intestate, which his estate was wholly insufficient to pay; and that the affairs of the estate proving to be complicated, and feeling herself incompetent to manage them, being ignorant of business, she had delivered all the books, papers, and effects of her intestate, then in her hands, to the ordinary, and requested permission to resign her administration, to which request the ordinary made no reply. That she was afterwards advised by a gentleman, whom she employed as counsel, that it was necessary that a receiver should be appointed, and an individual was selected for that purpose; and that she was subsequently informed by her counsel, that the individual selected had been appointed receiver; that in consequence of this information, she supposed that she was discharged from her administration, and, therefore, paid no attention, either to the actions brought against her, as administratrix, or to the action against herself and sureties, on her bond; and that her sureties, relying upon her, had also neglected the action against them, and judgment had, in consequence, been recovered against them, without any defence made. The bill prayed, that the judgment might be injoined, and the estate administered by the court.

The defendant demurred generally, and the demurrer was argued at Union, before Thompson, Chancellor, who overruled the demurrer; and after various subsequent proceedings, the cause was brought upon appeal, amongst other things, from his decree.

JOHNSON, J. The complainants' bill concedes, that the administratrix might have defended herself at law, as to all the matters stated. The pleas of plene administravit, and plene administravit præter, are exactly suited to such a defence. The only grounds upon which she seeks relief against

(a) Ante, 107, note c.

the judgment at law, are, her own incapacity to manage the administration, and her neglecting to defend herself, in consequence of being misadvised and misinformed by her counsel.

If one having matters proper for a defence at law, neglect to make it, equity will not, in general, relieve against the judgment; nor are the mistakes or negligence of counsel, in the conduct of a defence, a sufficient ground for relief. Ware v. Horwood, 14 Ves., 30; Stephenson v. Wilson, 2 Vern., 325.

Individual hardships may arise from enforcing these, or any other general rules, and, possibly, this case may furnish an instance; but I have not been able to discover in it one

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circumstance, to take *it out of their general operation. Every one who engages to perform a duty, undertakes for his capacity to perform it; and is alike responsible for the attention, and capacity, of all agents that he may find it necessary to employ in it. If chancery possessed the power of relieving, unerringly, against all our weaknesses and delinquencies, there would be no necessity for any other court; but that would approach nearer to perfection than can be expected of any human institutions.

The decree of the Circuit Court must, therefore, be reversed, and the complainants' bill dismissed, with costs; and it is so ordered and decreed.

HARPER, J., concurred.

Decree reversed.

Bailey, Eq. 181

E. JENNINGS v. JOHN SPRINGS.

(Columbia. Jan., 1831.)

[*Equity* ⟸118.]

It is within the discretion of the court, to permit a bill to be amended, by substituting the name of a new, for the original complainant, even after answer filed; but it must be upon payment of all the costs, up to the time of the amendment, as well as of the amendment itself.(*a*)

[Ed. Note.—Cited in Coleman v. Heller, 13 S. C. 496; Strickland v. Bridges, 21 S. C. 21, 26, 27; Suber v. Chandler, 28 S. C. 387, 6 S. E. 155; Baker v. Hornick & Co., 51 S. C. 316, 28 S. E. 941; Sentell v. Southern Ry., 67 S. C. 232, 45 S. E. 155; Buist v. Williams, 81 S. C. 499, 62 S. E. 859; Citizens Savings Bank v. Efird, 96 S. C. 22, 79 S. E. 637.

For other cases, see Equity, Cent. Dig. § 554; Dec. Dig. ⟸118.]

This was a motion to rescind an order made by De Saussure, Chancellor, at York, July, 1830, permitting the complainant to amend his bill, upon payment of the costs of such amendment, by substituting the names of the executors of William Pressley, for his own; the bill having been filed by him, as their agent, and his own name erroneously inserted, as complainant. The order was objected to, as the defendant had answered, but the objection was overruled.

Hill, for the motion, cited Butterworth v. Bailey, 15 Ves., 363; Godwin v. Godwin, 3 Atk., 370; and Dennison v. Little, 2 Sch. & Lef., 11, in note; and contended, that the order was unprecedented and irregular, and introduces a new practice, in the highest degree inequitable and pernicious. It is substantially a permission to the complainant, to dismiss his bill without costs, and to make the defendant a party to a new suit, without process. A new answer must be put in by the defendant, and no provision is made for the costs of that already filed; nor can they be taxed in the new suit, if the new bill is dismissed. It is obvious, that if such an order

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as *this can be made, a defendant may be harrassed, ad infinitum, with suit after suit, in the names of successive parties, until he is ruined by costs and expenses.

Pressley, contra. The order was clearly within the discretion of the Chancellor, and was neither irregular nor unprecedented. In the case of Godwin v. Godwin, which has been cited, it was conceded, that a bill may be amended, by making new parties, even after the cause has been set down for hearing; and it is every day's practice, to strike out the names of parties, having no interest, and who have been improperly joined. Admitting that the order is substantially the dismissal of the bill, and the substitution of a new suit; yet, it is difficult to conceive, what injury this can occasion to the defendant. It is said, that the costs of his answer ought to be paid: but there is no reason why they should, unless a new answer is necessary; and a new answer is not made necessary by the amendments, and scarcely any verbal amendment. If further amendments are deemed advisable, it is not because the amendment of the bill requires it; and if a new answer is filed, there can be no reason for it, but such as would render the defendant justly liable for the costs. The costs are always subject to the discretion of the Chancellor; and that discretion has been wisely exercised in this case.

JOHNSON, J. We are of opinion, that the order made in the Circuit Court was within the discretion of the Chancellor; but we think the complainant should be required to pay all the costs, up to the time of the amendment, as well as of the amendment itself; and it is so ordered. This seems, indeed, to be the necessary effect of the order

(*a*) Post, 428, 491; 4 Rich. E., 88; post, 375; 1 Hill E., 51; McM. E., 81; Lancaster v. Seay, 6 Rich. E., 111; 7 Id., 375; 9 Id., 38; 6 Id., 272.

of the Circuit Court, and this order was thought necessary, only, to remove any doubt on the subject.

O'NEALL, J., and HARPER, J., concurred.

Order modified.

Bailey, Eq. *183

*WILLIAM P. CORBIN and Wife v. JESSE M. HOWELL, Administrator of John Howell, Executor of William F. Goodwyn, ABRAHAM D. JONES, surviving executor of William F. Goodwyn, and Others.(a)

(Columbia, Jan., 1831.)

[*Executors and Administrators* ⟸500.]

The administrator of an executor, is competent to make a return to the ordinary, of his intestate's administration of the estate of the testator, where the intestate has failed to make such return in his lifetime; and if the return is made within twelve months after the grant of administration, the estate of his intestate will be entitled to commissions, upon his receipts and payments, on account of his testator, within one year preceding his own death: nor is it material, at what time of the year the account is rendered.

[Ed. Note.—Cited in Lay v. Lay, 10 S. C. 221.

For other cases, see Executors and Administrators, Cent. Dig. § 2135; Dec. Dig. ⟸500.]

Before Harper, Chancellor, Columbia, February, 1830.

This was a bill for an account and settlement of the estate of William F. Goodwyn, deceased, which had been referred to the commissioner, and now came up upon exceptions to his report. The only exception, which it is necessary to notice, related to commissions, which were allowed, on the receipts and payments of John Howell, the deceased executor, which were very considerable; and all the facts material to the question, raised by this exception, will be sufficiently understood, from the circuit decree.

Harper, C. The general rule is, that executors and administrators are entitled to commissions, under the statute,(b) for all moneys received, and paid away, by them; but they must conform to the requisitions of the statute.

In this case it is objected, that the executor did not make any return to the ordinary, although he had been in the management of the estate, for several years. It has been long settled, that for the years for which an executor, or administrator, has not made returns to the ordinary, he is not entitled to commissions: nor is he to have commissions, on sums of money received, and paid away, in one year, in which he neglected to make a return, by subsequently bringing forward those sums into a later year, for which he does account, as that would defeat the statute altogether: but there can be no doubt, as to his right to commissions, on his receipts and payments, within the year immediately preceding his making his returns.

The circumstances, under which the question arises in this case, are peculiar. The facts are as follows: John Howell, the executor, died in October, 1825, without having made any return: but an account of his administration, was returned to the ordina-

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ry, by *his administrator, Jesse M. Howell, in November, 1826: and the commissioner has allowed commissions on the transactions of the year 1825, which were very considerable.

It is contended, for the complainants, that it is not competent for the administrator of an executor, or administrator, to make the return, and obtain the commissions, even for the estate of his intestate: for that case is not provided for by the statute. In my judgment, however, it is clearly within the spirit of it.

Suppose an executor, or administrator, conducts large pecuniary concerns for an estate, and receives, and pays away, considerable sums of money, which he enters in his book, but dies at, or near, the end of the year; and his executor, or administrator, goes at the beginning of the year, and exhibits the accounts to the ordinary: ought not that officer to receive them, and allow the commissions? The service was performed, and the policy of the law is to encourage returns and accounts, by executors, and administrators, before the ordinary. It seems to me, that in such a case, the commissions ought to be allowed.

Another objection was made, that Jesse M. Howell, the administrator of John Howell, did not make the return of the pecuniary transactions of the estate of Goodwyn, for the year 1825, for which the commissions were allowed, until November, 1826: whereas, they should have been made at the first court of Ordinary for that year. The 28 section of the statute enacts, that executors, and administrators, shall, annually, whilst the estate shall remain in their care, or custody, at the first court to be held after the first day of January, render to the court of the county, or ordinary, of the district, from which they obtain probate of will, or letters of administration, a just and true account, upon oath, of the receipts and expenditures of such estate, the preceding year: and if any such executor, or administrator, shall neglect to render such annual account, he shall not be entitled to any commissions for his trouble, in the management of the estate, and shall, moreover, be liable to be sued for damages, by any person, or persons, interested in the said estate. P. L. 495. 5 Stat., 112.

(a) See Corbin v. Jones, Rich. E. C., 52.
(b) 5 Stat., 112.

The letter of the statutory provision does seem to require the return to be made at the first County court, or court of Ordinary, held after the first day of January, in each year; but yet it is obvious, that the provision had reference mainly to the County court system, which then existed, and had regular times of meeting, but have since been abolished. There are, in fact, no stated periods

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*for holding the courts of Ordinary; and if the statute should be rigidly applied to these transactions, then a sitting of the Court of Ordinary, called for some special purpose, on the next day after the first day of January, without general notice of its sitting, which is never given, might cut off the claim of all the executors, and administrators, in the district, however regular their accounts, and habits of accounting. There is an additional reason for not applying such a rule of construction to cases like the present, which is furnished by the statute itself; for, by one of its provisions, on the death of a party, time is given to his representatives to do acts, which he, himself, if living, would have been compelled to do earlier.

Besides, this provision is in the nature of a penalty; for it not only works a forfeiture of commissions, but subjects the executor, or administrator, to a suit for damages, and, therefore, must be construed strictly. It might be added, that it has not been shown, by proof, that there was any regular court of Ordinary held in the district prior to November, 1826, when the return was made.

Upon the whole, I am of opinion, that the defendant is entitled to the commissions which have been allowed by the commissioner; and the exception is, therefore, overruled.

From this decree, the complainants appealed, and moved that it might be reversed, on the following grounds:

1. That executors, and administrators, who fail to make annual returns, are not entitled to commissions.

2. That commissions are intended as a compensation for the several duties required by law; and unless all those duties are performed, commissions are not to be allowed.

3. That none but the executor or administrator can perform those duties, so as to be entitled to commissions; and his administrator is not competent to make a legal return, so as to give a right to the commissions.

Chappell, for the motion.

W. F. De Saussure, contra.

HARPER, J. We agree with the Chancellor on the principles of his decree, which are the subject of appeal. The Act of 1789, 5 Stat., 112, declares, that executors and administrators, shall annually, "at the first court to be held after the first day of January, render to the court of the county, or ordinary of the district," an account on oath; and if he "shall neglect to render such annual account, he shall not be entitled to any commissions." P. L. 495. A distinct clause gives to executors, and administrators, a

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compensation, not *exceeding fifty shillings in the hundred pounds, on all moneys received and paid away. Id. It is not a condition, precedent to the allowing of commissions, that an account shall be rendered; but they are allowed, on all sums received, and paid away, subject only to be forfeited, if the executor, or administrator, shall neglect to render an account. In the case supposed by the Chancellor, where an executor, or administrator, conducts large pecuniary concerns of an estate, and receives and pays away considerable sums of money, and enters them regularly in his books, but dies at, or near the end of the year, it cannot be said that he has neglected to return his accounts. The time for rendering the annual account had not arrived, and there was no neglect. From the necessity of the case, the account can then be rendered only by his personal representative.

As county courts are no longer in existence, and as there are no stated times for holding the Court of Ordinary, the direction of the Act, that the account shall be rendered at the first court, to be held after the first day of January, can no longer have any effect; and it has been long settled in practice, that returns may be made at any time of the year. It has been also settled, by repeated decisions, that if an executor, or administrator, makes returns for some years, and neglects to do so for others, he shall be allowed commissions for the years for which he makes returns, and for those only. It follows, that however long he may have neglected to render accounts, if he thinks proper at last to do so, he will be allowed commissions on the amounts received, and paid away, for one year preceding the rendering of such account. Up to the time of his death, if John Howell had thought proper to make a return, he would have had commissions for one year preceding; and what John Howell, at the time of his death, might do, his administrator, representing him, had a right to do afterwards.

As to the length of time, within which an administrator of an executor, or administrator, may, by making a return, entitle his testator's or intestate's estate, to commissions, that, I think, must be determined by the clause of the Act, which provides, that executors and administrators, "shall be allowed twelve months to ascertain the debts due to and from the deceased, to be computed from the probate of the will, or granting letters of administration." P. L., 494. 5 Stat., 111.

Of necessity, some time must be allowed; and there is no other limit than this. We think, then, that by making a return, at any time within one year after probate, or the granting of administration, the administrator of

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an executor, or administrator, may en*title his testator's, or intestate's estate, to commissions, for the transactions of one year preceding the testator's or intestate's death.

It does not appear to us, at what time administration was granted to the defendant, Jesse M. Howell. The return was made by him, within one year and one month after his intestate's death; for the decree states the intestate to have died in October, 1825, and the return to have been made in November, 1826. It is very improbable, and barely possible, that administration may have been taken out in less than a month after his death. I must suppose this matter to have appeared to the Chancellor. The motion is therefore dismissed.

JOHNSON, J., and O'NEALL, J., concurred.

Decree affirmed.

Bailey, Eq. 187

MARIA MILLER, Administratrix of Daniel Miller v. JAMES FURSE, and Others.

(Columbia. Jan., 1831.)

[1. *Equity* ⇐180, 237.]
An answer overrules a demurrer to the same matter; but the defendant may, in his answer, state, by way of pleading, that the complainant has plain and adequate remedy at law, and object, at the hearing, to the want of jurisdiction, on this ground, appearing on the face of the bill.

[Ed. Note.—Cited in Myers v. O'Hanlon, 12 Rich. Eq. 210.

For other cases, see Equity, Cent. Dig. §§ 416, 492; Dec. Dig. ⇐180, 237.]

[2. *Equity* ⇐43; *Execution* ⇐171; *Injunction* ⇐16.]
Bill to enjoin a levy on slaves under execution against a third person, dismissed for want of equity; the complainant stating a plain legal title, and a trespass committed.(*a*)

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 121; Dec. Dig. ⇐43; Execution, Cent. Dig. § 507; Dec. Dig. ⇐171; Injunction, Cent. Dig. § 15; Dec. Dig. ⇐16.]

[3. *Equity* ⇐363.]
A bill may be dismissed, as to some of the defendants, for want of jurisdiction, and retained as to others, who have not objected to the jurisdiction in season.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 768; Dec. Dig. ⇐363.]

[4. *Equity* ⇐53.]
An objection to the jurisdiction, on the ground that the complainant has plain and adequate remedy at law, must be made by demurrer, or other pleading. It comes too late at the hearing. McTeer v. Moorer and Ford, ante, 62, contra overruled.(*b*)

[Ed. Note.—Cited in Page v. Street, Speers, Eq. 183.

For other cases, see Equity, Cent. Dig. § 174; Dec. Dig. ⇐53.]

[5. *Equity* ⇐42.]
The jurisdiction can be objected to, in any stage of the proceeding, only in those cases where the defect is such, as that the matter could not, by any circumstances, be brought within the jurisdiction of the court. In all other cases, the objection must be made by the pleadings.

[Ed. Note.—Cited in Waller v. Cresswell, 4 S. C. 356; Davenport v. Caldwell, 10 S. C. 347.

For other cases, see Equity, Cent. Dig. §§ 119, 120; Dec. Dig. ⇐42.]

[6. *Fraudulent Conveyances* ⇐113.]
A bill of sale, absolute on its face, is void even as to subsequent creditors, where there is a secret trust for the grantor; although made with a view to prevent his obtaining credit.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 364; Dec. Dig. ⇐113.]

[7. *Equity* ⇐427.]
A decree cannot be made for the complain-

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ant upon a title not stated in his *bill, nor relied on at the hearing. In general, proof of such title should be objected to when offered, and, if not objected to, may furnish ground for a decree; but, if only incidentally brought out, in evidence, and not urged at the hearing, the defendant should not be prejudiced, by his omitting then to object to it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1001; Dec. Dig. ⇐427.]

[This case is also cited in Gillett v. Powell, Speers, Eq. 151, on the question of jurisdiction.]

At Barnwell, February, 1830.

Harper, C. The bill states that the complainant was lately in possession of certain slaves, Cæsar and Hagar, and the children of Hagar, which her father, and intestate, Daniel Miller, purchased in the year 1814, from one John R. McLewrath, who executed a bill of sale of them, to him, and of which he remained in quiet possession, until his death, in 1819, when they came into the possession of the complainant, as his administratrix, and remained in her possession until very recently, the defendants, James Furse and Higginbottom & Collins, having obtained judgments against John R. McLewrath, caused executions to be levied on them; that of Furse, on Cæsar, and those of Higginbottom & Collins, on Hagar and her children, claiming them as the property of McLewrath. The bill prayed that the executions may be perpetually enjoined, as to this property.

The defendant, James Furse, by his answer, charges the alleged sale, in 1814, to have

(*a*) It has been since decided, that a bill will lie for the specific delivery of slaves. Horry and Trapier v. Glover, 2 Hill Eq., 523. And see Sarter v. Gordon, Id., 121.—R.

Young v. Burton, McM. E., 255; Id., 304; 2 Rich. E., 11, 79; 2 Strob. E., 227, 221; 3 Rich. 262; 5 Id., 531, 351; 10 Id., 232, 408; 1 Strob. E., 188; Id., 335, 341.

(*b*) Jaudon v. Gourdin, Rich. E. C., 249; Council v. Page, Sp. E., 183.

been fraudulent and void, as to McLewrath's creditors.

The joint answer of Higginbottom & Collins makes a similar charge: and the defendants say they demur because the complainant might have plain and adequate remedy at law. I shall first consider the case with respect to them.

A party cannot answer and demur to the same matter. The answer overrules the demurrer: that is to say, if the defendant answers, he must answer fully. The object of a demurrer is to save the necessity of answering. But if there be any matter which might be the subject of a plea in bar of the complainant's bill, the defendant may state and rely upon it in his answer. Mitf., 245–6. Although it is called a demurrer, therefore, I must regard this as a statement, by way of pleading, that complainant has plain and adequate remedy at law. The form is not material. So considered, the objection must prevail; for the bill states a plain, legal title, and a trespass committed.

A bill may be dismissed, however, as to some of the defendants, and retained as to others. The defendant, Furse, makes full answer and states a defence, without relying on the objection that the complainant has adequate remedy at law; although the ob-

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jection *was taken ore tenus, at the hearing. This makes the question, whether such an objection to the jurisdiction of the court can be made after answer, and, for the first time, at the hearing. In a hasty opinion, delivered at Walterborough, I decided that it might be so made, but upon further reflection, I am satisfied that I was mistaken.(c)

Lord Redesdale observes, in his treatise on equity pleadings that, "in general, if a demurrer would hold to a bill, the court, though the defendant answers, will not grant relief, upon hearing the cause." Mitf., 100. This is certainly true, in general. The bill must state such a case, as to authorize a decree. If the statement be not such as to show that the party has a right, entitling him to a remedy in some jurisdiction, no decree can, of course, be made. But it is certain that this court does not, of its own motion, take notice of the defect of equity jurisdiction; and does often decree in matters of mere legal right. I apprehend that the difficulty has arisen, like many of the disputes in the world, from the ambiguous use of terms. It is commonly said, that consent cannot give jurisdiction; and this is true, if the words are taken to relate to those matters which cannot be brought incidentally within the jurisdiction of the court. No consent could give this court jurisdiction in a criminal matter; and the court would be bound to take the objection, if the parties did not. But, with very few exceptions, there is no question of civil right, in matters of property, that may not come within the jurisdiction of the court. "The Court of Chancery, being a supreme court of general jurisdiction, nothing shall be intended to be out of its jurisdiction, which is not shewn to be so." Mitf., 183. Lord Redesdale, after noticing the courts of local jurisdiction, as of the counties palatine of Chester, &c., and observing that where the circumstances that give them jurisdiction occur, their jurisdiction is exclusive in matters of law and equity, adds, "though if these circumstances are not shewn, or if they are not shewn in proper time, and the defendant, instead of resting on them, and declining the jurisdiction, enters into the defence at large, the court, having general jurisdiction, will exercise it. But where no circumstances can give the chancery jurisdiction, as in the case alluded to, of a bill of review, and appeal from a decree in a county palatine, it will not entertain the suit, even though the defendant does not object to its deciding on the subject." Mitf., 135.

When it said that chancery has no jurisdiction in a matter of civil right, triable at law, it is meant, that circumstances do

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not exist *to authorize the exercise of the jurisdiction, that, under other circumstances, it would possess. What is said by Lord Hardwicke, in Penn v. Lord Baltimore, 1 Ves., 446, I think must be taken to have reference to the distinction I have attempted. He says, "to be sure, a plea to the jurisdiction must be offered in the first instance, and put in primo die; and answering submits to the jurisdiction: much more when there is a proceeding to hearing on the merits, which would be conclusive at common law. Yet a court of Equity which can exercise a more liberal discretion than common Law courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree, than where a plain want of equity appears." He states, that answering is a submission to the jurisdiction, and that, in general, an objection to the jurisdiction cannot be taken at the hearing; and I think by considering the nature of the case, to which his remarks were applied, it will appear, that by a plain want of jurisdiction, he meant such a defect, as that the matter could not, by any circumstances, be brought within the jurisdiction of the court. It was a bill for a specific performance of an agreement, respecting the boundaries of provinces in America. Here, there existed circumstances which clearly constituted a ground of the peculiar equity jurisdiction. Specific performance was claimed, and the question was, whether this was a matter which could, by any means, be brought within the jurisdiction, or belonged exclusively to the king and council. Lord Hardwicke decided in

(c) Vide McTeer v. Moorer, ante, 62.

favor of the jurisdiction, because, although the court could have no jurisdiction over boundaries in America, it had jurisdiction in personam, in respect of a contract made in England. What is said in Green v. Rutherford, 1 Ves., 471, is not, I think, inconsistent with this. Lord Hardwicke there says, there can be no submission to an inferior and limited jurisdiction, by appearing, pleading, or answering: leaving us to infer, that there may be such submission to a superior court of general jurisdiction.

The case of Trelawney v. Williams, 2 Vern., 483, is direct on this point. It was a bill for an account of the product of a tin mine, and it was objected, at the hearing, that the plaintiff ought to have sued in the Stannery court. The Lord Keeper decided, that to oust this court, the defendant ought to have pleaded to the jurisdiction; and that the objection came too late at the hearing. See also Mr. Cox's note to Strode v. Little, 1 Vern., 59.

In Burgess v. Wheate, 1 Eden, 190, the master of the Rolls observed, that by bringing the cause into equity, Burgess was estopped to allege the defect of jurisdiction;

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and refers to Sir John Warden's* case, before Lord Talbot, in which there was an objection for want of jurisdiction, and that the matter was properly triable at law: "but it being disclosed, that he had filed a cross bill, the court did not enter into that objection, but said the defendant had given a jurisdiction." To the English cases are to be added the authority of Chancellor Kent, in Underhill v. Van Cortland, 2 John. C. R., 369, and Livingston v. Livingston, 4 Id., 290. The authority of the former of these cases seems to be recognized by the Appeal court of this State, in Wilson v. Cheshire, 1 McC. Eq. 242; although, indeed in that case, the objection was taken, for the first time, in the Appeal court, after a decree below.

That matters should be unnecessarily drawn from the ordinary tribunals of the country, to this jurisdiction, is an abuse, and to be guarded against. But I am not aware that the view I have taken, has any material tendency to aggravate the abuse. If parties are agreed to litigate their civil rights here, they may always admit such circumstances as will form a ground for the exercise of the equity jurisdiction, unless the parties object; and there can be no hardship in requiring the objection to be made in the first instance, before the delay and expense of preparing the cause for trial has been incurred. This would be an abuse of a different sort. To say that the objection may be taken at the hearing only in cases where there is a plain defect of equity jurisdiction, would be to have no rule at all, but to leave it to the discretion of the Judge in every particular instance. This sort of uncertainty is the greatest of abuses. I think, therefore, the defendant, Furse, cannot object, that there is plain and adequate remedy at law.

It remains to inquire into the title, which the complainant has shewn to the slaves in question. A bill of sale of the slaves was produced, on the part of complainant, executed by John R. McLewrath, in 1814, to the intestate, Daniel Miller, and a bond of Miller to McLewrath, of the same date, for $800, alleged to have been the consideration. A receipt, purporting to be from McLewrath to Miller, for the last payment of the slaves, $600, bearing date 15 March, 1818, was also given in evidence. On this bill of sale is endorsed a writing, purporting to be a quit claim and release of the same slaves to the complainant and Mrs. Cornelia G. McKenzie, dated 10 February, 1820. The delivery of a horse and of $50 in money, by Miller to McLewrath, in 1818, was also proved: and likewise the payment of some small sums on his account. Two witnesses testified to declarations of McLewrath and Miller, that it was an actual and bona fide transfer; and that

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they were regarded *as Miller's negros. It appears that they continued at the plantation and residence of Miller, until his death in 1819; but McLewrath was Miller's stepson, and lived in the same house until he went to the western country, in 1818. He returned after Miller's death, and lived some time on the plantation with the complainant; but afterwards went again to the western country, from which he has never returned.

On the other side, was the testimony of the witness, Enicks, to some acts of ownership exercised by McLewrath over the slave, Cæsar, after Miller's death; and that he was known as McLewrath's Cæsar; and that of John Kellogg, who testified that he was intimately acquainted with Miller, and that in repeated conversations, from the date of the bill of sale up to the year of his death, 1819, Miller informed him that they were McLewrath's negros; that he had taken a bill of sale for them, of which he never intended to taken any advantage; and that it was to prevent McLewrath's wasting them, as he was imbecile and improvident, but might become capable of taking care of property in future.

The testimony of this last witness, whose credit was not disputed, goes clearly to establish a trust in Miller for McLewrath, and that the sale of 1814 was merely colorable. I do not say that it was fraudulent, as being intended to defraud creditors. It does not appear that McLewrath was in debt at the time: and it was probably intended to prevent his obtaining credit in future. The declarations of Miller and McLewrath, that it was an actual transfer, are of no effect against this testimony; for these were in

pursuance of their plan of holding the slaves out to the world as the property of Miller, he only explaining the true state of things to his friend, Kellogg. The receipt, bearing date in 1818, may have been in furtherance of the same design; and Kellogg speaks of Miller's declarations in 1819, after the date of the receipt. Without intending to cast any imputation, I must observe that there are suspicious circumstances attending that receipt. Upon examination, it appears that the surname is spelt differently from what it is in three other instances of his signature produced to the court, when he signed in the presence of witnesses; and the initial of the middle name is omitted. The handwriting, too, appears to me to have but a faint resemblance to that of the other signatures. That complainant did not include these slaves in the inventory of her father's personal estate, is also a circumstance to corroborate the testimony of Kellogg, and to show that she knew the testimony to have been colorable. She attempted an explanation of this in the bill, but that is no evidence.

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*The case may be different with respect to the release or quit claim of the date of February, 1820. I do not perceive anything to show, that this was not intended to effect an actual transfer of the property. The testimony of defendant's witness, Enicks, that McLewrath employed him to draw a bill of sale to complainant of the same slaves, assigning as a reason that he had no children, that his half brother, (I suppose his next of kin,) was tyrannical to slaves, and that he preferred complainant to have them, seems to show a serious purpose of transferring the slaves to complainant; and this purpose further appears from his conduct in removing permanently to the western country, leaving them in her possession. If there was any trust intended, I should conjecture that it was for his life, complainant to have the property afterwards.

But although intended to transfer, it purports to be voluntary, and may be fraudulent as to creditors. The general rule is, that a voluntary conveyance, made by a person indebted at the time, shall be presumed fraudulent as to creditors. Now, there is a deficiency of the evidence, which would enable me to decide in relation to the validity of this conveyance, whether he was indebted at the time or not; and to what extent the judgments of the defendants, which were in evidence, were recovered after the date of the instrument of release, or quit claim. There is strong ground to conjecture that some of the causes of action on which they were founded were in existence before that date, but this was not proved; and besides, the witness who proved the execution of the instrument, stated that there was an error in the date, but he did not state the true date. I find myself unable to come to a satisfactory conclusion, without directing a reference to ascertain these facts.

It is, therefore, ordered and decreed that the bill be dismissed, as to the defendants, Higginbottom & Collins, with costs; and that it be referred to the commissioner to inquire and report the true date of the instrument of release, or quit claim, before mentioned, and also the amount of property which was owned by John R. McLewrath, independently of the slaves conveyed, or released, and the amount of his debts at the time of the said release, or conveyance.

From this order, the defendant, Furse appealed, and moved that it be reversed, and the bill dismissed with costs, on the following grounds:

1. That the defendant was entitled to object to the jurisdiction at the hearing; and, at all events, as the bill was dismissed as to some of the defendants, on that ground, it ought to have been dismissed as to all. Butler v. Ardis, 2 McC. Eq. 60.

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*2. That upon the merits of the case put in issue by the pleadings, the defendant, according to the view taken of it by the Chancellor, was entitled to have the bill dismissed: and the inquiry directed to be made by the commissioner is wholly irrelevant and foreign to the issue.

3. That the complainant, neither in her bill, nor at the hearing, relied upon the release, or quit claim, set up by the decree: and the defendant has had no opportunity of answering the case made by that title.

Patterson, for the motion.

HARPER, J. This court concurs in so much of the decree as relates to the subject of jurisdiction: and the first ground of appeal is, therefore, overruled.

With respect to the other ground, I am satisfied that the decree was erroneous. The title on which the complainant relied in her bill was as administratrix, and derived from the bill of sale of 1814. No title was set up under the release, or quit claim, dated in 1820. This was no part of the complainant's case, and it could not be supposed that the defendants were prepared to meet it. It is true, it very often happens, that a somewhat different case is made by the proof from that set forth in the bill;(d) and, in general, I think parties are bound to object to such proof, when it is offered, or they will be taken to have waived the objection. But in this case, the instrument in question was only incidentally brought out in evidence. It was endorsed on

(d) Hatcher v. Hatcher, McM. E., 317; Nix v. Harley, 3 Rich. E., 379; Barr v. Haseldon, 10 Id., 60.

the bill of sale of 1814, and, therefore, necessarily came to the view of the court, when that instrument was offered. I believe it was not relied on as a distinct and substantive title, or produced for the purpose, and, therefore, the defendant was not called upon to object.

It is for these reasons ordered and decreed, that the order of reference to the commissioner, made in the case be reversed, and the bill dismissed as to the defendant, James Furse.

JOHNSON, J., and O'NEALL, J., concurred.

Decree modified.

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT CHARLESTON, MARCH AND APRIL, 1831.

JUDGES PRESENT.

HON. DAVID JOHNSON.
" JOHN B. O'NEALL.
" WILLIAM HARPER.

*PHILIP MOORE v. MARY J. PORCHER, Administratrix of James Porcher, Deceased.

(Charleston. March, 1831.)

[1. *Equity* ⇐71.]

In 1803, the defendant's intestate took possession of certain slaves, and some other personal property of inconsiderable value, to which the complainant and his brother, both at that time infants, were entitled by the trusts of a deed, executed by their mother: the trustees appointed by the deed not having acted under it. The complainant's brother having come of age, made his will, by which he bequeathed one-half of his estate to complainant, and subsequently died. In 1814, the defendant's intestate delivered over the slaves to complainant; and in 1830, complainant filed a bill for an account of the hire of the slaves, and the proceeds of the other property, which had been sold. *Held*, to be a stale claim, and bill dismissed with costs.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204–211; Dec. Dig. ⇐71.]

[2. *Limitation of Actions* ⇐36, 66.]

When a trustee does an act, which purports to be an execution of his trust, he is thenceforth divested of his fiduciary character, and will be protected against an account by the statute of limitations.(a)

[Ed. Note.—Cited in Starke v. Starke, 3 Rich. 445; Montgomery v. Montgomery, Rich. Eq. Cas. 74; Farr v. Farr, 1 Hill, Eq. 391; Glover v. Lott, 1 Strob. Eq. 80; Coleman v. Davis, 2 Strob. Eq. 340; Brockington v. Camlin, 4 Strob. Eq. 196; Long v. Cason, 4 Rich. Eq. 63; Roberts v. Lesly, 8 Rich. Eq. 41; Colburn v. Holland, 14 Rich. Eq. 241, 243; Motes v. Madden, 14 S. C. 491; Beard v. Stanton, 15 S. C. 170; Owens v. Watts, 24 S. C. 78; Roberts v. Johns, Id., 588.

For other cases, see Limitation of Actions, Cent. Dig. §§ 171, 360; Dec. Dig. ⇐36, 66.]

[3. *Executors and Administrators* ⇐213; *Limitation of Actions* ⇐143.]

[Where a claim has become barred under the statute of limitations, the bar cannot be waived by an acknowledgment of the debt by the administrator.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 750; Dec. Dig. ⇐213; Limitation of Actions, Cent. Dig. § 582; Dec. Dig. ⇐143.]

This was a bill for an account, and came on to be heard at Coosawhatchie, in January, 1830, before Harper, Chancellor, from whose decree, the case will be fully understood.

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*Harper, C. The pleadings and evidence make out the following case. In 1796, Mary Moore, the mother of complainant, executed a deed, by which she conveyed to trustees, three slaves, and certain other personal property, consisting of cattle, &c., in trust for her two sons, Daniel Moore, since deceased, and the complainant; reserving to herself the use of the property for life. She soon after married one Zimmerman, and retained possession of the property. After the death of herself and Zimmerman, both of which happened in or about the year 1803, the trustees

(a) Starke v. Starke, 3 Rich. L., 438; Car. L. J., 503; Brockington v. Camlin, 4 Strob. E., 189; Long v. Cason, 4 Rich. E., 60; Sollee v. Croft, 7 Id., 34, 42; Glover v. Lott, 1 Strob. E., 79; Coleman v. Davis, 2 Id., 340; Payne v. Harris, 3 Id., 39; Parks v. Noble, 9 Rich. E., 85; Barnwell v. Barnwell, 2 Hill E., 228. See cases cited 2 Rich. E., 446.

not acting, the intestate, James Porcher, took possession of the children, and of the property conveyed by the deed; and, according to the testimony of Thomas Roberts, sold the personal property, exclusive of the slaves, for $600, or upwards. Mr. Porcher, in taking possession of the children and the property, seems to have acted merely as a friend, or voluntary trustee.

In 1807, Daniel Moore, who had assumed the name of Porcher, came of age, and died in the same year, having made his will. By this, he devised his whole estate to the complainant and his half sister Harriet Zimmerman; with a limitation to the survivor, in the event of either dying without leaving issue. The intestate, James Porcher, who was appointed executor, soon after proved the will of Daniel Moore, and qualified. The complainant came of age in 1813, and on 3 January, 1814, according to a receipt produced in evidence, received from Mr. Porcher the slaves belonging to himself and his sister, Harriet, under the deed and will. This is the last transaction in evidence, until 17 February, 1821, when, according to the testimony of Joshua Kirkland, there was a meeting of the parties concerned, complainant and one Jones, who had married Harriet Zimmerman, at the house of Mr. Porcher, who was present to make a division of the property between complainant and his sister. The property, I suppose, was the slaves, which the witness stated to have been in complainant's possession. The division was to be made by friends; but Jones brought no one to act for him, and nothing was done; Mr. Porcher saying that the business might lie over till another time. At this meeting, at the request of Mr. Porcher, complainant signed the following paper: "I do hereby protest against Mr. James Porcher allowing the estate of Jacob Zimmerman the amount of the perishable property, that was sold for that estate by him and Mr. Nicholas Winckler, as I was entitled to one-half by my own right, and one-half of my brother Daniel Porcher's half, which gives me a title to three-fourths by my mother's deed to my

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brother, Daniel, *and myself; a reference to the deed will fully show, as Mr. Zimmerman had no property when he married my mother. Philip Moore."

Mr. Porcher died on 7 February, 1823. There was evidence of demands by the complainant, after Mr. Porcher's death, on his administratrix, the present defendant, in respect of the present claim; and of her referring him to her lawyer, Mr. Martin, to effect a settlement; as well as of some attempts to settle between themselves. She said she knew nothing of the business.

The bill which was filed in January, 1830, claims an account of the perishable property, sold by Mr. Porcher, after the death of Zimmerman; of the hire of the slaves, before their delivery to complainant, in 1814; and of the personal estate of Daniel Moore, or Porcher. The answer relies on the lapse of time, and statute of limitations, and states circumstances to aid the presumption of some settlement between complainant, and defendant's intestate, in his lifetime.

I am of opinion, that this is a stale claim. From the time of the complainant's coming of age, until the death of Mr. Porcher, nine or ten years had elapsed; and from that time up to the filing of the bill, six or seven years. It was replied, however, on the part of the complainant, that Mr. Porcher was a trustee, in whose favor time will not run. He constituted himself a trustee with respect to the property conveyed by Mary Moore, and was expressly, and directly a trustee, as executor of Daniel Moore. Without any authority to the purpose, I am of opinion, from the reason and analogy of the law, that when a trustee does an act, which purports to be a final execution of his trust, the statute will begin to run from that time, so as to bar an account. It is said, in general, that it takes twenty years to bar an equity; but the court often applies the bar of the statute, in cases of demands, analogous to legal demands, although the remedy may be only in equity. An account of the rents and profits of real estate will be restrained, in England, to six years before the filing of the bill, although the person in possession may stand in the character of a trustee, in analogy to the action at law. See Hercy v. Ballard, 4 Bro. C. C., 468; Stackhouse v. Barnston, 10 Ves., 466, 469; and Reade v. Reade, 5 Ves., 744. A bailee, or an agent, who receives money for his principal, is quasi a trustee; and his possession is not adverse, nor will the statute run. But he may determine that character, either by paying over the money, or refusing to pay on demand, and claiming for himself, and his possession will thenceforth be adverse. A

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trustee, in equity, *cannot determine his character of trustee, by refusing to perform; but he may by performing his trust. The possession of a trustee is not adverse; it is the possession of the cestuy que trust, and the statute does not apply: but when he does an act purporting to be an execution of the trust, he shakes off the character of trustee, and thenceforward stands in an adverse relation. If the cestuy que trust supposes that the trust has not been fully and faithfully performed, he is put upon the assertion of his right. So I think an executor, who makes a general distribution of an estate, will be protected from an account after the lapse of four years. If he makes a full and fair distribution, he no longer sustains the character of executor; but the trust is discharged. If there be fraud, the statute will not run until it is discovered. If the distribution purports to be a partial one, the character of executor continues. It would

be unreasonable that residuary legatees, who have been paid off, should be at liberty to come for an account at any distance of time, suggesting mistakes, or that they were entitled to more than they had received. The time allowed by the statute is long enough for the discovery of errors.

In the present case, the intestate, James Porcher, delivered over, all that remained of the capital of the property conveyed by Mary Moore's deed, and the bulk of Daniel Moore's estate, in 1814. The personal property was very inconsiderable. I think this purports to be a general execution of the trusts, and the statute began to run from that time. The claim to an account of rents and profits is only incidental to the claim for the capital of the estate. There is no charge of fraud, or if we suppose the allegation of a breach of trust to amount to the charge of fraud, the complainant must have known of it, from the time he came of age.

The transaction of 1821, relating to the division of the slaves, and the writing called a protest, were relied upon as a recognition of this claim, by Mr. Porcher, and of his still sustaining the character of trustee. They do not seem to me to have any such effect.

The division contemplated in 1821, between the complainant, and his sister, was to be an execution of the trust, which he had undertaken in 1814. Mr. Porcher attended that transaction, because he was interested in it. Having devolved his trust, so far as he was concerned, on the complainant, he might have been responsible to Harriet Zimmerman, if complainant had failed to discharge it faithfully. This accounts for his appearing as a party in that transaction, and, certainly, does not amount to anything like an admission of liability to complainant.

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*The writing, called a protest, if it is to have any effect at all, seems to me rather unfavorable to complainant's claim. The only purpose which I conceive Mr. Porcher to have expected to answer, by taking that paper, is this: to show, that he had taken possession of the property mentioned in it, at complainant's instigation, or, at all events, that he had adopted the act, and made it his own, and to secure himself, and throw the responsibility on complainant, in the event of its being demanded by any representative of Zimmerman. But he could be entitled to such acknowledgment, or security, only on the supposition of his having paid over, or accounted for, the proceeds of that property to complainant, or being just about to do so. If these proceeds were in his hands, to be paid over to either party, that should show himself entitled, there was no necessity for such a paper, or any title to demand it. It is difficult to give a meaning to this transaction, but I can think of no other than the one I have suggested. If this be the true one, it rather aids the presumption of Mr. Porcher having accounted for this property to complainant. This presumption is further strengthened by the circumstance, that the income derived from this property could hardly have been sufficient for the support of the children. I must conclude, that the complainant forbore so long to demand an account from Mr. Porcher, in his lifetime, because he was conscious of being entitled to nothing. Nor do I think the negotiations with the defendant, after the death of her intestate, sufficient to obviate the effect of the lapse of time. If the demand was barred before the death of the intestate, the administrator had no right to revive it. Nor do they seem to amount to any admission of complainant's being entitled to an account. It may have been merely an attempt to satisfy him that nothing was due.

It is ordered and decreed, that the bill be dismissed with costs.

The complainant appealed, and now moved to reverse the decree.

Bailey, for the motion. It is conceded, that it requires twenty years to bar an equity; and then it is difficult to understand, how a trustee can be protected against an account by the statute of limitations. And it is certainly an objection of great weight, that no direct authority to the purpose can be produced. All the cases, in which the bar of the statute has been applied in equity, are cases of legal demands, or founded upon legal titles; although attended with incidental circumstances, which authorized, or required, a resort to the equity jurisdiction.

Such were the cases of Fisher v. Tacker, 1 McC. C., 169, and Van Rhyn v. Vincent, Id.,

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310. Both of these were cases of *merely legal demands. They were substantially actions of assumpsit; and it is upon this ground that the decree is based, in both cases. In the former of them, Waties, Chancellor, whose decree was affirmed by the Court of Appeals, said, "It is manifest, that the present demand was originally a legal one, and the circumstance of bringing it into this court, will not alter its original nature." 1 McC. C., 174. So in Van Rhyn v. Vincent, Nott, J., in delivering the opinion of the Court of Appeals, observes, "the trust is not the foundation of the jurisdiction of the Court of Equity in this case, but the want of a discovery. And where a party has a mere legal demand, and the Court of Equity has a concurrent jurisdiction for the purpose of discovery, the defendant is as well entitled to the benefit of the statute of limitations in a court of Equity, as at Law. The mere change of forum cannot change their legal rights, for although it is a rule in the Court of Equity, that lapse of time will be no bar between a trustee and cestuy que trust, yet that doctrine applies only to technical, equi-

table, trusts, and not to those constructive trusts, of which courts of Law, as well as courts of Equity, have jurisdiction." 1 McC. C., 313. It is here obvious, that the terms constructive trusts are applied only to legal demands; and the distinction between them, and equitable trusts, runs through all the cases. The cases are collected and commented on, in the reports of Fisher v. Tucker, and Van Rhyn v. Vincent, and it is unnecessary to refer to them more particularly. Indeed, the principle is abundantly illustrated, by the cases cited in the decree in this case. In Hercy v. Ballard, 4 Bro. C. C., 468, which was for an account of rent, it is stated, that Osmer, the defendant's testator, "entered as tenant to the trustees;" and so the demand was purely legal. So in Reade v. Reade, Lord Rosslyn said, "My idea in giving you the two-fourths is, that you are legally entitled; then the circumstance of your being obliged to sue in equity, does not alter the nature of the action for mesne profits." 5 Ves., 749.

Stackhouse v. Barnston, is an important case, because it marks the distinction in a case to which the statute does not apply. That was a bill for an equitable charge upon an estate, and it was held, that the statute was not a bar to the charge itself, or to any part of the arrears. In reference to the latter, it was said by the master of the Rolls, "as to what is contended by the defendants, that the account should be restrained to the last six years, that is frequently done as to rents and profits: but that is by analogy to the legal limitation; where the legal owner

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would be barred from an action *for mesne profits for more than six years, the equitable owner being restrained in the account to the same period. But that does not apply to such a case as this." 10 Ves., 469.

The distinction is founded on sound principles. As applied to legal demands, the statute is wise and just; and it would be absurd, that coming into equity should change the character or legal incidents of the debt. But it is otherwise as to trusts. They originate in confidence, and are in direct contrast with the notion of a debt; and it would violate the fundamental principle of the trust, and lead to the most mischievous consequences, to permit the trustee, after he has assumed the trust confided to him, to convert it into a mere debt, or to be discharged by anything short of a complete execution.

But it will be said, that the defendant's intestate was only constructively a trustee; for he was not a party to the deed, and the legal estate was never vested in him. To this it might be answered, that as personal property passes by delivery, and as the intestate took possession, with the assent of the legal owners, and all the parties interested, for the express purpose of executing the trusts of the deed, it may very well admit of question, whether the legal estate was not in fact vested in him; but it is sufficient to say, that he had the legal possession, and could not be sued as a trespasser; and although the possession might have been recovered at law, after demand made, yet the intermediate profits could, strictly, have only been recovered in this court. The intestate then was a trustee technically and directly, and not by construction merely; and he cannot, therefore, be protected by the statute. Besides, as the executor of the will of Daniel Porcher, he was, as to one moiety of the property, beyond all question the legal owner, and strictly and technically, a trustee for the legatees; and yet the decree allows him the protection of the statute, as to the whole estate.

Finally, if the principle of the decree be conceded, it cannot apply in this case. Nothing was delivered in 1814, but the slaves; nor is there anything in the receipt to show, that the trustee intended this delivery to be regarded as the final execution of his trust. As late as 1821, seven years afterwards, it appears by the protest, that the other property had never been delivered, or accounted for. This paper protests against Mr. Porcher's allowing that property to the estate of Zimmerman; and by its terms, excludes the idea that he had accounted for it to the complainant, or his sister. No doubt that the paper was required with a view to an immediate adjustment of the account; but it

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never was adjusted. *The meeting in 1821 was had for the very purpose of effecting this settlement, and the reason of its not being accomplished then, is stated in the decree. The same reason would occasion delay afterwards; and the death of Mr. Porcher put it out of his power, personally, to do justice to the complainant.

It is made a ground of reproach to the complainant, that he did not sue Mr. Porcher in his lifetime. Had Mr. Porcher lived, there would have been no occasion for this bill; and is the complainant to blame because he felt, as he feels now, that he might confide in his trustee? Was he to sue his friend and benefactor so long as he did not refuse to do justice to him? Was he to repay his obligations to Mr. Porcher by bringing him into this court, without an absolute necessity? That is the doctrine of the decree; and the great objection to it is, that whilst it works individual injustice in this case, by the introduction of a new rule, the rule itself is destructive of that personal confidence, which is of the essence of every trust.

Colcock, contra. It is not disputed but that the statute is a bar in the case of constructive trusts; and this is conclusive as to the present case; for as to all the property contained in Mary Moore's deed, and it is not pretended that there is any other, Mr. Porcher could only be considered a constructive

trustee. He was a stranger to that deed; and all the evidence is, that he took possession of the property as the friend of the infants. If we suppose this to be done with their consent, it makes him no more than a naked bailee. It does not admit of argument, that he never had the legal title; and therefore he can only be regarded as a trustee by construction. A technical trust is that in which the rights of the cestuy que trust rest altogether in conscience, the legal estate being in the trustee. Decouche v. Savetier, 3 John. C. R., 190. In Lockey v. Lockey, Pr. C., 518, the defendant had received the profits of an infant's estate, and the statute was held to apply. Is there any difference between that case and this?

But the principle established by the decree, is clearly applicable, even to strictly technical trusts. The statute will not bar a trust; but when the trust is executed, the relation of trustee and cestuy que trust is at an end. The confidence which is said to be of the essence of the trust, is determined; and every principle on which the statute of limitations is enforced by courts of Equity, applies. In Hovenden v. Lord Annesley, 2 Sch. & Lef., 633, Lord Redesdale said: "If a trustee is in possession and does not execute his trust, the possession of the trustee, is the possession of the cestuy que trust; and if the only cir-

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cumstance is, that he does not perform *his trust, his possession operates nothing as a bar, because his possession is according to his title." But if he does perform his trust, or does that which purports and is understood to be a final performance, can it be said, thenceforth, that his possession is according to his title? Here the trust was executed, and the property delivered to the cestuy que trust, sixteen years before his bill was filed; and yet he now seeks an account of the rents and profits previous to that delivery. In Rowland v. Best, 2 McC. C., 317, even where the complainants were permitted to recover the property, the account for rents and profits was restricted to four years next before the filing of the bill.

This case strongly exemplifies the justice of the rule laid down in the decree. It is conceded that Mr. Porcher was the friend and benefactor of the complainant, and it is inconceivable that he should have suffered the account to have remained unsettled, from the delivery of the property, in 1814, until his death, in 1823. Seven years after his death, this bill is filed against his executrix, who has no personal knowledge of the transactions, and is without any means of rendering the account called for; and every principle of equity requires that the consequences of his long neglect should fall upon the complainant.

Whether there was a sufficient final performance of the trust to warrant the application of the statute, depended upon the evidence, and was a question exclusively for the Chancellor; and even if his judgment were not conclusive, there is nothing brought to the view of this court to authorize a reversal of it.

Bailey, in reply. In Decouche v. Savetier, the statute was held not to apply, and the distinction is there said to be, where a party takes possession as trustee, and where he takes possession in his own right, and is afterwards, by matter of evidence, made a trustee by construction. 3 John. C. R., 216. Here the defendant's intestate took possession as trustee, and for the avowed purpose of executing the trusts.

In Lockey v. Lockey, Pr. C., 518, the statute was held to be a bar, expressly on the ground that there was no trust. The report is very brief and the facts are not stated; but it is evident from the language of the judgment, that the defendant was in the condition of a mere trespasser. The conclusion is, that "as the complainant is barred of his action of account at law, so shall he be of his remedy in this court."

In Hovenden v. Lord Annesley, Lord Redesdale said, "courts of Equity, are bound to yield obedience to the statute of limitations,

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*upon all legal titles and legal demands." 2 Sch. & Lef., 630. And throughout the opinion of his lordship, the distinction as to the cases of trust, to which the statute is, and those to which it is not applicable, is laid down to be, between trusts created by the act of the parties, and those raised by the court, by construction upon legal titles and legal demands. Id., 633.

As to the case of Rowland v. Best, it is manifest that the hardship of the case on the defendant, had great influence with the Chancellor. On principle and authority, the complainants should have recovered the whole of the interest, or no part of it; and Nott, J., in delivering the opinion of the Court of Appeals, said, "I should have been better satisfied, in this case, if interest had been allowed only from the time of the demand. But as the Chancellor had all the testimony before him, perhaps he had a better opportunity of judging of the matter." 2 McC. C., 322. It is, therefore, a case standing on its own circumstances, and cannot be regarded as a precedent.

PER CURIAM. We are satisfied with the decree of the Chancellor; and the motion is, therefore, dismissed.

Decree affirmed.

Bailey, Eq. 204

WILLIAM HENRY CANNON, an Infant, by His Next Friend, v. PAUL ULMER, Executor of John Ulmer.

(Charleston. March, 1831.)

[1. *Executors and Administrators* ⟸304.]

An executor delivered over to the husband, after the death of the wife, a slave which had been bequeathed to her during coverture; and the husband subsequently sold the slave and became insolvent. On a bill by the infant son and only child of the husband and wife, *held* that the executor was not discharged by the delivery to the husband, and the objection of the want of administration of the wife's estate having been waived, the representative of the executor decreed to account for two-thirds of the value of the slave; but no interest allowed prior to the date of the sale, there being evidence that the infant had received the full benefit of the slave's services to that time.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1244; Dec. Dig. ⟸304.]

[2. *Executors and Administrators* ⟸291.]

The jus mariti cannot attach upon a bequest to the wife, although made during coverture, until the executor has assented to the legacy.(*a*)

[Ed. Note.—Cited in Renwick v. Smith, 11 S. C. 308.

For other cases, see Executors and Administrators, Cent. Dig. § 1153; Dec. Dig. ⟸291.]

[3. *Executors and Administrators* ⟸304.]

Delivery to the father, of a chattel to which he and his infant son are jointly entitled as distributees of an intestate, of whose estate there was no administrator, will not bind the interest of the son, in discharge of the party making the delivery.(*b*)

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1243; Dec. Dig. ⟸304.]

Heard by De Saussure, Chancellor, Coosawhatchie, January, 1829.

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*Christopher Langley, by his last will, amongst other things, bequeathed a slave named Joe, to his daughter, Mary Cannon, the wife of Henry Cannon, and died on 1 March, 1812; and his daughter, Mary Cannon, also died on 16 of the same month, leaving her said husband, and their only child, the present complainant, at that time an infant of tender years, surviving her. The slave Joe, came into the possession of Henry Cannon, who retained possession until the year 1817, when he sold Joe, to pay his debts, and, in fact, to be relieved from a ca. sa., under which he had been arrested. Henry Cannon being insolvent, this bill was filed to recover two-thirds of the value of Joe, being complainant's distributive interest in his mother's estate, from the estate of defendant's testator, who had been appointed executor of Christopher Langley's will, and had qualified as executor, shortly after the decease of the latter. The defendant, in his answer, alleged, that Henry Cannon took possession of Joe, the very day after Christopher Langley's death, without the permission of the executor; who, nevertheless, and before Mary Cannon's death, assented to the possession, on the single condition, that Joe should be re-delivered in the event of its becoming necessary for the payment of debts. It was further insisted, that a delivery to Henry Cannon, even after the death of his wife, would have been justifiable, and discharged the executor.

Much evidence was introduced at the hearing, with a view to ascertain how, and when, Joe came into the possession of Henry Cannon, and to establish an assent to the legacy, by the executor, in the lifetime of Mary Cannon. It appeared, by the evidence, that the principal employment of Joe, previous to his sale in 1817, was to attend to, and take care of the complainant. No administration had been taken out on Mary Cannon's estate, but the objection was waived by the defendant.

His Honor, the Chancellor, held the evidence insufficient to establish, that the marital right of Henry Cannon had attached upon the slave Joe; and that without this, the executor was liable; for a delivery to Henry Cannon would not discharge him; and if he had not delivered Joe, he had certainly permitted Henry Cannon to retain possession of him. Decree for complainant, for two-thirds of the value of Joe, with interest from the death of Mary Cannon.

From this decree the defendant appealed, and now moved that the same might be reversed.

Bailey, for the motion, cited 1 Rop., Husb. and W., 166, 202; Com. Dig., Baron and

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Feme, E., 3; Bac. Abr., Bar. and *F., D.; Reeve's Dom. Rel., 61; Toller's Ex., 220, 221, 320, 308. In Byrne v. Stewart, 3 De S. E., 135; Speight v. Holloway, Id., 138; Ex Parte, Wells and Elms, Id., 155; and Bunch v. Hurst, Id., 273, the right of the wife accrued before coverture. And see Davis v. Rhame, 1 McC. C., 191; and Ordinary v. Geiger, 2 N. & M., 155; 1 Bl. Com., 453, 461; Act of 1748, P. L., 217.

Elmore, contra.

HARPER, J. We do not perceive anything in the testimony to authorize us to reverse the Chancellor's decree, with respect to his conclusions upon the facts, to wit: that John Ulmer, the executor of Langley, did not assent to the legacy to Mary Cannon, the testator's daughter during her lifetime; but that, after her death, he permitted the slave Joe to go into the possession of her husband, who survived her.

On this state of facts it was argued, that the marital right of the husband attached on the slave, and that the executor was dis-

(*a*) Ryan v. Bull, 3 Strob. E., 90; Durant v. Salley, Id., 159; Dawson v. Dawson, 2 Id., 39; Verdier v. Hyrne, 4 Strob. L., 463.

(*b*) See Glover v. Lott, 1 Strob. E., 79; 2 Hill. E., 228.

charged, by delivering him to the husband. The authorities relied on for this purpose, say, in general terms, that if the wife acquires property during the coverture, this is ipso facto, the property of the husband, the separate existence of the wife being merged in the husband; and that if the husband survive the wife, without reducing it into possession, he takes it jure mariti, and not as administrator. There is no doubt of the law in this respect. If property be conveyed to the wife, during the coverture, or she in any manner acquire the title to it, this is, in effect, the title of the husband. If it vests in possession, this is sufficient, though there may be no actual manual possession. The wife is not, in contemplation of law, a separate person, capable of taking a title. So, if a bond, or note, be given to the wife, during coverture, the husband may sue alone, without joining the wife. In this case, if the executor were proved to have assented to the legacy, during the lifetime of the wife, although no possession was taken by the husband, until after her death, this might have completed the husband's title. But this is not shown, and we must conclude, therefore, that the title remained in the executor.

It was further argued, that the executor was authorized to deliver over the slave to Henry Cannon, the father, in his own right, and as natural guardian of his son; the father being entitled to one-third, and the complainant to two-thirds, as the distributees of Mary Cannon. The rule certainly is, that an executor is not authorized to pay over an infant's legacy to his father; Toll. Ex., 314, et seq., although in some instances, where

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the legacy was trifling, he has *been protected in doing so. But neither Henry Cannon, nor the complainant, was the legatee of Christopher Langley. The legacy not having been assented to during the lifetime of Mary Cannon, no one but her administrator could have been entitled to receive it. If the executor had refused to deliver it until administration taken out, the complainant would have had security for his interest in the legacy. The father being insolvent, the complainant has lost this interest, in consequence of the unauthorized act of the executor. Indeed, no one but the administrator of Mrs. Cannon could sustain this suit. But the objection is waived on the part of the defendant, who consents, there being no surmise of debts of Mrs. Cannon, to answer directly to the party beneficially interested.

We think, however, there is a plain equity, why the complainant should not recover interest on the value of the slave, up to the time of the sale by Henry Cannon, in 1817. The evidence is uncontradicted, that he himself had principally the services of the slave up to that period. If the administrator of Mrs. Cannon were suing, for the benefit of creditors, this defence could not be set up; but it would be manifestly unconscientious that the complainant should recover the value of the slave's services, which he himself has actually received. The decree of the Chancellor is, therefore, modified accordingly, so far as respects the question of interest, and in other respects affirmed.

JOHNSON, J., and O'NEALL, J., concurred.

Decree modified.

Bailey, Eq. *208

*JOSEPH BLAKE v. WILLIAM HEYWARD, JAMES BOLAN, and ABRAHAM HUGUENIN.

(Charleston. March, 1831.)

[1. *Adverse Possession* ⇐56.]

Under the Act of 1824, which provides, "that the second section of the Act of 1712, limiting the time for the prosecuting of a right or title to lands, to five years, be altered, so as to extend the time for the prosecution of such right or title, to ten years," a party residing beyond seas is entitled to ten years for the prosecution of his right or title to lands, although, by the second section of the Act of 1712, he is limited to seven years. Vide Acts of 1824, p. 24, P. L. 101.

[Ed. Note.—Cited in Buchan v. James, Speers, Eq. 381; Hill v. Connelly, 4 Rich. 625, 626; Kaufman v. Carter, 67 S. C. 318, 45 S. E. 211.

For other cases, see Adverse Possession, Cent. Dig. § 276; Dec. Dig. ⇐56.]

[2. *Statutes* ⇐181.]

Although, if the legislature will plainly enact that which is hard and unreasonable, the courts are bound to give it effect; yet, if the terms of an Act are not unequivocal, the courts are not bound by their most obvious literal import, but should give such a construction to them as will suppress the mischief, and advance the remedy contemplated by the framers.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. ⇐181.]

[3. *Lis Pendens* ⇐26.]

A purchaser pendente lite, for valuable consideration, without fraud, and without actual notice, will be protected in his possession, against the lien of a mortgage, by the statute of limitations.(a)

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 59; Dec. Dig. ⇐26.]

[4. *Judgment* ⇐764.]

A decree in equity, for the payment of money, constitutes a lien on land, similar to that of a judgment at law, so as to bind it in the hands of a purchaser, whose title has not been matured by the statute of limitations.(b)

[Ed. Note.—Cited in Gray v. Toomer, 5 Rich. 266; Warren v. Raymond, 12 S. C. 26, 27; Freer v. Tupper, 21 S. C. 81; Cook v. Jennings, 40 S. C. 216, 18 S. E. 640.

For other cases, see Judgment, Cent. Dig. § 1322; Dec. Dig. ⇐764.]

(a) Post, 254, 375, 479; Council v. Page, Sp. E., 212; Lewis v. Mew, 1 Strob. E., 180; Id., 257; 1 McC. E., 252; 4 DeS. E., 256; Bennett v. Calhoun Association, 9 Rich. E., 163.

(b) Post, 235; Dawson v. Scriven, 1 Hill E., 177; Rich. E. Ca., 390; 2 Strob. E., 47; Gray v. Toomer, 5 Rich., 266; 11 Rich L., 711.

[5. *Judgment* ⟸793.]

The lien of a decree is not defeated by the plea of purchase for valuable consideration, without notice. This defence is a protection in equity only, and can never prevail against a legal title, to which there is no obstacle to a recovery at law.(c)

[Ed. Note.—Cited in Clark v. Smith, 13 S. C. 601; Hardin v. Melton, 28 S. C. 45, 46, 4 S. E. 865, 9 S. E. 423; Sweatman v. Edmunds, 28 S. C. 62, 5 S. E. 165; Reid v. McGowan, 28 S. C. 79, 5 S. E. 215; Cook v. Jennings, 40 S. C. 216, 18 S. E. 640.

For other cases, see Judgment, Cent. Dig. § 1383; Dec. Dig. ⟸793.]

[6. *Vendor and Purchaser* ⟸239.]

Although, in general, equity will not relieve against a purchaser for valuable consideration, without notice; yet where, upon a bill to revive a decree, the purchaser was directed to be made a party, as a favor to him, and to enable him to protect himself against the decree, if it appear that the lien of the decree might have been enforced against him, without the aid of the court, a decree will be made against him upon the ground of the lien. See [Dawson v. Scriven] 1 Hill E., 177; [Screven v. Joyner] 252 [26 Am. Dec. 199].

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 583; Dec. Dig. ⟸239.]

[This case is also cited in Morgan v. Morgan, 45 S. C. 336, 23 S. E. 64, without specific application, and in Warren v. Raymond, 12 S. C. 9, and distinguished therefrom.]

At Coosawhatchie, January, 1830.

Harper, C. This was a supplemental or amended bill, and was filed on 7 April, 1828. The original bill was filed on 8 September, 1823, against Richard B. Screven, Benjamin S. Screven, and Thomas E. Screven, executors, and devisees of John Screven, deceased, to revive a decree, obtained in 1806, for payment of a debt, secured by a mortgage, and for the sale of certain mortgaged premises, called Jasper's Barony, part of the estate of the said John Screven, deceased, and by him devised to the defendant, Thomas E. Screven. A decree to revive was made in 1827,

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from which *decree there was an appeal; and on the hearing in the Court of Appeals, it being suggested, that certain persons were in possession of some parts of the land, claiming the same by an adverse title, it was ordered, that the complainants should have leave to amend their bill, and make such persons parties. The present bill was filed in pursuance of that order.

The answer of the defendant, William Heyward, states, that in 1802 his mother purchased four hundred acres of the land from Richard B. Screven, one of the executors of John Screven; that from his mother it came, by conveyance, to him; and that there has been quiet possession from the date of the purchase. He further states, that on 23 June, 1819, Richard B. Screven conveyed to him two acres of the land; and that on 5 June, 1821, Thomas E. Screven conveyed to him eight hundred and seventy-seven acres, and on 8 March, 1824, seven hundred and thirty-eight acres more. The purchase money of the last tract was $2,214, of which he secured and, in fact, paid $1,200; but then receiving notice of the present suit, gave a conditional bond for the balance.

The defendant, James Bolan, states in his answer, that he purchased one thousand and fourteen acres of land of Thomas E. Screven, and took conveyance on 18 October, 1819; and that he has held adverse possession ever since. Abraham Huguenin, another of the defendants, states that he is in possession of two hundred and thirty-four acres, part of the barony, which was purchased by one Fitts, of Thomas E. Screven, on 7 February, 1820, and by the defendant from Fitts, on 10 May, 1822; and that he received a title directly from Thomas E. Screven; no conveyance having been executed to Fitts. This defendant is also in possession of another tract of land, of two hundred and ninety-five acres, also part of Jasper's Barony, which he purchased of Benjamin H. Buckner, who received a conveyance on 11 January, 1819.

All the defendants state a full consideration paid, and deny notice of the complainant's incumbrance at the time of their respective purchases. They rely on their being bona fide purchasers, without notice, for valuable consideration; and also on the statute of limitations.

So far as regards the statute of limitations, the several tracts of land following, to wit: the two acres purchased by the defendant, William Heyward, on 23 June, 1819, and the tract of eight hundred and seventy-seven acres, purchased on 5 June, 1821; that of one thousand and fourteen acres, pur-

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chased by the defend*ant Bolan, on 18 October, 1819; that of two hundred and thirty-four acres, purchased by Fitts, on 7 February, 1820, and conveyed to the defendant, Huguenin, on 10 May, 1822; and the tract purchased by Buckner, on 11 January, 1819, and conveyed by him to the defendant, Huguenin, stand on the same footing.

I suppose adverse possession to have been taken of these several tracts from the date of the respective purchases. The complainants, from the earliest, of the purchases, resided beyond seas. By the Act of 1712, P. L., 101, Stat., 584, seven years were required to bar actions for land of persons beyond seas; and, by analogy, the claim to right, or interest, in lands. In all these cases less than seven years had elapsed, at the time of the passing of the Act of 1824, Act of 1824, p. 24, 6 Stat., 238, extending the limitation of actions, for the recovery of land,

(c) Donald v. McCord, Rice E., 330; 6 Rich. E., 166; 10 Id., 384; 9 Id., 25; 3 Strob. E., 132, 134; 1 Id., 113; Cruger v. Daniel, McM. E., 197; Shultz v. Carter, Sp. E., 542; 4 Rich. E., 113; 1 Id., 106; 1 Strob. E., 338.

to ten years, and, therefore, no title was then matured; and less than ten years, although more than seven, had elapsed before the filing of the present bill, on 7 April, 1828. It was contended, however, that the Act of 1712 was not altered by the Act of 1824, so far as relates to persons beyond seas, but that the limitation of seven years still applies to them.

This raises a question of construction, which, I confess, embarrassed me considerably. The second section to the Act of 1712 provides, that if persons to whom titles to land shall descend, or come, "do not prosecute the same within five years after such right or title accrued, that then he, or they, and all claiming under him or them shall be forever barred from recovering the same; excepting any person or persons beyond the seas, or out of the limits of this province, femes covert, or imprisoned, who shall be allowed the space of seven years to prosecute their right, or title, or claim to any lands, tenements, or hereditaments, in this province, after such right and title accrued to them, or any of them, and at no time after the said seven years." P. L., 101. The Act of 1824 enacts, "that the second section of the Act of 1712, limiting the time for the prosecuting of a right or title to lands to five years, be altered, so as to extend the time for the prosecution of such right or title to ten years." Acts of 1824, p. 24. The argument is that only the limitation of five years, applicable to persons within the State, is altered by the Act of 1824; and that with respect to persons beyond seas, it is as it was before. Such is said to be the plain letter of the Act.

Now, in my private judgment, I am perfectly satisfied that the legislature never intended to put persons beyond seas, femes

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co*vert, and persons imprisoned, in a worse situation than persons who are in the country, or under no disability. I believe so, because it would be hard and unreasonable that persons should be required to prosecute their rights within a shorter time who have less opportunity of doing so, or even of knowing that they are invaded. But yet it is true, that if the legislature will plainly enact that which is hard and unreasonable, the courts are bound to give it effect. If the words are unambiguous, there is no room for construction. If, for instance, the word "ten" had been used, as suggested in argument, instead of "five," in the Act of 1712, there could be no room for doubt as to the meaning; but without resorting to the doctrine of Blackstone, 1 Com., 91, that although the words of a statute are plain, yet "when some collateral matter arises out of the general words, and happens to be unreasonable, then the Judges are in decency to conclude that this consequence was not foreseen by the parliament, and, therefore, they are at liberty to expound the statute by equity, and only quod hoc disregard it" —a doctrine which has been questioned, although precisely applicable to the present case—I think it cannot be said, that the words of the Act of 1824 are unequivocal. The words, "limiting the time for the prosecution of a right or title to lands to five years," are only descriptive of the section referred to, and they describe it loosely. If these words had been omitted; if the enactment had been, "that the second section of the Act of 1712, for the limitation of actions, be altered so as to extend the time for the prosecuting a right or title to lands to ten years;" this would have been plain, and would have no doubt included persons beyond seas. The enactment is not that so much, &c., &c., shall be altered. It speaks of "the second section of the Act of 1712 limiting, &c.," as if the exclusive purpose of that section had been to limit actions to five years; and such is the impression which any person, unacquainted with the Act of 1712, would receive from reading that of 1824. Now, that was the general purpose of the section; and persons beyond seas, femes covert, &c., would have been barred by the general limitation of five years, but for the subsequent qualification in the same section; and the Act of 1824 alters the general provisions of the section, without adopting any qualification. It is as if the legislature, pursuing the terms of an old statute, had enacted, for the amendment of the law, "that if, in future, any person shall fail to prosecute his action for land within ten years, he shall be forever barred." This would have applied to all persons, whether beyond seas or not.

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*If we take Lord Coke's rule for the construction of statutes, to consider the old law, the mischief and the remedy, and "to make such construction as shall suppress the mischief and advance the remedy," (3 Rep., 7,) it will lead us to the same conclusion. The mischief intended to be remedied was, that titles to land were acquired, by possession, in too short a time; and there was no grievance that femes covert, and persons beyond seas, were unduly protected. The purpose of the Act of 1824, unlike that of 1712, was not to quiet litigation, but rather the contrary; that parties should not lose their property, without having a reasonable time to vindicate their claims to it; and we advance the remedy of the statute, when we apply it to all, who were affected by the grievance. An objection was made, that there was another qualification in the second section of the Act of 1712, giving infants time to prosecute after they came of age; and it is asked, whether they are restricted to ten years, although the time may expire before they come of age, as would seem to follow, if the limitation of ten years is applicable to all

persons. That part of the Act of 1712 had already been superseded by the Act of 1788, P. L., 455, 5 Stat., 77, to which that of 1824 has no reference; and it would be useless to inquire what would be the effect of the last Act, if that of 1788 had not been passed.(d) The legislature may have been governed in the mode of enactment by the existence of that Act. I think that the titles to the several tracts of land mentioned are not matured by the statute.

These defendants also plead that they are bona fide purchasers, for valuable consideration, without notice. The lien on Jasper's Barony, in nature of a mortgage, was constituted by a decree of the court in 1802. This decree was upon a bill for specific performance of an agreement for the purchase of Jasper's Barony, by John Screven; and the decree was, that the purchaser should pay the purchase money, and the land be mortgaged for the payment. The money not having been paid, but in part, a final decree for the sale of the mortgaged premises was made in 1806; and the bill to revive the decree of 1806 was filed on 8 September, 1823; so that there was no lis pendens to affect the defendants with notice, at the time of the several purchases last mentioned. It was contended, however, that the decree of 1806 bound the land; and that the defendants cannot avail themselves of the plea of purchase for valuable consideration, without notice. If by this it be meant that a decree of this court constitutes a lien on land, like a judgment at law, so as to bind it in the hands of a purchaser, I know of no authority for such

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a doctrine. A decree of this court *ranks with a judgment at law, in a course of administration, and must be paid according to priority of time. Searle v. Lane, 2 Vern., 89; Morrice v. Bank of England, Ca. Temp. Talb., 218. But this, in general, relates only to personal estate; and there is no lien on land. Bligh v. Earl of Darnley, 2 P. Wm., 621.

I suppose the argument to be, that a decree of the court is, of itself, notice to a purchaser. In the case of Price v. White,(e) decided by the Court of Appeals, at Charleston, in 1828, it was determined that a decree of this court is not notice. See also, Sugden on Vendors, 538. A judgment at law is not notice; nor will the court interfere against a bona fide purchaser of property, if he has obtained any advantage, by which he can, at law, protect himself against the judgment; such as the assignment of an outstanding term. 2 Cruise Dig., 254. Indeed, the rule of equity is general, that a bona fide purchaser, without notice, who has paid his money, has such equity that the court will not in any case interfere against him, if he can defend himself at law. In Jerrard v. Saunders, 2 Ves. Jr., 457; Walwyn v. Lee, 9 Ves., 24, it is said, that if a bona fide purchaser, without notice, has obtained the legal estate, he can never be affected in equity. In this case, the defendants have obtained the legal estate; and if it was necessary for the complainant to bring the present bill, to obtain the benefit of the decree, of 1806, he cannot have the aid of the court against the defendants, standing in the situation of bona fide purchasers, for valuable consideration, without notice.

It was also argued, that the defendants could not make a good legal title to the land, without finding the incumbrance; according, I suppose, to the rule laid down, 2 Fonb., 303, bk. 3, ch. 3, § 1, note (b), "that there where a purchaser cannot make out a title but by a deed, which leads him to another fact, he shall be presumed to have notice of such fact." Without entering into any consideration of the meaning and effect of the rule, it is sufficient to say that it does not appear in this case, how the title could be made out, or what deed in the chain of title could lead to a knowledge of this incumbrance. As the defendants deny notice, the complainant was bound to prove it. As the land was decreed to be mortgaged, I suppose that a conveyance was executed to John Screven, in his lifetime, so as to vest the title in him; although this is not stated, or shewn. If there was such a conveyance, however, it does not follow, nor is it probable, that it would have afforded the

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notice. It *is stated, and admitted, that the land was devised to defendant's vendor, Thomas E. Screven, by the will of his father, John Screven. That will is not in evidence, but the mere devise of the land, could not give notice of the incumbrance. If by making out the title, it be meant, that defendants could not have searched the public offices for incumbrances, and among them that of the register in equity, without finding the decree, which affected the land; that raises the question, which has already been considered, and determined, to wit: whether the decree of the court is of itself notice; or whether the party shall be presumed to have searched the office, and obtained notice. I think the plea of purchaser for valuable consideration, without notice, must be sustained.

The purchase of seven hundred and thirty-eight acres made by the defendant, Heyward, on 8 March, 1824, was made pendente lite, so that he cannot, as to that purchase, avail himself of the plea of purchaser for valuable consideration, without notice; nor has time enough elapsed, to give him a title by the statute of limitations.

We are next to consider the case, with regard to the four hundred acres of land, stated, by Mr. Heyward, to have been purchased

(d) Hill v. Connelly, 4 Rich. L., 616, 625; Noble v. Burnett, 10 Id., 525; Att. Gen. v. Baker, 9 Rich. E., 528; O'Neall v. ———, MS., Charleston, April, 1860.

(e) Vide post, 244; for a report of this case. —R.

by his mother, in 1802. This purchase was also made pendente lite; but I am inclined to think, that the constructive notice implied from lis pendens, has nothing to do with the statute of limitations. The statute will not run in favor of a purchaser from a mortgagee, or trustee, with notice, because, in general, such purchase is a fraud. That is, it will not run until the fraud is discovered. But to make out a case of fraud, it would seem, that there must be actual notice. All the cases on the subject are, that the lis pendens is such notice, as will disable a purchaser from pleading that he is a bona fide purchaser, for valuable consideration, without notice. The reason of the rule is, that otherwise, it would be in the power of a defendant to defeat the plaintiff, if he could find an innocent purchaser; or, by shifting the property from hand to hand, create the necessity of making new parties, and render the suit interminable. All this has nothing to do with the statute of limitations. Actual notice, with respect to this land, was attempted to be inferred, from what is stated by Mr. Heyward, in his answer: that about 1807, or 1808, he saw an advertisement, for the sale of the land, by Mr. Parker, as agent of the complainant: that he called on Mr. Parker, and requested him to investigate the circumstances of his mother's purchase, and discontinue the advertisement, if the title was good; and that he again saw Mr. Par-

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ker, who told him, *that the advertisement was improper, and withdrew it. This seems to me the reverse of proving notice. The conduct of Mr. Parker was calculated to satisfy him, that the title was good and even if Mr. Heyward had notice previously, it may be doubted whether the complainant could assert his claim, after this conduct of his agent. Besides, if this were notice, it was long after the purchase was made; and even then, probably, time enough elapsed for the statute to run out; and, moreover, if Mr. Heyward had purchased fraudulently, with notice, this communication to complainant's agent, was a discovery of the fraud. He was then aware, that Mr. Heyward claimed by an adverse title, and from that time, the statute began to run. I think, there can be no doubt of Mr. Heyward's title to the tract of four hundred acres.

It is therefore ordered, and decreed, that the bill be dismissed as to all of the defendants, except so far as it seeks to make liable to complainant's demand, the seven hundred and thirty-eight acres of land, purchased by the defendant, William Heyward, of Thomas E. Screven, on 8 March, 1824. And it is ordered, that the said land be sold, in pursuance of the original decree in this case, for the satisfaction of complainant's demand.

The complainant appealed from this decree; and now moved that it might be reversed, except as to so much of it, as made one of the tracts of land, purchased by the defendant, Heyward, liable to the complainant's demands.

Frost, for the motion. The question upon the construction of the Act of 1824, as to the time within which the complainant is barred by the statute of limitations, may be safely left where the Chancellor has placed it. His argument is conclusive in itself, and it would be as difficult to add to its force, as to overthrow it.

On principal and authority, the decree of 1806 must be regarded as a lien on the lands. Woddrop v. Price, 3 De S., 203. Decrees are not liens in England, because there is no process by which the defendant's property can be sold, or be otherwise made directly liable, in satisfaction. Even a sequestration acts but indirectly on the estate, being, in fact, a process for contempt. 2 Mad. C., 205. In this State, the real, as well as the personal estate, is made liable to, and may be sold in satisfaction of, a decree in equity,(*f*) by writ of execution, in nature of a fi. fa., under the Act of 1785, P. L. 316, and see St. 5 Geo. II, c. 7, s. 4, P. L. 250:(*g*) and hence the rule of the English chancery does not apply to decrees in equity here. Wherever the law renders land directly liable to the satisfaction of adjudicated claims, the adjudication con-

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stitutes a *lien on the land; and that for the obvious reason, that otherwise the law would be evaded and defeated. This is a principle of the common law, and is illustrated by the history of every lien by judgment, or debt of record. Take, for instance, statutes merchant and statutes staple, which are liens on land, simply because the land is made liable for the satisfaction of the debt. Before the St. 2 Westm. 2, 13 Edw. I, c. 18, a judgment at law was not a lien on land; but after that statute, it was held to be so, because, under the statute, the defendant's land might be extended by writ of elegit, and the execution would be defeated, if the judgment were not a lien. 2 Statutes at Large, 93, 101; 2 Inst., 394, 395; Plow., 72; 3 Rep. 14; Gilb. on Ex., 32, 37, 42, 55; and see St. 29 Car. 2, c. 3, s. 15; P. L., 83.(*h*)

The plea of purchase for valuable consideration, without notice, cannot avail against a legal lien; and even if the decree were not a lien, this defence cannot protect the defendants in this case, for they have not entitled themselves to the benefit of the rule of this high equity. A plea of purchase for valuable consideration, without notice, will not avail, unless it be alleged, and proved, that the vendor was seized, or pretended to be seized, in fee, and was in possession: that the purchase money was actually paid, and not

(*f*) 7 Stat., 211.
(*g*) 2 Stat., 570.
(*h*) 2 Stat., 528.

merely secured to be paid, and notice before payment, or execution of the deeds, is sufficient notice; and lastly, the plea must aver a conveyance, and not a mere agreement to convey. Not one of these defendants have come up to these requisitions, and therefore they are not protected by this defence. Moreover, a purchaser will be presumed to have notice of every deed, and of every fact, which must come to his knowledge in investigating his title; and, indeed, whatever is sufficient to put the party upon inquiry, is notice. The Chancellor is mistaken, in presuming that a conveyance was made to John Screven, in his lifetime. No conveyance was made to him, or to his heirs, devisees, or executors; and their only title is the decree of 1802, which, while it vested the land in them, uno flatu, declared it mortgaged for the debt. In support of these views, the following authorities were cited: Sug. on Ven., 554, 556, 530; Mitf. Pl., 215; Cooper E. Pl., 281, 282, 285; 2 Mad. C., 322, 323; Head v. Egerton, 3 P. Wms., 281; Story v. Lord Winsor, 2 Atk., 630; Attorney General v. Backhouse, 17 Ves., 290; Walwyn v. Lee, 9 Ves., 32; Daniels v. Davison, 16 Ves., 252; Hart v. Middlehurst, 3 Atk., 377; Brandlyn v. Ord., 1 Atk., 571; 2 Cruise. Dig., 254; 2 Fonb., 303, bk. 3, ch. 3, § 1, note (b); Moore v. Ben-

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nett, 2 C. C., 246; Murray v. *Ballou, 1 John C. R., 575; Drapers' Company v. Yardley, 2 Vern., 662; Smith v. Low, 1 Atk., 490; Biscoe v. Earl of Banbury, 1 C. C., 291; Coppin v. Fernyhough, 2 Bro. C. C., 291; and Taylor v. Stibbert, 2 Ves. Jr., 437.

R. B. Smith, contra. As to these defendants, this is an original bill, and before it was filed, the complainant was barred by the Act of 1712; and that Act is not altered, as to persons beyond seas, by the Act of 1824. The Act of 1824 is, in terms, confined to such as, by the Act of 1712, were barred in five years, by the Act of 1712, and the complainant was not barred until the lapse of seven years; and if we go beyond the terms of the Act, and speculate upon the intention of the framers, there is no more ground for allowing the complainant ten years, than there is for giving him twelve, because the Act of 1712 allows persons beyond seas, two years more than residents of the State; or for extending his time to fourteen years, because the Act of 1824 doubles the time allowed to persons here by the Act of 1712. In this uncertainty, the only safe rule is, to adhere to the plain import of the terms of the Act; which may, perhaps, be founded on very sound principles of policy.

On the question of lien, and the notice of the decree, the case of Price v. White, referred to by the Chancellor, is conclusive. Nor is there anything in any of the authorities cited, which can deprive the defendants of the benefit of their plea, that they are purchasers for valuable consideration, without notice. The Screvens were in the quiet possession of the land from the time of the purchase, and the defendants neither knew of any incumbrance, nor was there any on record, where they were bound to look for it. Sug. on Ven., 130, 131; Powell on Mortgages, 670, 672; Frost v. Beckman, 1 John. C. R., 288; and see Jackson v. Henry, 10 Id., 185; Mertins v. Joliffe, Amb., 313; and Earl of Portsmouth v. Lord Effingham, 1 Ves. Sen., 435.

Mazyck, in reply, cited, and commented on Sug. on Ven., 338, 398, 554; Mont. on Lien, 86; Mackreth v. Symmons, 15 Ves., 330; 2 Mad. C., 128; Sterry v. Arden, 1 John. C. R., 267; Martin v. Kerridge, 3 P. Wms., 240; Bligh v. Earl of Darnley, 2 P. Wms., 621; Newland C. Pr., 113.

O'NEALL, J., delivered the opinion of the court.

This court concurs in opinion with the Chancellor, in his construction of the Act of 1824, 6 Stat., 238.

On the question, whether a decree of the Court of Equity constitutes a lien on land, similar to that of a judgment at law, so as

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to *bind it in the hands of a purchaser, we have, unanimously, come to a different conclusion from that maintained by the decree.

At common law, a judgment did not bind the land of the defendant, for the reason, that the execution went against his goods alone, and his land was not liable, by any process, to be taken in satisfaction; but after the St. Westm. 2, 13 Edw. I, cap. 18, which subjected a moiety of the defendant's land to an extent, by writ of elegit, it was held, that the judgment bound from its recovery. Gilbert on Executions, 37; 2 Inst., 394, 395. This lien was by the statute of frauds and perjuries, 29 Car. 2, c. 3, § 15; P. L., 83, 2 Stat. 528, restricted, in its commencement, to the day on which the judgment was signed. It would hence seem to follow, from the effect produced by subjecting land to execution, for the payment of debts, that although, by the common law, the recovery of a judgment created no lien on the goods of the defendant, yet that it did create a lien on land, so soon as by statute it was made liable to be taken in execution to satisfy the judgment.

In the English court of Chancery, a decree is regarded as acting against the defendant, personally. The non-performance of it is a contempt, to punish which, and to compel the performance of the decree, the only processes resorted to are, the writs of attachment, and sequestration. The first operates directly upon the person of the defendant,

the latter, upon his estate. The writ of sequestration is only issued on the special order of the Chancellor, and for a contempt clearly made out. The effect of it is, to sequester the rents and profits of the defendant's estate, until he performs the act required, and thus discharges the contempt. That there was no process, issuable, as of common right, whereby the estate of the defendant was rendered liable to the satisfaction of a decree in chancery, was, manifestly, the only reason why such a decree, has been held, in England, to create no lien on the defendant's estate: for in the case of Morrice v. The Bank of England, Ca. Temp. Talb. 217, it is, in all other respects, held to be equal to a judgment at law.

In this State, there has been a most material change of the English law, both as to the enforcement of judgments at law, and of decrees in equity by execution. Before the St. 5 Geo. II, c. 7, 2 Stat., 570, land in this State was not liable to be sold under execution; but by that statute, it is declared to be liable to the like remedies, proceedings, and process, in any court of Law, or Equity, to which personal estate is liable. P. L. 250. Under this statute, land became liable to levy and sale under a fieri facias; and if the

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Court of Equity *had then possessed the power of issuing executions against the goods of defendants, little doubt could have been entertained, that decrees would have bound land. That power, however, did not belong to the court, until it was conferred by the Act of 1785, 7 Stat., 211; by which, it is provided, that, "whereas, the mode of enforcing decrees in the Court of Chancery, is tedious, and often defective: be it therefore enacted, that in all cases where payment of money is decreed by the said court, it shall be lawful for the party, to whom such payment is to be made, to sue forth, at his option, either the usual process for compelling performance of the said decree, or a writ in nature of fieri facias, to make the estate, both real and personal, of the party, by whom such money is to be paid, liable in satisfaction thereof, in the same manner as it is on such a writ from the Court of Common Pleas; and that the sheriff of the district, in which the estate levied upon lies, shall have the same power and authority to sell and convey the same, as he hath on a fieri facias from the Court of Common Pleas." P. L. 361. The consequence, as we have already seen, of subjecting by statute, the defendant's real estate, to the payment of a judgment, by means of an execution, is, at common law, to create a lien from the recovery of the judgment, and by the statute of frauds and perjuries, from the day on which the judgment is signed. The grant, therefore, of the common law process of fieri facias, to enforce a decree in equity, against both the real and personal estate of the party, gave to such decree, as a necessary incident, the lien of a judgment at law.

But even under the words of the Act, without resorting to a common law inference to aid us, we should be compelled to come to the same conclusion. The Act authorizes the party, to whom money is decreed to be paid, to sue out a writ in the nature of a fieri facias, to make the estate, both real and personal, of the party, by whom money is decreed to be paid, liable to the satisfaction of the decree; and how can it be made liable, but by giving to the decree the same lien as a judgment at law? If it had not this lien, the party could easily defeat the satisfaction of the decree, by a sale of his land so soon as it was pronounced, and before, under the rules of the Court of Equity, execution could be issued. Other creditors, too, by judgments at law intervening between the decree and execution, might sweep off the means of satisfaction. To make the party's estate liable to satisfy the decree, it must have the same lien as a judgment at law, and the Act certainly intended to give it that effect.

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*The decree, to have this lien, must, however, be a decree for the payment of money; for that is the only case in which, by the Act, the party can resort to a fieri facias. If the decree is for the performance of a specific act, then to compel performance, an attachment, or sequestration, must be resorted to. It could have no lien, therefore, for it only looks to, and requires the party to perform the specific act. But there may be such a thing as a specific, as well as a general lien, under a decree. When the decree sets apart a particular piece of property, for the payment of a sum of money, it would create a specific lien, and if not aided by the general lien, it would stand pretty much on the footing of a mortgage; and would, in general, be subjected to most of the rules relating to liens created by the act of the parties; but where the decree also adjudges the money to be paid out of the whole of the party's estate, then it creates a general lien, which follows all his property, as well that which is subjected to the specific lien, as the rest; and the party, to whom the money is ordered to be paid, may resort to his fieri facias, and compel satisfaction, by a sale of the estate. But the case of a specific lien, wherever the decree ascertains, and directs a sum of money to be paid, is aided by, or is, perhaps, merged in, the general lien which the law gives to it as a decree for the payment of money.

The decree in the case before us, establishes a sum of money to be due by the defendants in the original bill, and not only subjects the land in dispute to the payment of it, but also directs that the balance, if any, after the sale of the land, shall be paid out

of the estate of their testator. It is, therefore, a decree for the payment of money, and has a lien, from the time it was pronounced, on all his real estate. The case of Woddrop v. Price, 3 De S., 203, is an authority sanctioning the conclusion, that decrees for the payment of money bind land, in the same manner as judgments at law. Other decisions of the former Court of Appeals in equity, it is believed, followed up, and maintained the same conclusion; but for the want of reports of the cases decided in that court, for many years, we have been unable to refer to the cases themselves.

The decree having a legal lien on the whole of the testator's real estate, it is unnecessary to consider the questions made on the defence set up, of purchase for valuable consideration, without notice. The purchasers took subject to a legal lien, and are liable to be divested by a sale under the decree. The complainant has a legal title to enforce his decree; and the defendants have but an equity to oppose to it, and must of course

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fail. The plea of purchase, *for a valuable consideration, without notice, can never prevail against a legal title, to which there is no obstacle to a recovery at law. It is only a protection against an equity. It was not necessary for the complainant to have made these defendants parties. He might have enforced his decree without noticing them; and if he had, of his own mere motion, made them parties, I will not say, that the court would have thought itself authorized to decree against them. But as a favor to the defendants, and to enable them to protect themselves if they could, he was directed to amend his bill, and make them parties. This has accordingly been done, and the defendants have been heard in defence of their title; and failing to protect themselves under the statute of limitations, it follows, from our view of the lien of the decree, that the land in dispute must be adjudged to be liable to the satisfaction of it.

It is therefore ordered and decreed, that so much of the Chancellor's decree as dismisses the amended or supplemental bill, be reversed; and, that the tract of land containing one thousand and fourteen acres, purchased by the defendant, Bolan, on 8 October, 1819; the tract of land containing two hundred and thirty-four acres, purchased by Fitts, on 7 February, 1820; the tract containing two hundred and ninety-five acres, purchased by the defendant, Huguenin, from Buckner, who purchased on 11 January, 1819; the tract of two acres, purchased by the defendant, Heyward, on 23 June, 1819; the tract containing eight hundred and seventy-seven acres, purchased by him on 5 June, 1821; and the tract containing seven hundred and thirty-eight acres, purchased by him on 8 March, 1824; be sold in pursuance of the original decree, in this case, for satisfaction of the complainant's demands.

JOHNSON, J., and HARPER, J., concurred.

Decree modified.

Bailey, Eq. *222

*THOMAS B. THOMAS and EDWARD T. HERIOT, Trustees of Edward G. Thomas, and EMILY, His Wife, v. HIGHAM & FIFE, and Others.

(Charleston. March, 1831.)

[1. *Husband and Wife* ⟸31.]

A pecuniary legacy of unascertained amount, is sufficiently described in a marriage settlement as "a legacy," adding the names of the testator and legatee; and no additional schedule is necessary to give validity to the settlement, under the Act of 1792, 5 Stat., 203. Vide 1 Faust, 209.

[Ed. Note.—Cited in Ramsay v. Richardson, Riley, Eq. 279; Rivers v. Thayer, 7 Rich. Eq. 162, 163.

For other cases, see Husband and Wife, Cent. Dig. §§ 178–195, 883, 884; Dec. Dig. ⟸31.]

[2. *Trusts* ⟸169.]

The trustees of a marriage settlement, will be presumed to have renounced their trust, from their having paid over trust moneys to trustees, substituted by order of court, although it does not appear, that they were parties to the order of substitution. Vide Act of 1796, 2 Faust, 96, 5 Stat., 279.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 224; Dec. Dig. ⟸169.]

On appeal from the decree of De Saussure, Chancellor, at Georgetown, February, 1830.

JOHNSON, J. We concur in opinion with the Chancellor in this case. It was impossible to have described the thing settled, a legacy, otherwise than as it is described in the settlement. A schedule, therefore, would have been useless; and by the terms of the Act, one is necessary, only when the property settled is not specifically described in the deed.

Martha Cannon and Thomas Doughty, who were the trustees by the settlement, were also executrix and executor of the testator, Daniel Cannon, and were consequently in possession of the legacy; and as they paid it over to the substituted trustees, the necessary inference is, that they had formally renounced, and assented to the substitution. The substituted trustees must, therefore, be regarded as legally invested with the estate, and authority of the original trustees.

The motion to reverse the Chancellor's decree is dismissed.

O'NEALL, J., and HARPER, J., concurred.

King, for the motion.
Dunkin, contra.

Decree affirmed.

Bailey, Eq. *223

*JOHN J. ALEXANDER and Wife v. ROBERT HERIOT, and Others.

(Charleston, March, 1831.)

[1. *Infants* ⟸57.]

An infant is bound by his contract, although it is not for necessaries, if he in any way affirm it, after attaining to full age; and where a slave has been purchased for an infant, if he insists upon retaining the slave, when of age, and with a full knowledge of all the facts, it will be regarded as an affirmation of the contract of purchase.(*a*)

[Ed. Note.—Cited in Eubanks v. Peak, 2 Bailey, 500; Norris v. Wait, 2 Rich. 152, 44 Am. Dec. 283.

For other cases, see Infants, Cent. Dig. § 145; Dec. Dig. ⟸57.]

[2. *Infants* ⟸57.]

Where one makes a purchase for an infant, avowedly as agent, if the infant affirm the contract, after attaining full age, he will be directly liable to the vendor, and it will make no difference, that the agent was in possession, in the character of an executor, of funds to which the infant was entitled, if it clearly appear that the credit was given, not to him, but to the infant; especially if the infant, after maturity, took the bond of the agent, for the amount of the funds in his hands, as executor, without allowing credit for the purchase money, although the bond has not been paid.

[Ed. Note.—Cited in Eubanks v. Peak, 2 Bailey, 500.

For other cases, see Infants, Cent. Dig. §§ 136–148, 151; Dec. Dig. ⟸57.]

[3. *Sales* ⟸303.]

If a slave is sold, upon the condition of being mortgaged, for the purchase money the purchaser takes, subject to the lien of the condition, although a mortgage was not in fact executed.(*b*)

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 859; Dec. Dig. ⟸303.]

This case, which was heard by De Saussure, Chancellor, at Georgetown, in February, 1830, and came up, on an appeal from his decree, will be sufficiently understood from the opinion of the Court of Appeals.

O'NEALL, J., delivered the opinion of the court.

The only question raised in this case is, whether the defendant, Robert Heriot, should be allowed a credit in his account with the complainants, for the sum of $900, with interest thereon, being the price of the slave Lavinia, purchased for the complainant, Mrs. Alexander, then Miss Spierin, by Robert F. Withers, the executor of her mother, Mary E. Spierin, at a sale of the estate of Mrs. George Heriot, which was made by the defendant, Robert Heriot. At the time of this sale Miss Spierin was a minor, and the executor, Mr. Withers, was in the possession of funds to a large amount, to which she was entitled; and so also was the defendant, Heriot.

Two points are to be considered: first, whether the complainants are bound by this purchase; and, secondly, whether the credit at the sale was given to Miss Spierin, or to Mr. Withers.

Upon the first of these points there is little difficulty. A minor is bound by such contracts only, as are for necessaries suitable to his rank and condition in life; and the

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purchase in this case was *not one of necessity, and could not have been binding on the infant, unless affirmed since maturity. The contracts of an infant, however, are not void, but voidable; and the infant on attaining to full age, may affirm or disaffirm them. What amounts to an affirmation was, perhaps, a very perplexing question, until the case of Cheshire v. Barrett, 4 McC., 241 [17 Am. Dec. 735]; but in that case, the doctrine, that the delivery of goods to an infant, on a sale, was to be regarded as a gratuity, was overruled; and it was held, very properly, that a sale by the party, after he had attained to full age, of the thing bought in infancy, was an affirmation of the contract to pay the purchase money. In this case there have been acts proved, no less unequivocal of an affirmation of the contract to purchase the slave, Lavinia. The complainants have, for many years, retained possession of her; and even, at the hearing, avowed their determination to keep her. Under these circumstances they are bound by the contract, unless there is something in the other facts of the case to discharge them.

In relation to the second point of the inquiry, it appears that Mr. Withers declared at the sale, that he bought for Miss Spierin; and that the defendant, Heriot, did not require him to give a bond, with security, but dispensed with them, saying, that they were unnecessary, as he had a settlement to make with Mr. Withers. At this time, a part of the funds of Miss Spierin were in the hands of Mr. Heriot, and he had been ordered by the Court of Equity to pay them over to Mr. Withers, as executor; but they had been suffered to remain in the hands of Mr. Heriot for the support of Miss Spierin.

If Mr. Withers had bought, in the character of executor, it is perfectly clear, that Mr. Heriot would have had no right to look to the complainants, except upon shewing, that all the funds of the trust, in the hands of Mr. Withers, had been paid over to them; and that they had not allowed him credit for the price of Lavinia. See Guerry v. Capers, ante, 159, decided at Columbia, in December

(*a*) A branch of this controversy reported Rich. E. Ca., 302; Rainsford v. Rainsford, Sp. E., 392; Gregg v. Harllee, Dud. E., 42; 1 Bail. L., 28; 2 Id., 497; 2 Rich. L., 148; Norris v. Vance, 3 Rich. L., 168; 2 Hill E., 529.

(*b*) Post, 464—6; 2 Hill. E., 170, 421, 8; Dow v. Ker, Sp. E., 417; Id., 448, 459; Maybin v. Kirby, 4 Rich. E., 113; Dud. L., 78.

last. But if Mr. Withers did not buy in the character of executor, he bought as the agent of Miss Spierin, and she must be bound by it.

It is most obvious that neither Withers, nor Heriot, nor the complainants, ever regarded the purchase as made by the executor, and to be paid for out of the trust funds in his hands. At the sale Mr. Withers was not treated as buying on his own credit. Mr. Heriot looked for payment, not to Mr. Withers, but to the funds of Miss Spierin, which were in his own hands; for he dispensed with the bond and mortgage, saying that he

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had a settlement to make with *Withers. It does not appear that Withers claimed credit for the price of Lavinia, in the after settlement with the complainants; nor does it appear that they looked to the payment being made by him. According to the calculation made of the funds in his hands, with the interest computed, he gave to Mr. Alexander his bond for the whole of the funds in his hands at the time of his settlement; and if this bond had been paid, no objection could, or would have been made to the credit now claimed by the defendant Heriot. But it does not follow, because it has happened, unfortunately for the complainants, that Mr. Withers was unable to pay his bond, that, therefore, the defendant, Heriot, and not they, must sustain the loss of the price of this slave. The bond, in fact, changed the character in which Mr. Withers stood to the complainants; and he thenceforth ceased to be their trustee, and they his cestuy que trusts. He became the debtor to Mr. Alexander, and thereby discharged his trust. It was, in law, a payment of his previous liability. It follows, from these views, that the purchase was the contract of Miss Spierin, by her agent, Mr. Withers, with the defendant, Heriot; and, of course, the complainants are bound by it.

But, in another point of view, they are equally bound, even if Mr. Withers had purchased as executor. The property must be considered as mortgaged by Withers, for the purchase money; and, upon his failing to pay, the defendant would have the right to subject the property to the payment.

The defendant's motion must therefore be sustained; and, it is ordered, and decreed, that so much of the Chancellor's decree as overrules the exception of the defendant, Heriot, in relation to the price of the slave, Lavinia, be reversed; and that the defendant be allowed credit, in his account, for that amount, with interest from the time when it became due.

Dunkin, for the motion.
Inglesby, contra.

Decree affirmed.

Bailey, Eq. *226

*JAMES ROWLAND and Wife v. Executors of JAMES C. MARTINDALE.(a)

(Charleston, March, 1831.)

[1. *Evidence* ⟸354.]

Entries in the books of an agent, made by himself, are not, in general, evidence for him, of the disbursement of money on account of his principal. Vide Lever v. Lever, 2 Hill, Eq. 158; Sinclair and Kiddle v. Administrators of Price, Id., 160, note.

[Ed. Note.—Cited in Williams v. Gregg, 2 Strob. Eq. 297, 315; Hopkins v. Hopkins, 4 Strob. Eq. 210, 53 Am. Dec. 663.

For other cases, see Evidence, Cent. Dig. § 1470; Dec. Dig. ⟸354.]

[2. *Principal and Agent* ⟸78.]

Letters from a principal to an agent, expressing gratitude for his kindness, do not furnish a ground for presuming, that he had accounted for a sum of money, which he is proved to have received, but of which no trace appears upon his accounts; although by his death before a bill filed for an account, the defence may have been deprived of other evidence to support it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 162–177; Dec. Dig. ⟸78.]

[3. *Principal and Agent* ⟸67.]

An agent having no authority to invest, is not liable for interest on a balance remaining in his hands, until a demand made by his principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 128; Dec. Dig. ⟸67.]

On appeal from the decree of De Saussure, Chancellor, Charleston, May, 1829.

JOHNSON, J., delivered the opinion of the court.

The grounds of the motion will be better understood, by a concise analysis of the facts, out of which they arise. The defendant's testator, undertook to assist the complainant, Mrs. Rowland, then Mrs. Hamlin, in the settlement of the estate of her deceased husband, E. Hamlin, of which she was administratrix; and the report of the master ascertains that divers sums, amounting in the whole, to $2,368 75, belonging to that estate, went into his hands. The object of the bill was to obtain an account of the manner in which this sum has been disbursed; and a satisfactory account of the disbursement of $1,977 44, has been rendered, leaving a balance of $391 31 in his hands, which the master recommends to be paid, with interest from 1 December, 1819, one year after the date of the last disbursement. The questions arising out of this motion, are: 1. Whether the master was correct, in rejecting credits of several items of disbursements of money, amounting to $129 56, which are supported by no other evidence than entries in his books, made by Martindale himself. 2.

(a) Williams v. Gregg, 2 Strob. E., 315, 297; Cameron v. Watson, 10 Rich. E., 93; post 482, 500; 2 Bail. L., 51; McM. E., 57; 2 Hill L., 567; McM. E., 47; 3 Rich. L., 188.

Whether Martindale was correctly charged with $365, received by him, but of which there is no account in his books. 3. Whether he was chargeable with interest on the balance remaining in his hands, and from what time.

1. As a general rule, there is no question, but that an agent must prove his disbursements by strictly legal evidence. No man of business pays money without evidence of the fact, other than his own knowledge; and the accountability of the agent, renders it

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*still more necessary to him to take and preserve satisfactory vouchers of his payments. With proper attention, it is always in his power to do so, and it ought never to be dispensed with. There may be exceptions to this rule: as in the case of the Assignees of Keenan v. Administrators of Price, 2 Hill Eq. 160, note, decided at the last sittings in Columbia, where it was held, that the book entries of an agent to retail goods, were admissible as evidence, upon the principle, that the transactions were properly, and necessarily, the subject of book entries. But here there is an additional reason for an adherence to the general rule. The complainants are themselves bound to account for this estate, and to prove the disbursement; and Martindale's entries will not avail them for that purpose; and if a loss must be incurred, it is the consequence of his negligence, and he must bear it.

2. The letters of Mrs. Rowland to Martindale are relied upon, as shewing a settlement of the accounts between them; and that is the ground upon which his counsel seek to discharge him from the item of $365, which he received from her, and of which there is no account. These, it is true, express what she no doubt felt great gratitude for his kindness; but none of them contain any direct reference to a settlement of the accounts; on the contrary, they prove, most incontestably, that she was ignorant as to their condition. Whatever of difficulty, or mystery, has arisen in this cause, is founded on the supposition, that the death of Martindale has deprived the defence of the necessary evidence to support it; and this, possibly, may be so, but it is no answer to the plain, and unequivocal case, made out on the part of the complainants. That circumstance cannot avail them in the account which they are bound to render of the estate.

3. Martindale had no authority to invest the funds which came into his hands. They were placed there to be disbursed, as the exigencies of the estate might require; and, of consequence, he was entitled to retain them, until the complainant thought proper to withdraw them. But an account was required of him on 28 February, 1823, and he neglected to render one; and from that time he ought to be charged with the interest, but not before.

It is, therefore, ordered and decreed, that the decree of the Circuit Court be reversed; and that the defendants do pay to the complainants, the sum of $494 56, with interest from 28 February, 1823; and that they also pay the costs of suit.

T. S. Grimke, for the motion.
Dunkin, contra.

Decree reversed.

Bailey, Eq. *228

*ALICE IZARD, and Others, **v.** THOMAS MIDDLETON, Administrator of Henry Izard, and Others.

(Charleston, March, 1831.)

[1. *Judgment* ⇐780.]

Lands held in fee-simple conditional are bound after the birth of issue, by the lien of a judgment, or decree, against the tenant, in bar of the right of the issue to take, per formam doni.

[Ed. Note.—Cited in Pearse v. Killian, McMul. Eq. 234; Buist v. Dawes, 4 Rich. Eq. 426; Addison v. Addison, 9 Rich. Eq. 68; Burnett v. Burnett, 17 S. C. 550.

For other cases, see Judgment, Cent. Dig. § 1341; Dec. Dig. ⇐780.]

[2. *Deeds* ⇐126.]

The issue in fee-simple conditional cannot claim against the act of the tenant, and can only take by succession from him, and in his right; and, therefore, it would seem to follow, that if there be issue, lands held in fee-simple conditional, although not bound by a lien, are, nevertheless, assets for the payment of debts; ob dict. per Harper, J.(a)

[Ed. Note.—Cited in Burnett v. Burnett, 17 S. C. 550.

For other cases, see Deeds, Cent. Dig. §§ 356½, 357, 449; Dec. Dig. ⇐126.]

[3. *Frauds, Statute of* ⇐4.]

A parol agreement, before marriage, to settle the personal estate of the wife to the uses of the marriage, is not sufficient to support a settlement executed after marriage, and after the marital rights had attached against the creditors of the husband.

[Ed. Note.—Cited in Suber v. Chandler, 36 S. C. 350, 15 S. E. 426.

For other cases, see Frauds, Statute of, Cent. Dig. § 4; Dec. Dig. ⇐4.]

[4. *Fraudulent Conveyances* ⇐61.]

A voluntary settlement is void as to existing creditors, if the donor afterwards prove to be insolvent; but the rule admits of a qualification, where the debts are utterly inconsiderable, when compared with the donor's property, such as debts incurred for the weekly expenses of his household. If he be more largely indebted, his solvency, at the time of the settlement, can only be judged of by the event; at least, if there be an exception, where the insolvency was subsequently occasioned by some sudden and unforeseen casualty, such as fire, or tempest, yet the fluctuations in the value of property, occasioned

(a) See Pearse v. Killian, McM. E., 234.

by the mercantile condition of the country, cannot be ranked among those casualties.(b)

[Ed. Note.—Cited in Blake v. Jones, Bailey, Eq. 141, 21 Am. Dec. 530; Farr v. Sims, Rich. Eq. Cas. 137, 24 Am. Dec. 396; Brock v. Bowman, Rich. Eq. Cas. 185, 188; Martin & Evans v. Evans, 2 Rich. Eq. 377; Gracey v. Davis, 3 Strob. Eq. 58, 51 Am. Dec. 663; Buchanan v. McNinch, 3 S. C. 500, 501; Curlee v. Rembert, 37 S. C. 219, 15 S. E. 954.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 150; Dec. Dig. ⟸61.]

[5. *Fraudulent Conveyances* ⟸248.]

No delay, short of such lapse of time as will raise the bar of the statute of limitations, or the presumption of satisfaction, will preclude a creditor from pursuing the property of his debtor in the hands of a voluntary donee.(c)

[Ed. Note.—Cited in DuPont v. DuBos, 52 S. C. Append. 605.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 732; Dec. Dig. ⟸248.]

[6. *Fraudulent Conveyances* ⟸225.]

A creditor taking a security from his debtor, who has made a voluntary settlement, is not thereby precluded from pursuing the settled property, if the security proves to be insufficient, and the debtor insolvent; but it would be otherwise, if the creditor had consented to the settlement, and the security were given in consideration of that consent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 653; Dec. Dig. ⟸ 225.]

This was a bill by creditors for an account of the estate of their deceased debtor; and to subject certain personal estate, settled by him in his lifetime, to the payment of his debts, as also to render real estate, of which he was seized in fee-simple conditional, liable to his debts in the hands of his heirs, who claimed the same per formam doni. The cause was heard at Charleston, in January, 1830, before De Saussure, Chancellor, from whose decree the case will be fully understood.

De Saussure, C. Two principal questions

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are made for the *consideration of the court in this case: 1. Whether the decree of this court, establishing a large debt against the late Henry Izard, Esquire, in his lifetime, is binding on the estate called the Elms, which was devised to him by his father, Ralph Izard, in fee conditional at common law, so as to defeat the right of the children of Henry Izard, who claim per formam doni. 2. Whether the voluntary conveyance, made in favor of his children by Henry Izard, of ninety slaves, which he had acquired by their mother, his first wife, is valid against his creditors.

The devise of the estate called the Elms, by Ralph Izard, to his son, Henry Izard, was in these words: "I also give and devise to my said son Henry, and the heirs of his body, lawfully begotten, my mansion house, out houses, and buildings, on my plantation called the Elms, in the parish of St. James Goosecreek, together with such part of the said plantation, as is comprised within the lines colored yellow, in the plat lately made of the same by Mr. Joseph Purcell, surveyor." There were limitations over to other sons and daughters, in succession, in the event of Henry Izard's dying without issue. This devise to Henry Izard, and the heirs of his body, created a fee conditional at common law, according to the most express authorities. 2 Bl. Com., 110, 111, 112; and Co. Lit., 19, a. And according to the same authorities, when the devisee had issue, the condition was performed, and the estate was so absolute as to enable the devisee, first, to alien the estate, and thereby bar his issue, and also the donor of his right of reverter; secondly, to forfeit it for treason; and thirdly, to charge the land with rents, common, and certain other incumbrances, so as to bind his issue. The devisee, Henry Izard, had issue, and died leaving issue living; and the question for our consideration then is, whether he has done any legal act, to bar the issue from taking per formam doni. He certainly had done no act to forfeit the estate, and if he had, forfeitures for treason are abolished by our laws. He has not aliened the estate in the ordinary sense of that term, by deed, or any voluntary actual conveyance; nor has he, by any direct act, charged the estate, by deed, with any rents, or commons, or the like, as Lord Coke expresses it, in his comment upon the text of Littleton, 19, a. In fact, he has done no act at all in relation to this estate; but a decree has been obtained against him, for a large sum due by him to his father's estate. A decree is equivalent to a judgment at law; but whether it is a sufficient charge to bind the estate, is a different question. What act will amount to such an alienation, or charge, by the first taker, as

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will defeat the heir claiming per *formam doni, seems very questionable. Neither does Blackstone explain what is meant by the words, "certain other incumbrances;" nor Lord Coke, by the words, "or the like." And we are left, therefore, to the general law on the subject. The result of my view is, that I do not consider the Elms estate as bound by the decree of the Court of Equity, establishing a debt against Henry Izard, in his lifetime, and never enforced during his life; and it will therefore descend to his heir-at-law, who will take it per formam doni.

We come now to the consideration of the question, of the voluntary settlement of ninety negros, made by Mr. Izard, in the month of May, 1813. I consider that settlement as wholly voluntary; for notwithstanding the fact, fully proved, that there was an inten-

(b) Explained in Brock v. Bowman, Rich. E. C., 188; Id. 122; 4 Rich. E., 228; 3 Id., 86; Bank v. Toomer, 2 Hill E., 31; ante, 141; 1 Hill E., 113, 288, 297; 2 Id., 611; Dud. E., 224; 2 Rich. E., 54; 3 Id., 33; post, 309; 5 Rich. E., 132; 7 Id., 137n.; 1 Bail. L., 575; 2 Id., 130; 5 Strob. L., 206; Ril. L., 211.

(c) See Martin v. Evans, 2 Rich. E., 378.

tion to make a settlement of these slaves of the intended wife, and that even a trustee was named, it was not carried into effect. The marriage took place without a settlement; the husband got possession of the slaves, and the marital rights attached on them; so that Mr. Izard was the absolute owner. Mrs. Middleton, the mother of Mrs. Henry Izard, was desirous that a post nuptial settlement should be executed; but it never was made, until after the death of Mrs. Henry Izard. Mr. Izard then felt anxious to gratify his mother-in-law, and he executed a voluntary deed, on 25 May, 1813, by which he conveyed to trustees, the slaves which he had acquired in marriage, in trust for himself during life, and on his death, to be distributed among the children of that marriage, and to himself, in case he survived them.

It was contended for the complainant, that this voluntary deed was void as to creditors, because Mr. Izard was largely indebted at the time of its execution. The facts appear to be as follows: Mr. Izard and his mother, the widow of Ralph Izard, the devisor, and the complainant in this suit, qualified under the will of Ralph Izard. Henry Izard went into the possession of the estate, and he regularly paid the annuity of $3,000, bequeathed to his mother, which was charged on the whole estate. After making a division among the heirs of certain parts of the estate, certain other property, reserved for the payment of the debts of Ralph Izard, was sold, in order to pay the debts. The estates called White Oak, and Skinking, and forty-three slaves, were put up for sale by Mr. William Payne, the auctioneer, in the year 1807, and were bid off by a Mr. Owen, for the sum of $26,550. Titles are said to have been made to Mr. Owen, but he did not pay any money, or give any security. It was understood that he bid for Henry Izard; and it is believed that

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they *were bid in for want of purchasers. Some questions might have been made, as to the purchase being obligatory on Mr. Izard, and some arguments were urged on that point: but these were all ended by the fact, that Mr. Izard assumed the purchases. They formed, in fact, the basis of the greatest portion of the debt, which was awarded against him in June 1823; which award was affirmed by the decree of the Court of Equity, in the year 1824. By that decree, it appears, that the sum of $9,209.47 was awarded against Mr. Izard, as the balance of capital in his hands, due to his testator's estate, on 1 June, 1823; and that the amount due by him on the same day, on account of his purchases from the estate, was $27,931.17; making together, a capital sum of $37,140.64, due by Henry Izard on 1 June, 1823, bearing an interest of seven per cent.; and the decree declared that sum to be due by Mr. Henry Izard.

The award and decree were in 1823, and 1824. It is necessary, therefore, in order to ascertain the fairness of the settlement, to look back at the state of things at the time when the voluntary deed was executed, which was in May, 1813. The counsel for the defendants contended, that by the accounts of Mr. Izard, filed with the ordinary, in 1813, he owed nothing to the estate, or, but a trifling sum, to wit, $260; except the amount of his purchases, which are debited against himself, in his account, at $26,550. The counsel for the complainant, insisted, that by the account made out by Mr. J. M. Davis, the accountant, under the award, on 3 November, 1823, the balance due by Mr. Izard, to the estate, on 1 January, 1813, was $8,857.38, besides the amount of his purchases, which are put down by Mr. Davis, at $27,516.67. Nothing was disclosed to the court, which could satisfactorily explain this difference; but the court is more disposed to give its confidence to accounts made up officially, on oath, before a court, than to statements made up, long afterwards, by those magicians, professional accountants, whose duty, and skill, it is to make figures and accounts speak the language of their employers.

On the part of the defendants, it was contended, that Mr. Izard, at the time of the voluntary deed, in May, 1813, owned a very large property; to a far greater amount than his debts. That he owned two hundred slaves, including the ninety named in the voluntary deed; also, the Elms, the Camp, and the plantations called White Oak, and Skinking, and another small landed estate, called Wadbecan. From the evidence, it appears, that Mr. Izard's property, at the time of the settlement, was worth, by one statement of

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his *debts, more than three times their entire amount; and by another statement, more than twice and a half the whole amount of his debts. And the proportion, which the property reserved to Mr. Izard, bore to the property contained in the voluntary deed, was as $62,533 to $37,140; as appears by the following statement:

Sixty slaves, at $300	$18,000
Forty-three slaves, bought in, at $300	12,900
White Oak, and Skinking	12,000
The Camp	7,000
Wadbecan	1,000
The value of his life estate in the Elms	6,633
The value of the life estate, reserved in the ninety slaves, in the voluntary deed, at	6,000
	$63,533

We are now brought to the consideration of the question, whether the property held by Henry Izard, was such as to justify his making a voluntary conveyance, in May, 1813, in favor of his children. There is no doubt of a man's right to dispose of his property as he pleases, so that he does not injure his creditors, or put them in jeopardy. The question in all such cases is, whether such gifts, or

deeds, securing property to children, are made with a view to defeat and defraud creditors, or not. There are two species of fraud; one, where a man deliberately intends to defeat his creditors, and makes such voluntary dispositions of his property, as he knows, or believes, will produce that effect; the other, where, without any such design, he yet makes such disproportionate gifts, or voluntary settlements of his estate, as will, in all reasonable probability, not leave him sufficient property to pay his debts.

Of the first species of fraud, there is not, in this case the least pretense. The other ground requires fuller discussion. It is true, that a virtuous and honorable man may be so mistaken in his views of the state of his affairs, and of the value of his property, and the amount of his debts, as to be led by his affection to his children, to provide for them so abundantly, as necessarily to injure his creditors; and this would be called legal fraud, which would vitiate his voluntary settlements, or gifts. The decided cases on this subject, are very numerous; but scarcely two of them are alike, and each seems to depend on its own circumstances. I have examined and considered them carefully, and it is painful to be obliged to say, that there are considerable discrepancies among them.

The circumstances of the case we are con-

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sidering, have been *detailed. The question is, was the voluntary deed fair, and bona fide, under these circumstances. It has been stated, that there is not the smallest ground, even for suspicion, of moral, or intentional fraud. It remains, then, only to consider, whether the amount of property conveyed by the voluntary deed, compared with the whole of Mr. Izard's property, and that portion reserved out of it to pay his debts, and having reference to the amount of debt then existing, makes out a case of fairness, and just dealing, or the reverse. I incline to think, that guided by the tenor of the decided cases, prior to the great case of Howard v. Williams, 1 Bail. 575 [21 Am. Dec. 483], I should have been obliged to decide, that the voluntary deed could not have been sustained; but upon a most attentive perusal of that case, I think the principles laid down there will support the voluntary deed. If, therefore, there be at present a deficiency to pay off the debts, it must have arisen from some of those causes assigned by the Court of Appeals, as not affecting the validity of a voluntary deed, which was fair and bona fide when executed; such as depreciation, accident, misfortune, or other unfortunate changes in a man's affairs, and the like.

I have not before noticed, particularly, that the voluntary deed was immediately recorded in 1813, which was a number of years before the award, and before the decree, to wit: in 1824. The vehement presumption is, that the family—for unhappily this is a family controversy, knew of the existence of the voluntary deed, and of the recording. And no complaint was ever made, nor that fund ever looked to for payment.

It is therefore ordered and decreed, that so much of the bill as seeks to make the estate called the Elms, and the slaves included in the settlement referred to, liable to the debts of Henry Izard, be dismissed; and the said estate and slaves are declared not to be liable to the demands of the complainants, except that the Elms remains chargeable with the annuity to Mrs. Alice Izard, in the event of the residue of the estate of Ralph Izard proving insufficient to pay it.

From this decree the complainants appealed, and now moved that the same be reversed, and the real and personal estate therein mentioned, made liable to the complainants' demands.

The appeal was very learnedly and elaborately argued by Thomas S. Grimke, for the motion, and by Thomas W. Gadsden, and Petigru, contra; but the principles advanced, and the authorities relied on, are so fully examined and illustrated, in the opinion delivered in the Court of Appeals, that it is unnecessary to give the arguments of counsel.

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*HARPER, J., delivered the opinion of the court.

After as mature an examination as we have been able to make, we have reluctantly come to the conclusion, that the decree of the Chancellor must be reversed, on both the points which are the subject of appeal.

The first question relates to the liability to debts, of the land which was devised to Mr. Henry Izard, in fee-simple conditional, by the will of his father. By the Stat. 5 Geo. II., c. 7, P. L., 250, 2 Stat., 570, "houses, lands, negroes, and other hereditaments, and real estates," are made liable to, and chargeable with debts; and it is declared, that they shall be assets, in the hands of the heir, in the same manner that lands descended in England, are liable for the satisfaction of bond or specialty debts. From the generality of the terms of the statute, it is sufficiently plain, that whatever estate, or interest, Mr. Izard had in the land, was, during his lifetime, liable to be sold under execution for the satisfaction of his debts; and we are to inquire, what that estate or interest was? It was not a life estate, as seems to have been supposed, but a fee-simple conditional. The authorities are sufficiently clear, (*d*) that by a gift in fee-simple conditional, as the law in relation to it was settled before the statute de donis, the heirs of the body took nothing as against the ancestor. They were named, not for any benefit intended to them, or to control the ancestor's power of disposition over the lands, but to define the nature and extent of his estate, and to point out the

(*d*) 2 Westm. 2; 13 Edw. I, c. 1; 2 Inst., 332.

course of the descent, if no disposition should be made.

The authority of Bracton seems express to the point. In lib. 2, cap. 6, after speaking of the "donatio simplex et pura," which is a gift to a man, and his heirs generally, and saying that nothing is given to the heirs, though they are named in the gift, he observes, that the donor may enlarge the grant, and make others quasi heirs, by granting to one, his heirs, and assigns. He then adds: Item, sicut ampliari possunt hæredes, sic ut prædictum est, ita coarctari poterunt per modum donationis, quod omnes hæredes ad successionem non vocantur. Modus enim legem dat donationi, et modus tenendus est contra jus commune, et contra legem, quia modus et conventio vincunt legem: ut si dicatur, do tali tantam terram, cum pertinentiis, in N., habendam et tenendam sibi et hæredibus suis, quos de carne sua et uxore sibi desponsata procreatis habuerit, &c. He adds, in the same chapter, "Et unde hujusmodi hæredes procreati fuerint, ipsi tantum ad successionem vocantur; et si taliter feofatus aliquem inde ulterius feofaverit, tenet feofamentum, et hœredes tenentur ad warrantiam: cum

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ipsi nihil clamare possunt *nisi ex successione et descensu parentum; quamvis quibusdam videatur quod ipsi feofati fuerint cum parentibus, quod non est verum." That is, "if heirs of this sort are begotten, they only are called to the succession; and if one thus enfeoffed, enfeoff over another, the feoffee holds the land, and the hears are bound to warranty, inasmuch as they can claim nothing but by succession and descent from the parent; although it appears to some that they are enfeoffed together with the parent, which is not true."

The same inference may be drawn from what is said by Lord Coke, 1 Inst., 19, a. "If donee in tail at the common law, had aliened, before any issue had, and after had issue, this alienation had barred the issue, because he claimed fee simple." When, therefore, it is said, that it was on the performing of the condition, by the birth of issue, that the donee was enabled to alien, to forfeit, or to charge, it must mean, that he was enabled as against the donor. As against the issue, his power was perfect before performance, and they could claim nothing as against his act.

The same thing is said in the case of Willion v. Berkley, Plow., 241; and so also in Bac. Abr., Estate in tail, in the preliminary remarks to that title, which Mr. Preston, in his treatise on Estates, attributes to Chief Baron Gilbert. 2 Prest. Est., 294, ch. 7. Mr. Preston himself, in the treatise mentioned, examines the subject, and comes to the same conclusion, that the issue had no right, as against the ancestor. Id. It was only by the effect of the statute de bonis, that the issue were enabled to avoid the alienation of the ancestors. Thus it is said by Lord Coke, 2 Inst., 336, that the formedon in descender lay not at the common law. That remedy was given by the statute; although, in a particular instance, it would seem, that the formedon in descender did lie at the common law. Hargrave's note 5, to 1 Inst., 19 a.

The lands being thus liable in the hands of Mr. Izard, it was bound by the lien of the decree against him, as we have determined during the present sitting; (e) and lands bound by a judgment, or a decree, according to our decisions, are bound also in the hands of the heir. But if there had been no decree against Mr. Izard, in his lifetime, yet if the heir takes only by succession from the ancestor, and in his right, it would seem to follow, that whatever would be liable to debts in his hands, must be assets in the hands of the heir: and such is the purport of the statute, 5 Geo. II., c. 7, (supra.)

With respect to the other point involved in the case, we have lately had occasion, in sev-

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eral instances, to consider how far a vo*luntary settlement can be supported against creditors, whose debts existed at the time. It will not be necessary, therefore, to go into any elaborate examination of cases; but I will endeavor to express, with as much precision as the nature of the subject will allow, our views of the law.

The rule laid down by Chancellor Kent, in Reade v. Livingston, 3 John. C. R., 481, which, however, is not fully sanctioned in this State, is, that any, the least indebtedness, at the time of a voluntary settlement, will vitiate it. And the highest English authorities go far to support him in this position. In Russell v. Hammond, 1 Atk., 15, in Fitzer v. Fitzer, 2 Id., 511, and in Taylor v. Jones, Id., 600, Lord Hardwicke repeatedly says, in general terms, that with respect to creditors, a voluntary settlement is always fraudulent. An exception was made in the case of Lush v. Wilkinson, 5 Ves., 384, where there was a single inconsiderable debt. That was a case of peculiar circumstances, and the master of the Rolls observed, that every man must be indebted for the weekly bills of his house. The general rule, then, I take to be, that a voluntary settlement is void as to existing creditors; but it admits a qualification, if the debts are utterly inconsiderable, when compared with the amount of the donor's property, like those which a man incurs for the weekly expenses of his household; so, that, in fact, he cannot be considered to be substantially indebted.

The expression used in Lush v. Wilkinson, that it must depend upon this, whether the party is in solvent circumstances, has occasioned some embarrassment. The word insolvent is not very definite in its meaning. It can hardly mean, that the party, after making the voluntary conveyance, has re-

(e) Blake v. Heyward, ante, 208.

tained property to an equal, or greater, estimated amount than his debts. Perhaps it may be said, that a man indebted to near the estimated value of his property, is generally insolvent. It seems to me, from comparing the cases, that the solvency must be judged of by the event. If a man, indebted at the time of the settlement, continues embarrassed, and becoming more and more involved, ends in total and acknowledged insolvency, this is evidence enough of his insolvency as to the existing creditors, whose debts remain unpaid. The exception is, where the debts are so trifling and inconsiderable, that they cannot be regarded as having materially contributed to his subsequent failure. Whether there may not be a further exception, when the failure has been produced by some sudden and unforeseen casualty, such as fire, or tempests, it is not necessary now to inquire. The fluctuations in the value of

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property, occasioned by the mercantile *condition of the country, cannot however be ranked among those casualties. These fluctuations are constantly taking place, and men must calculate upon, and be prepared for them. If a man were ever so much indebted at the time of the settlement, and should afterwards pay off his debts, and become totally unembarrassed, these debts could not affect the settlement though he should subsequently become insolvent. He has proved his solvency at the time of the settlement. Or if he should so pay them off, with the exception of a trifling balance, so inconsiderable as to make it evident that the omission to pay that off also was a mere casualty, that might not vitiate. This was the case of Howard v. Williams (supra.) where of very large debts, a very trifling balance, less, I believe, than fifty dollars, remained unpaid, when the settlement was impeached; and it was held that this was a mere accident.

These are the views we expressed in the late case of McElwee v. Sutton, 2 Bail., 128, decided by us at Columbia, at our last sitting, and they seem to us consistent with the other decided cases in this State; particularly with the case of Howard v. Williams, which is principally relied on by the Chancellor, and with Iley v. Niswanger, 1 McC. Eq. 521, as also with Simpson and Davidson v. Graves, decided by this court, at Charleston, in April, 1828,(*f*) but not yet reported. The authorities, both in this State, and in England, are too uniform to allow us to decide differently, even if we ourselves were disposed to put a different construction upon the statute of Elizabeth.(*g*) But in truth I do not know any other rule that could be adopted. It would not do to say, that a man may make a settlement, if he retains property apparently sufficient to pay his debts. A man must know that his creditor's security is lessened, if he conveys away a considerable portion of his property, although he retains what appears to be more than sufficient. To say that the property must be very abundantly sufficient, would be to have no rule at all; but to determine every case, perhaps according to its circumstances, or perhaps according to the bias, or feelings, of the Judge, or the jury, who should pass upon it.

It is said, upon the authority of Lord Mansfield,(*h*) that the question in every case is bona fides, or not; although Lord Mansfield never doubted the authority of the cases to which I have referred. This is in some sense true, but courts must lay down for themselves some tests, by which to judge of the bona fides. We have no means of looking into the heart of a man, or deciding upon his motives but by his actions. It will not do to say, that because we are satisfied in our private judgments, that no actual fraud was

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in*tended; because Mr. Izard was known to be a gentleman of the most scrupulous integrity, and honor; that we shall apply another rule, than we should do in the case of an individual, whose character was less known and established. Although it may be called drawing a conclusion of fact, yet the making a certain inference from certain appearances, becomes at length a subsidiary rule of law. There are, as it has been said, certain general presumptions to take the place of individual and specific belief: as in the case of a bond, of which there has been no acknowledgment, and on which nothing has been paid for twenty years; we must pronounce it paid, although we may have the most intimate private conviction that it never has been paid.

We think there can be no doubt, but that Mr. Izard must be considered to have been indebted for the amount of his purchases of his father's estate, at the time of the settlement, although it may be, that the other parties interested in that estate, could have avoided those purchases. Whatever calculation may be made, and the difference of calculation is wholly immaterial, this was a very considerable debt. Although he may have retained property to two or three times the amount, this debt alone has occasioned the present insolvency of his estate; for the estate owes no other. And this has been occasioned by no sudden or unforeseen casualty, but by the ordinary, and gradual fluctuations, in the value of property. According to the principles I have expressed, the settlement cannot then be supported.

Another ground was taken in the argument, on which perhaps it is not necessary to remark at great length. It was, that the complainants in the present case were aware of the settlement, and acquiesced in it, by

(*f*) Vide Riley's Eq. Ca., 232.

(*g*) 13 Eliz., c. 5; P. L., 67; 2 Stat., 496.

(*h*) Cowp., 434.

neglecting to enforce their demand: and that they demanded, and received, from Mr. Izard, a security for their debt, which was satisfactory to them: and, therefore, that they ought not now to be permitted to enforce their claims on the settled property. I know of no rule, but the statute of limitations, or the presumption arising from length of time, barring their demands, that compels creditors to enforce their demands on a party, who has made a settlement, or to lose their recourse on the settled property. Perhaps it may be, in general, a benefit to the voluntary donees, that indulgence should be given. Men do not indulge their debtors that they may become insolvent, but that they may pay: and, if it should turn out, contrary to expectation, that they become less able to pay, it would be unreasonable, that this well-meant indulgence should be to the injury of the creditor. It

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could not *have been intended, and was not calculated to injure the donee. The case of Estwick v. Caillaud, 5 T. R., 420, was relied on as a case in which the court refused to relieve a creditor after long acquiescence. But the determination was not at all upon that footing. That was not a voluntary conveyance, being in part for the payment of creditors; and therefore was not subject to the rules respecting voluntary conveyances; and the jury determined that there was no actual fraud. It is true, that the court seems to go upon the supposition, that the portion of the property which Lord Abingdon conveyed to his own use, might be made liable in equity to creditors, who were not provided for; and that it was afterwards determined, upon a bill filed in the Exchequer, that no such relief could be had. Caillaud v. Estwick, 2 Anstruther, 381. But that goes on the principle, as expressed by Chief Baron Macdonald, in the case, that equity does not aid an execution at law. He observes, that there are different securities which an execution cannot reach: first, from the nature of the property, as stock in the funds: secondly, from the hands in which it is, as a trustee. The question of actual fraud, it is said, was settled at law. It may be observed, that although equity, will not aid in such a case, the property is not out of the reach of creditors, as it may be reached in general by a ca. sa.

Then as to the security that was to be taken. I do not know on what principle, a creditor, who becomes alarmed at his debtor's making a settlement, and demands and receives security, can be precluded recourse to the settled property, if the security should prove insufficient; even though he should profess himself satisfied with the security. He was mistaken as to the sufficiency of the security, but has done no injury to the donees. It would be a different case, if the party, when about to make a settlement, should consult his creditors, and they should consent to the settlement, on condition of a specified security's being given. In such a case, the consent would be the inducement to the giving of the security. Here there is no direct proof of the consent, nor does it in any manner appear, that Mr. Izard was induced by such assent to give the security. In the case of Stephens v. Olive, 2 Bro. C. C., 90, which was relied on, the property settled, was made liable, by the settlement itself, to the only existing creditor. If a party about to make a settlement, sufficiently secures his existing debts, by mortgage, or otherwise, the settlement of course will be good. No injury is done to the creditors. For aught that appears, this was done in Stephens v. Olive; and the existing mortgage creditor was not complaining, or before the court.

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*Upon the whole matter, we cannot see sufficient grounds to support the settlement, in the case before us: and it is, therefore, ordered, and decreed, that the Chancellor's decree be reversed; and that the real and personal estate referred to, be sold in satisfaction of the complainants' demands, as prayed in their bill.

Decree reversed.

Bailey, Eq. 240

CHARLOTTE PRICE, and Others, v. JOHN WHITE, and Others.

(Charleston, March, 1831.)

[1. *Receivers* ⇐197.]

A receiver, who discharges the duty assigned to him, is entitled to the usual commissions, although they may appear to be more than a reasonable compensation for the services rendered. In some instances they may be more, in others less, than an adequate remuneration; but even this is preferable to the uncertainty of suffering the rate of compensation to depend upon the discretion of the master. Nor is it any ground for an exception to the general rule, that the business was conducted almost entirely by overseers, and factors, inasmuch as the receiver has incurred the responsibility incident to these subagencies.(a)

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 388; Dec. Dig. ⇐197.]

[2. *Husband and Wife* ⇐12.]

On a bill filed by a wife against the creditors of her husband, to enjoin the sale of certain plantations, and slaves, claimed by them under an assignment from him, and by her under several settlements, it was ordered, that the sum of $2,000, per annum, be paid to her out of the crops, until the determination of the suit. The crops proving insufficient, after defraying expenses, to pay the annuity, held, that she was not entitled to be satisfied for the deficiency out of the capital of that portion of the property, to which it was decided that the creditors were entitled, but that she was restricted to the profits; and that it made no difference, that the husband had previously agreed to pay her

(a) Act 1821, 7 Stat., 323; Massey v. Massey, Chev. E., 159; Lowndes v. Pinckney, 1 Rich. E., 173, 175; rule of court, 3 Rich. E., 361.

the same annuity, absolutely; for even if such agreement had been made, it was not binding on the creditors, and, moreover, was suspended by the order.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 67; Dec. Dig. ⟸12.]

[3. *Costs* ⟸32.]

The costs of a groundless application ordered to be paid by the party making it, although the costs of the cause, generally, were directed to be paid out of the fund in court.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 120; Dec. Dig. ⟸32.]

This cause came up upon exceptions to the master's report; and was heard by De Saussure, Chancellor, at Charleston, in January, 1830. The bill was filed by Mrs. Charlotte Price, and her children, to enjoin the sale of several plantations, and slaves, which were claimed by her and them under various settlements and which were included in an assignment, under the insolvent debtor's Act, made by her husband, Thomas W. Price, to the defendants, for the benefit of his creditors, of whom the defendant, John White, was the principal. Upon filing the bill in September, 1825, it was or-

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*dered by the court, that Col. William Cattell be appointed receiver; and that he regularly pay over to Mrs. Price, out of the first proceeds of the crops, the sum of $2,000 per annum, heretofore agreed to be paid to her, until the determination of the suit. The cause was heard upon the merits, in January, 1827, by De Saussure, Chancellor, by whom a decree was made, which was subsequently modified by the Court of Appeals; and by the decree, as modified, Mrs. Price was declared to be entitled to a part of the property in dispute, and the residue was directed to be sold for the benefit of the creditors of her husband.(*b*)

The matters of account were referred to the master: and upon taking the account, a charge was made by the receiver, Col. Cattell, for commissions, of five per cent. on the whole amount which came into his hands, to wit: two and one-half per cent. for receiving, and two and one-half per cent. for paying away, amounting in all to $657.87. The charge was objected to by the defendants, as excessive, inasmuch as the receiver had a merely nominal management of the estates, the entire business of which had been conducted by the overseers of the several plantations, and the factor in Charleston. It was, nevertheless, allowed by the master.

The net produce of the crops, after defraying expenses, proved to be inadequate to the payment of the annuity to the complainant, during the pendency of the suit, and there was due to her an arrear of $1,324. It was insisted for the complainant, that this deficiency should be paid to her from the proceeds of the property sold by the master under the decretal order. The ground relied on was, that previous to the order of court, the full amount of the annuity had been paid to her by the defendant, Thomas W. Price, under an agreement entered into by him, upon her surrendering the Chyhaw plantation to his management; which agreement was for the payment of the specified annuity, absolutely; and the order of court being, that it should be paid, "as heretofore agreed to be paid," it was a charge upon the whole property. This claim was also allowed by the master.

The defendants excepted to the report for the allowance of these claims; and they also excepted to other parts of the report, but in the disposition made of the case, it becomes unnecessary to notice any other of the exceptions, than those first mentioned.

The Chancellor overruled all the excep-

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tions, and confirmed the *report; and the defendants now moved to reverse so much of his decree as overruled the exceptions.

Petigru, for the motion.

Yeadon, contra.

JOHNSON, J. The exceptions relating to the commissions of the receiver, and the arrears of complainant's annuity, have alone been insisted on in the argument; and to these the judgment of the court will be confined.

The rate of commissions allowed by law to a receiver, is necessarily arbitrary. In some instances, the commissions may prove to be more, and in others they will be less, than an adequate remuneration; but even this is better than the uncertainty of suffering the rate of compensation to depend upon the discretion of the master. When, therefore, a receiver discharges the duty assigned to him, he is entitled to the usual commissions, although they may appear to be more than a reasonable compensation for the services rendered. It is said, however, that Col. Cattell, the receiver in this case, did nothing; and his own examination, in which he states that he would not take charge of one of the plantations, because the others were withheld, is relied on to prove it. But the fact is not disputed, that they were all managed by overseers appointed and employed by him, and that the crops were sold by factors of his own selection, and under his direction. It was not expected, that he would perform these services in person, and it does not follow that the interests of those concerned were not promoted by this arrangement; and at any rate, he incurred the responsibility incident to these subagencies, and, therefore, he is entitled to his commissions. If any thing has been lost by his neglect, or the mismanagement of his agents, that would be the foundation of a demand upon him to make it good.

(*b*) Vide post, 244—next case.

The claim of the complainant, to have the deficiency of the annual allowance of $2,000, made up out of the capital of the estate, is clearly without any solid foundation. If it be referred to her contract with her husband, it would be sufficient to remark, that by her own statement in the supplemental bill, it was a mere hiring from year to year, which either party might put an end to at pleasure. But if the agreement created a larger liability, it was one which the husband could not transfer to the defendants, his assignees, so as to bind them without their consent. And, moreover, the order of the Chancellor superseded that agreement altogether, and puts the allowance on an entirely different footing. The order of September, 1825, directs that the receiver shall regularly pay

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*over to Mrs. Price, out of the first proceeds of the crops, the sum of $2,000 per annum, heretofore agreed to be paid to her, until the determination of the suit. The order of the Court of Appeals charges it upon the same fund; and even if the court had possessed the power, yet there is no order charging the deficiency on any other, or creating any other liability. A plain, common sense view of the whole case, will lead to the same result. In justice, Mrs. Price was only entitled to receive a dividend of the income of these estates, in proportion to that part of them which was ultimately adjudged to belong to her; and that constituted but a small portion of the productive property, to wit: the slaves: but she has received the income of the whole, not only of her own, but of that to which the defendants are entitled; and it is unreasonable that she should have more. In this respect, therefore, the decree of the Circuit Court must be reversed.

The other grounds of appeal have not been insisted upon: and the decree must, therefore, in all other particulars, be affirmed. Whatever costs may have been incurred, by reason of the application of Mrs. Price, to be paid her annuity out of the capital of the estate, must be paid by her: all other costs to be paid out of the funds of the estate, as heretofore ordered.

O'NEALL, J., and HARPER, J., concurred.

Decree modified.

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*The case made at the former hearing of the preceding cause, upon the merits of the bill, has been reported in the Carolina Law Journal, p. 297, et seq.; but as the copies of that valuable publication have become less generally accessible than is desirable, and the case itself is frequently referred to, and is both important and instructive, it has been deemed advisable to subjoin a report of it in this place.

Bailey, Eq. 244

CHARLOTTE PRICE, per Prochein Amy, and Others, v. JOHN WHITE, BENJAMIN F. HUNT, WILLIAM BURGOYNE, and THOMAS W. PRICE. S. C., Car. L. J., 297.(a)

(In the Court of Appeals, Charleston, March, 1828.)

[1. *Husband and Wife* ⇐30.]

All settlements by the husband upon his wife, whether made before or after the marriage, are marriage settlements within the meaning of the Act of 1785(b) and are void, as to his creditors, if not recorded within the time prescribed by that Act; and it is immaterial, whether the settlement is voluntary, or supported by a valuable consideration, such as the wife's equity; and if, upon that consideration, whether it be made without, or in pursuance of, a decree for a settlement. So, too, a settlement, contained in a deed of separation, is a marriage settlement, and must be recorded. Nott, J., dissenting as to the latter point.(c)

[Ed. Note.—Cited in Brock v. Bowman, Rich. Eq. Cas. 188; McMeekin v. Edmonds, 1 Hill, Eq. 296; Perryclear v. Slowman, 2 Hill, Eq. 510; Bank of United States v. Brown, Id., 565, 30 Am. Dec. 380; Laborde v. Penn, McMul. Eq. 449; Cloud v. Calhoun, 10 Rich. Eq. 373, 374; Trustees v. Bryson, 34 S. C. 415, 13 S. E. 619.

For other cases, see Husband and Wife, Cent. Dig. § 176; Dec. Dig. ⇐30.]

[2. *Husband and Wife* ⇐11.]

Where, upon a bill by husband and wife, to recover a legacy to her, it was decided by a competent tribunal, that the wife took an absolute estate in the property bequeathed, and the husband was ordered to make a settlement, the interest of the wife under the will, is res judi-

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cata; and if the settlement *fail, from not being duly recorded, the court will not review the question, whether the will was not, in itself, a sufficient settlement to protect the property against the creditors of the husband.(d)

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 56; Dec. Dig. ⇐11.]

(a) Post, 458; Napier v. Wightman, Sp. E. 367; Cloud v. Calhoun, 10 Rich. E., 373; Sibely v. Tutt, McM. E., 328; Laborde v. Penn., Id., 449; Head v. Halford, 5 Rich., E., 128; Wade v. Fisher, 9 Id., 362; Rich. E. Ca., 188.

(b) 4 Stat., 646; 6 Stat., 636.

(c) Decrees that constitute settlements in themselves, and do not contemplate the execution of a deed or further act of the parties may stand on a different footing. Ellis v. Woods, 9 Rich. E., 26; 3 Strob. E., 42; 4 Rich. E., 101.

(d) The doctrine of the present decision, on this subject, is greatly restricted by the later case of Bank v. Brown, 2 Hill Eq., 558 [30 Am. Dec. 380]. This case is, in fact, overruled by that of Bank v. Brown. The settlements set aside in Price v. White, were not all voluntary; and indeed there was but one, that of 1794, which could be called so. That of 1796, which was declared void, was supported by the same consideration as the settlement of the town house, in Bank v. Brown, which was sustained by the court, to wit: the wife's equity; and the only difference between the cases, was in favor of the settlement of 1796, as that was made under a decree for a settlement, and was executed before the wife's legacy was surrendered to the husband; whereas, in the settlement in Bank v. Brown, the money was paid to the husband without a decree, and before the settlement was ex-

[3. *Wills* ⟸612.]

A bequest of personalty to trustees, for a married woman, in trust, "to permit her, and the heirs of her body, to have and enjoy the free use, benefit, and profits thereof, and not subject to the debts of any body," vests an absolute estate in her, upon the executor's assenting to the legacy, and the marital rights attach. Semble.

[Ed. Note.—Cited in Cloud v. Calhoun, 10 Rich. Eq. 373.

For other cases, see Wills, Cent. Dig. §§ 1387–1392, 1608; Dec. Dig. ⟸612.]

[4. *Husband and Wife* ⟸12, 30.]

A decree in equity is not notice of a settlement ordered by it; and where a settlement is ordered to be made by a husband upon his wife, it must be duly executed, and recorded, or it will not avail against his creditors.(e)

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 59, 176; Dec. Dig. ⟸12, 30.]

[5. *Husband and Wife* ⟸30.]

Where a husband, by a deed of separation, conveyed to a trustee certain personal estate, to which the wife was entitled, and on which the marital rights had not attached, in trust for her sole and separate use, and she remained in the separate possession of the property, for more than five years; held, that her possession was adverse, and barred the creditors of the husband, having notice, although the deed had not been duly recorded.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 176; Dec. Dig. ⟸30.]

[6. *Wills* ⟸612.]

A devise of money to be laid out in land, and settled to the use of a married woman, attaches upon land purchased with the money, discharged of superadded trusts contained in the settlement, which are inconsistent with the limitations contained in the devise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1387–1392, 1608; Dec. Dig. ⟸612.]

[This case is also cited in Fowke v. Woodward, Speers, Eq. 246, on the subject of notice.]

In the year 1791, the complainant, Charlotte Price, then Miss Charlotte Smith, intermarried with the defendant, Thomas W. Price; and at the time of her marriage, was entitled, under the will of her grandfather, James Skirving, to a legacy, which had been invested in the purchase of twenty-five slaves, by the executors, who held them for her. No settlement was executed before the marriage; but the executors refused to deliver the slaves to the husband, unless he would make a settlement: in consequence of which, he by a deed, duly executed, conveyed the said slaves to certain trustees, in trust for himself and wife, during their joint lives, and after the death of either, in trust for the survivor, for life, and upon the death of the survivor, in trust to assign and deliver them to the issue of the marriage. This deed was executed on 5 March, 1794, but was not recorded until 2 September, in the same year. As soon as it was executed, the slaves were surrendered to the husband, by the executors.

Philip Smith, the father of Mrs. Price, died in January, 1796, and by his will, amongst other things, devised to certain trustees, whom he also appointed executors, the sum of fourteen hundred guineas, to be laid out in the purchase of lands, to them, and the survivors, and survivor, of them, and the heirs and assigns of such survivor, in trust, to permit his daughter Charlotte, the complainant, "and the heirs of her body lawfully begotten, to have, after the land shall be bought and purchased, in manner aforesaid, for her, the free use, occupation, and enjoyment of the same, and not subject to the debts of any body." He, also, in the next clause of his will, bequeathed to the said trustees, forty-five slaves, in trust, to permit his "said daughter Charlotte, and the heirs of her body, lawfully begotten, to have and enjoy the free use, benefit, labor, and profits arising from the said slaves, and of their future issue and increase, as herein above mentioned; in trust, to and for the same

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*uses, intents, and purposes, and according to the true intent, and meaning thereof, and not otherwise."

The testator also devised the sum of one thousand guineas, and other personal estate, to his daughter Mary; and bequeathed a very large number of slaves to his son, Philip Skirving Smith, and after his death to his children, with a limitation over, in the event of his leaving no children, to testator's daughters, Charlotte, and Mary, equally to be divided between them, or if his said daughters be then dead, to and amongst such of their children as shall be then living. The rest and residue of his slaves, the testator directed to be equally divided, share and share alike, between his said daughters; and bequeathed the same to the said trustees, in trust, to permit and suffer his said daughters, Mary, and Charlotte, "and the heirs of their bodies, lawfully begotten, to have and

ecuted, and even before the settled property was purchased. The case of Bank v. Brown, has, therefore, in effect decided, that marriage settlements, within the meaning of the Acts of 1785, are settlements supported by the marriage consideration; and, consequently, comprise only settlements executed before marriage, or, if after marriage, in pursuance of previous articles. It is said, it is true, in Bank v. Brown, that voluntary conveyances by the husband, to the use of the wife, after marriage, are to be regarded as marriage settlements; but this was obiter merely, as the question did not arise in the case. And it is difficult, on principle, to support this distinction between voluntary settlements, and settlements upon consideration. A voluntary settlement may be unavailing against creditors, from the mere want of a consideration; but if the marriage consideration be of the essence of a marriage settlement, then the absence of all consideration, cannot render a conveyance a marriage settlement. Nor is there in the policy, more than in the terms, of the Act of 1785, any thing that requires the distinction. Voluntary settlements are, in truth, less dangerous than settlements supported by a consideration. The former are open to attack, although recorded; while the latter are invulnerable, and the only protection of the creditor is, the notice furnished by recording.—R.

(e) Ante, 107, note c.

enjoy the free use, benefit, and profits, of the said slaves, and their issue."

The testator charged his real estate, which was very considerable, with the payment of the sums of fourteen hundred guineas, and one thousand guineas, devised to his said daughters; and, subject thereto, he devised the whole of his real estate to his son, Philip Skirving Smith, for life, remainder to such of the children of his son, as his said son should appoint; in default of such appointment to all the children of his son, equally; and in default of children, then to his son's heirs, or heirs-at-law.

All the executors renounced, and administration, cum testamento annexo, was granted to Benjamin Postell; against whom Price, and wife, on 14 September, 1796, filed a bill to recover possession of the legacies to her. In this bill, Mr. Price offered to make a settlement on his wife, and on 20 September, it was referred to the master, to prepare a settlement on Mrs. Price, of such estate, and for such uses, intents, and purposes, as are mentioned in the bill. On 4 October, the master reported, that Mr. Price had, shortly before the filing of the bill, executed a settlement on Mrs. Price, of a valuable plantation at Wiltown, on the Ponpon River, which he had purchased for the sum of £1,348.12; and that in consequence of this settlement, and in consideration of it, the administrator had paid to him the sum of fourteen hundred guineas, which had been devised to be laid out in land, for the use of Mrs. Price. The master further reported, that another settlement, of forty-five slaves, had been prepared, and approved by the solicitors of the parties; and he recommended, that trustees be appointed to support the trust, and that the settlement be executed by Mr. Price. On the same day, the court, by a decretal order, confirmed the settlement of the Ponpon plantation, and the payment of the fourteen hundred guineas to Mr. Price; and trustees were appointed to support the trusts of the settlement of the slaves, and it was ordered, that upon Mr. Price's executing that settlement, he should be put in possession of such part of the testator's estate as had been bequeathed to the use of Mrs. Price.

The settlement of the Ponpon plantation, above mentioned, was by lease and release, bearing date, respectively, 8 and 9 September, 1796. The trusts were to husband and

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wife, for life; to *the husband absolutely, if he survived the wife; to the use of the wife, for life, if she survived; remainder to the issue of the marriage; and in default of issue, then to such persons as the husband might appoint. Trusts to support contingent remainders were interposed, at the termination of every life estate; and a power was reserved to the husband to sell and dispose of the settled estate, on condition of his settling other estate, of the value of fourteen hundred guineas, upon the same trusts, and with the approbation of the trustees. These deeds were not recorded until 7 July, 1797.

The settlement of the forty-five slaves was by deed, bearing date 9 November, 1796. The trusts were, to husband and wife, for life, not subject to their debts; to the husband, for life, not subject to his debts; to the wife, for life; on the death of the survivor, to the children of the wife; and in default of issue, to the survivor of husband, or wife. A power was reserved to the husband, to sell any of the slaves, upon condition of settling other property of equal value. This deed was not recorded until 7 July, 1797.

Mr. Price, subsequently, by virtue of the power reserved to him in the settlement of September, 1796, sold the Ponpon plantation; and, by deed bearing date 26 June, 1805, conveyed a plantation at Toogadoo, to the trustees, upon the same uses and trusts, and subject to the same proviso, as are specified in the settlement of September, 1796. This deed was never recorded in the office of the secretary of State.

Shortly after this period, differences unhappily occurred between Mr. and Mrs. Price, in consequence of which they separated; and during the separation, to wit: in the year 1811, Philip Skirving Smith, the brother of Mrs. Price, died intestate, unmarried, and without issue. By this event, Mrs. Price became entitled to a moiety of the slaves bequeathed to the intestate by his father, under the limitation over, contained in the will, to the testator's daughters, the complainant, and Mary, who had since intermarried with William Jones; and being the only sister of the intestate, of the whole blood, Mrs. Price likewise became entitled, under the Act of 1791, to the whole of the real estate devised to the intestate by his father; and, also, to all the real and personal estate, to which the intestate was entitled in absolute property. Vide Jones and Wife v. Price and Wife, 3 De S., 165. Administration of the estate of Philip Skirving Smith was granted, first to Mrs. Price's uncle, Col. William Skirving, and upon his death to Mr. Price. The friends of Mrs. Price, thereupon, interfered, in order to obtain a settlement upon her of the newly acquired property; when, to prevent a suit in equity, a compromise was suggested, and agreed to. In pursuance of this agreement, an indenture was executed by and between Mr. Price of the first part, Mrs. Price of the second part, and Thomas Rhett Smith of the third part: by which it was stipulated, that Mr. and Mrs. Price should be permitted to live separate, and that a plantation at Chyhaw, and fifty-one slaves, being one-third of the whole number, should be settled to the sole and separate use of Mrs. Price; that a plantation at the Horse Shoe, and one other

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*third of the slaves, should be settled upon Mr. Price, for life, with remainder to such of

his children as he should appoint: and that the remaining third of the slaves, and the residue of the real estate, consisting of a plantation at Ashepoo, of four hundred and ninety acres, a tract on the Great Swamp, of five hundred acres, a tract of three hundred acres, called Bedon's, at Toogadoo, a tract of two hundred acres in St. Bartholomew's Parish, and eleven hundred acres in the State of Georgia, should be conveyed to Mr. Price, absolutely. This decree was executed on 31 December, 1812, but was not recorded until 3 August, 1813.

On 4 May, 1813, Mr. Price executed a conveyance, of the Chyhaw plantation, and fifty-one slaves, to a trustee, for the separate use of Mrs. Price, conformably to the agreement contained in the deed of separation. And, subsequently, conveyances were executed, pursuant to the agreement, of the lands and slaves, stipulated to be conveyed to Mr. Price, as well as those that were to be settled upon him for life, with remainder to his children, as those which were to be conveyed to him absolutely. None, however, of the deeds, which were executed in pursuance of the stipulations contained in the deed of 31 December, 1812, were ever recorded.

Mrs. Price took possession of the Chyhaw plantation, and the fifty-one slaves, conveyed to her use, and remained in possession for five years; when she was induced to surrender them to management of her husband, upon his agreeing to pay her the sum of $2,000 per annum, which was regularly paid to her by his factor, the defendant, White.

It was subsequently, and only a short time before the filing of the bill, discovered, that the tract on Toogadoo, called Bedon's which had been conveyed to Mr. Price, as a part of Philip Skirving Smith's estate, had been purchased by him as a gift to his sister, Mrs. Price: and that in fact, as early as June, 1808, he had duly conveyed it to trustees, for her sole and separate use, for life, with remainder to two of her sons, and with divers limitations over. This conveyance does not appear to have been ever recorded.

The defendant, John White, was the factor of Philip Skirving Smith, and upon his death, continued to do the business of the estate for Mr. Price. In this relation, Mr. Price became gradually indebted to him for advances of money, and indorsements, which Mr. White was obliged to pay, until the debt amounted to a very considerable sum. Mr. Price being unable to pay the debt, give him, as a security, a mortgage of one hundred negros, including a part of those settled on Mrs. Price and her children. On 15 May, 1819, Mr. Price confessed a judgment to Mr. White, on a bond in the penalty of $60,000, to secure Mr. White for advances made, and to be made, and also to indemnify him against his indorsements; and at the commencement of this suit, there was due to Mr. White, by Mr. Price, the sum of $73,107.88. In October, 1824, Mr. Price was arrested under a ca. sa., at the suit of another creditor, and was admitted to the benefit of the insolvent debtor's Act, upon executing an assignment of his estate, including all his right, title, and claim, to the real and personal estate comprised in the foregoing settlements.

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The defendants, John White, *Benjamin F. Hunt, and William Burgoyne, were appointed assignees: and John White, being the principal creditor, offered to sell under his execution; whereupon, this bill was filed in September, 1825, by Mrs. Price, and her children, to restrain the defendants from selling any part of the settled property.

The bill charged the defendant, White, with express notice of all the deeds, and prayed that they might be enforced. The bill further prayed that the settlements of 1796 might be reformed, so as to conform to the will of Philip Smith.

An injunction was granted, and a receiver appointed, upon filing the bill: and the receiver was directed to pay to Mrs. Price, during the pendency of the suit, the sum of $2,000 per annum, heretofore agreed to be paid to her by her husband.

The defendant, White, by his answer, explicitly denied all notice of the settlements, or of any of them. He admitted that he knew that Mr. and Mrs. Price lived separate, and that Mr. Price informed him he had relinquished the Chyhaw plantation and negros to her: but he knew nothing of the particulars. And he averred, that so far from being apprised of the existence of any settlements, he was assured by Price that the property was all his own: and, under this impression, Price, by persuasion and plausible pretences, drew him on to make large advances, and, in his absence, prevailed on his partner to make other advances far beyond what he ever intended; and that it was not until August, 1823, when his advances to Mr. Price had all been made and his liabilities for him incurred, that upon his insisting that Price should provide another endorser for his notes in bank, he was, for the first time, made acquainted with the existence of the settlements mentioned in the bill. The defendants insisted that none of the settlements could avail against creditors, being all void, either for not being recorded at all, or not recorded within the time prescribed by law. They further insisted that they were entitled to the benefit of the power, contained in the settlement of selling the Toogadoo plantation, on securing to Mrs. Price the sum of fourteen hundred guineas: and that all the property contained in Price's schedule was liable to his creditors, except the tract of land called Bedon's, on Toogadoo.

The cause came on for hearing at Charleston, in January, 1827, before De Saussure,

Chancellor, who pronounced the following decree:

De Saussure, C. There are many important and difficult questions involved in this case, and I approach it with hesitation, and even with reluctance; for whatever may be the decision, it may, and probably will, work a hardship on one side or the other; either on a respectable lady and her children, who have been hardly dealt with; or upon a highly respectable gentleman, who is a bona fide creditor to a very large amount himself, and who is also the assignee of other creditors.

The first question relates to the twenty-five slaves and their issue, which were purchased for Mrs. Price, during her minority, with a sum of money bequeathed to her by the will of her grandfather, Dr. James Skirving. His execu-

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tors refused to assent to *the legacy, or to deliver the slaves so purchased, until a settlement should be made. This was acquiesced in by Thomas W. Price, the husband, who conveyed the same by deed bearing date 5 March, 1794, to certain trustees, in trust for the joint use of the husband and wife, during their joint lives; then to the use of the survivor for life; and after the death of the survivor to the use of the children of the marriage. This deed was recorded on 2 September, 1794, being later than the time limited by the statute for recording marriage deeds; which declares void all marriage settlements not recorded within three months from the execution thereof. (f)

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*It was urged for the complainants, that the statute does not apply to cases of settlements made after marriage. The statute is not explicit as to what marriage settlements were intended; but in the construction of the statute, the courts have decided that it does apply to settlements after marriage, as well as to those before marriage. And this, doubtless, on the principle, that the less favored post-nuptial settlements, which are not allowed to be valid in all cases, as against creditors, even when duly recorded, could not be intended to be exempted from the obligation of being recorded, and thus put on a better footing than ante-nuptial settlements. Whatever were the reasons, however, I consider the point settled by the decisions; and the settlement as to the slaves before mentioned cannot, therefore, be held to be valid as a settlement.

It was, however, urged, that the negros in question were conveyed and held in trust for the benefit of Mrs. Price, by consent of the husband, who could not have reduced the slaves into possession, unless he had so consented; and that he, and his creditors claiming under him, cannot set up the non-recording in due time, to defeat the rights of Mrs. Price, as that was a fraud on her, which ought not to prejudice her. To this it is answered, that it was not the duty of the husband, but of the trustees, to record the deed; and that however strong the argument might be as against the husband, it does not apply to his creditors. They stand upon their legal rights; and do not, as was argued, stand merely in the shoes of their debtor, Mr. Price. The statute was enacted for their benefit, and not for the husband.

It was further argued, that if the non-recording of the post-nuptial deed does avoid

(f) Act of 1785, P. L., 357, 4 Stat., 656; 6 Stat., 636. A portion of this Act, as it is printed in the collections of the public laws, is wholly unintelligible. It has frequently occasioned embarrassment in practice, and has defied the ingenuity of the bar and the bench to give a sensible construction to its terms. In the case of Screven v. Bostick, at Coosawhatchie, in January, 1827, it was ingeniously contended, that this Act should be construed in connection with the 47 section of the County court Act, P. L., 372, 7 Stat., 234, which requires clerks of County courts, twice a year, to transmit to the office of the secretary of State, "memorials of all such deeds, settlements, &c., as shall have been proved and recorded in their respective courts;" and it was insisted, that the exception in the marriage settlement Act, "of such as shall be recorded or lodged in the said office," must have been intended to apply to marriage settlements which had been recorded in the County courts. The two Acts were ratified within nine days of each other, and were probably passing through the usual stages of legislation at the same time. In conformity with this view, the Chancellor, by whom the cause was heard, decided that a settlement, recorded in a County court, was not void on account of its not being recorded in the office of the secretary of State. 2 McC. Eq., 413. It has been suggested by Judge Brevard, that the Act was not correctly printed; 2 Brev. Dig., 45.

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*n.: but in the early case of Lennox v. Gibbes, in 1792, 1 DeS., 305, the Chancellor, who delivered the decree of the court, said, that in consequence of the obscurity of the Act, as printed, the court had procured a certified copy of the original Act as ratified from the secretary's office, and had found it, verbatim et literatim, the same as the printed copy. In that case, the court actually decided, that the part of the Act in question was inoperative, by reason of its being wholly unintelligible. It has since been ascertained that the error, for there was an error originated in the engrossment of the Act from the bill as passed by the legislature. The bill originally offered was amended in its passage, which occasioned several interlineations and erasures; and in engrossing the Act, some of these interlineations were inserted in the wrong place. This appears from the original bill, which was discovered by the late Hon. Thomas S. Grimke, among the papers of his father, Judge Grimke, who was Speaker of the House of Representatives when the Act was passed. An inspection of this bill at once furnishes a clue to the error, and provides the means of correcting it, as will be seen by the following copy of the part of the Act in question; which is given as it appears in the printed copies of the Acts, but with the words which are erroneously inserted italicised, and divided into sections, and numbered in the order in which, as it appears by the bill, they ought to have been copied. By reading these passages in the order in which they are numbered, the language of the whole is rendered clear and intelligible, to wit:

"And all that shall hereafter be entered into,

it as a settlement, the parties were remitted to their original rights; and that the property in question should be considered as held by the executors, or trustees, as before their assent to the legacy, and before the possession had been delivered to the husband. This is a very ingenious view of the

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subject, and *has great force when applied to another state of things, as will be hereafter shewn; but not in the question as to these twenty-five slaves. The effect of it, so applied, would be to defeat the statute altogether. In point of fact, then, the possession was in the husband, by the consent of the executor, who had previously held the slaves in the ordinary way, and not for the separate use of Mrs. Price; and that possession could have been qualified by the recording of the settlement, which last was not done in time. So far, therefore, as regards these twenty-five slaves, and their issue, I am of opinion, that they are liable to the creditors of Thomas W. Price, the husband; unless some other ground be relied upon and sustained on a further view of the whole case.

The next question relates to the property comprised in the will of Mrs. Price's father, Philip Smith, in which she had an interest. And first, with respect to the slaves bequeathed in trust for her. Upon examination of the last will of Mr. Philip Smith, it will be seen that the provision made by it for her was in trust, and substantially for her separate use; for the property was not to be subject to the debts of any persons; which must mean the debts of any person, to which they might possibly become liable, without such restriction, such as her husband. This will, then, made a settlement. The testator had a right to make it, and it was and is obligatory. Any attempt to change or vary the interest thus given, and thus limited, in contravention of the will of the father, was void. No further settlement was requisite; and if one was attempted, in court or out of court, and has become invalid and void, for want of recording or from any other cause, that cannot shake the pre-existing right given by the father, as limited by the will. So far, therefore, as regards these slaves bequeathed to trustees for Mrs. Price, by her father, the right remains unimpaired in her. It will be remembered, however, that where a husband is permitted to have the possession of the separate estate of the wife during the coverture, the account to which she may be entitled cannot be carried further back than one year preceding the husband's death.

The next question relates to the slaves bequeathed by Philip Smith to his son, Philip Skirving Smith, for life, with limitations to his daughters and their issue. The son died intestate, and without wife or child; and by a decision of this court in the case of Jones and wife v. Price and wife, 3 DeS., 165, it was settled, that the limitation over to the two daughters, of whom Mrs. Price was one, was good and valid, and that they were entitled to equal moieties of those slaves; which decree was carried into effect. By recurrence to the will of Philip Smith, it will be seen that it provides the same uses and trusts, and expresses the same intents and purposes as to these slaves, as with respect to the other slaves bequeathed directly to trustees for the daughters. The same reasoning, therefore, applies to these slaves as to those bequeathed to trustees, directly for Mrs. Price, in the first instance, of which we have already spoken and decided.

The next question relates to the slaves ac-

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quired by Philip Skirving *Smith himself during his life. He died intestate; and Mrs. Price, who was the only sister of the whole blood, there being no brother, was entitled to these slaves. But after the death of Col. Skirving, the administrator of Philip Skirving Smith, Mr. Price, the husband, adminis-

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for securing any part of the estate, real or personal, in this State, of any person, or persons, whomsoever, shall, within three months after the execution thereof, be duly proved, and in like manner, *(2 to be recorded; excepting such as shall be) (1 recorded or lodged in the said office,) (4 And in case any person or persons,) (3 entered in without the limits of this State, which shall be recorded, or lodged to be recorded, in the said office within twelve months from the date thereof,)* whomsoever interested in such marriage deed," &c.

These passages being taken up in the order specified, the whole section will read thus:

"Be it enacted, That on or before the first day of September next, all and every marriage contract, deed or settlement, now actually existing, after being duly proved, shall be recorded, or lodged, in the secretary's office of this State, to be recorded; and where such contracts, or marriage settlements, or the parties thereto, are without the limits of this State, then, and in such case, the parties interested therein, shall be allowed twelve months from the passing of this Act to record, or lodge, such contract as aforesaid, in the office aforesaid, to be recorded.

And all that shall hereafter be entered into, for securing any part of the estate, real or personal in this State, of any person, or persons, whomsoever, shall, within three months after the execution thereof, be duly proved, and in like manner *recorded, or lodged, in the said office to be recorded; excepting such as shall be entered in without the limits of this State, which shall be recorded, or lodged to be recorded, in the said office, within twelve months from the date thereof. And in case any person, or persons,* whomsoever, interested in such marriage deed, contract, or settlement, shall neglect or refuse to record, or lodge, the same in the manner, or within the times before mentioned, and in the office aforesaid, to be recorded, then the same, in respect to creditors, shall be deemed, and is hereby declared to be fraudulent; and all and every part of the estate thereby intended to be secured to such person, or persons, shall be liable to the payment and satisfaction of the debts due and owing by such person, or persons, in as full and ample a manner, to all intents and purposes whatsoever, as if no such deed, contract, or settlement, had been ever made or executed."—R.

tered and acquired possession of these slaves; and I am of opinion that the marital rights attached, and the slaves became his property, and liable to his debts, unless secured by some effectual settlement or other instrument. The instrument relied on in this case was a deed of 31 December, 1812, which operated as a deed of separation between Mr. Price and his wife; and an agreement through a trustee, that the slaves to which Mrs. Price was entitled on the death of her brother intestate, should be divided into three parts: one-third to Mrs. Price, separately, one-third to Mr. Price, and one-third for the children. This deed was recorded, and was followed up by the deed of 4 May, 1813, to give effect to the former, but the latter was never recorded. In my judgment, the marital rights had attached before these deeds, and these slaves will be liable to the debts of the husband, upon the same principles as apply to the twenty-five slaves first above mentioned.

We come, now, to consider the questions which relate to the lands. These consist of three distinct classes. First: The lands devised by the father to Philip Skirving Smith, with limitations to his heirs-at-law. Second: The land purchased with the sum of fourteen hundred guineas, bequeathed by Philip Smith, the father, to be laid out in land, for the benefit of his daughter, Mrs. Price. Third: A tract of three hundred acres of land, called Bedon's, which Philip Skirving Smith conveyed to trustees, for the sole and separate use of Mrs. Price, for life, and then to her children, whom he names, free from the control, or debts, of her husband.

As to the first, Philip Skirving Smith dying intestate, without wife, or child, Mrs. Price, his only sister of the whole blood, became entitled to the inheritance of these lands, as his heir-at-law, if the limitations of the will were to the heir-at-law of the son, Philip Skirving Smith, or jointly with her sister of the half-blood, Mrs. Jones, if the limitations were to the heirs-at-law of the testator. This last has not been made a question in this cause, nor is Mrs. Jones a party to this suit. We will then consider Mrs. Price as inheriting all the lands devised to her brother, as his heir-at-law. Of that inheritance, she could not be divested by any act of her husband. Nothing could divest her but her voluntary renunciation of her inheritance, or the decree of a competent court, made in a cause, in which she was a voluntary party, properly made so, and for her benefit. The non-recording of any settlement, made with or without the sanction of a competent court, could not affect her right to the inheritance, as in cases of personal estate; for the non-recording of a settlement has no other effect than to nullify the settlement. It is as if no settlement had been made. That, as to personal property lets in the marital rights, which give the absolute estate to the husband, unless as above stated, such personal estate was guarded by the will of the donor, and was effectually settled by it, which, certainly, requires no recording.

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As to the *real estate of the wife, comprised in a settlement, which is not recorded in due time, such non-recording lets in the marital rights of the husband, such as they were, as if no settlement had been made; and that amounts only to a life estate. The inheritance remains, then, untouched, and Mrs. Price is entitled to these lands.

The second question as to the land, relates to a tract purchased with the fourteen hundred guineas, bequeathed by Philip Smith, to purchase land for his daughter, Mrs. Price. All the reasoning applicable to the first question, in relation to the land, applies also to this. Whether included in the settlements or not, the ultimate inheritance remains in Mrs. Price, unless other considerations interpose. The only question which can arise, grows out of the fact, that the fourteen hundred guineas were laid out in the purchase of the Ponpon lands, under a decree of the court, on a settlement proposed, reported by the master, and accepted, but not recorded. By the terms of that settlement, Mr. Price was at liberty to sell that land, provided he settled fourteen hundred guineas in other land. Mr. Price did sell the land, and it has been sold, subsequently, to several persons in succession, and is now held by the last purchaser, for valuable consideration. It would be most mischievous to disturb these sales and these purchasers. Their purchase, and the possession, ought to protect them; nor is there any inducement to strain so immoderately, to protect the wife; for it is conceded by the counsel for the defendants, in his able argument, that Mrs. Price is entitled to the benefit of fourteen hundred guineas, in the after purchased lands on Toogadoo. She must have the benefit of that.

Another question, if question it can be called, relates to the tract of three hundred acres of land, called Bedon's, conveyed by Philip Skirving Smith, to trustees, for the use of Mrs. Price, for her separate use for life, and at her death to her children. There can be no doubt as to her right to that estate.

In the discussion which has been had, it has been argued, that settlements made under the authority, and in pursuance of decrees of the Court of Equity, are rendered void, if not recorded in the time prescribed by the statute. From the views which I have taken of this case, it does not appear to me that such a construction would affect its results. But I am desirous that I should not be understood as acquiescing in this doctrine. It is very questionable, to say the least of it. The statute evidently looked to settlements made by the parties themselves; to

deeds in pais. The object in requiring such deeds to be recorded, within a limited time, is publicity, so as to prevent false credits. That object is obtained by the decree of the court ordering a settlement. Such decree is notice to all the world. Indeed it is carried much further, for even lis pendens, is notice to all the world; and those who deal in relation to the subject in controversy, do it at their risk, and take the consequences. In pronouncing that settlements under decrees are not acted upon by the statute, it is not under the vain pretence that courts can dispense with statute; but it is a judicial decision, that the statute was not intended to

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have, and has not, any application *to settlements made under decrees of court. The decree is, substantially, the settlement; and even if the parties never acted under the decree, and never executed deeds, it appears to me that the decree would operate as a settlement. This is a question of construction, and does not go so far as the doctrine of the courts in relation to another statute. I mean that for recording mortgages. That provides, distinctly, that the first recorded mortgage shall prevail; and there is no qualification. But the courts have decided, that if the mortgagee, who holds the first recorded mortgage, knew when he took it, that there was a prior mortgage, though not recorded, he shall not be permitted to avail himself of the benefit of the statute, because he had actually the knowledge of the fact, which the recording prescribed was intended to give him.

With respect to the deed of 4 May, 1813, which was never recorded, it was conceded in argument, and justly so, that whatever might be the fate of the property under it, on other grounds, there is one of great importance, which is, perhaps, conclusive; and, in truth, it is so, in my judgment. It is, that the possession went under that deed, and has been uninterruptedly held for more than five years by Mrs. Price, as of her separate property, on an absolute and continued separation from her husband, with his consent: he not having reduced that property into possession.

I believe that I have touched on all the principal points of the case. Many of the letters, and other papers, are explanatory of the history of the case; but I could not attach weight to the declarations, and constructions of Mr. Thomas W. Price, in favor of his wife's claims, after he had become hostile to Mr. White, who had rendered him most essential services, and long sustained him in his embarrassments. I am sensible that the views which I have taken are too briefly stated, considering the magnitude and difficulty of the questions in the case. But the deficiencies will be amply made up, before the Court of Appeals, to which this cause ought to be carried, by the copious and able arguments of the counsel on both sides, of which I have had the benefit in writing. It is ordered and decreed, that the rights of the parties be established according to the principles and decisions above made, and stated, on each particular point. And that a reference be had before the master, to report what may be necessary to give effect to this decree.

From this decree the defendants appealed, except as to so much of it as relates to the settlement of 1794; and they now moved that the same might be reversed, or modified.

Petigru, for the motion. The first question made by the appeal, respects the interest which the complainant took under the will of her father, Philip Smith. The defendants object to the decree of the Chancellor on that question, because it is res judicata under the decree of 1796. The bill and answers have been lost, but the decree has been preserved; and that, and the deed prepared under it, and approved by the master, and confirmed by the court, furnish abundant evidence that the precise question was adjudged.

But if the decree were not conclusive, and

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the question were now *open, yet the judgment of this court must now conform to the decree. The terms used in the will of Philip Smith, create a fee-simple conditional at common law, as to the lands, and give an absolute estate in the slaves. Fearne, 101. The reservation, that the property should not be liable for any debts, is inconsistent with the result desired, and cannot exist with it. The liability to debts is inseparable from the right of property.

The statute of uses (*g*) was intended to suppress the frauds incident to secret trusts; and although they have, to some extent, been preserved by the decisions of the courts, yet it is under such limitations, and restrictions, as to guard against the mischief. Gilbert on Uses, 74, 139. Hopkins v. Hopkins, 1 Atk., 571, 2 Bl. Com., 337.

It may be urged, that the statute of uses is applicable to lands only; and, it is true, that trusts of personal property were probably unknown before the statute. But equity follows the law, and executes the trust, wherever the statute would execute the use; and the same legal consequences, growing out of the intention of the parties, follow from trusts, whether of real, or of personal estate. Co. Litt., 290, b. note, 249.

The courts will not suffer the legal rights of the husband to be defeated by implication in favor of the wife; and it is only in those cases, where the intention of the donor, to give a separate estate to the wife, is clearly expressed, that it will be carried into effect. 2 Rop., Hus. and Wife, 103; Clancy, 262.

(*g*) 2 Stat., 466.

A chattel held in trust for the wife, is subject to the same rule as if it had been given directly to her, unless it is expressed to be for her sole and separate use; and this must not be taken by intendment, but must be explicit. Bates v. Dandy, 2 Atk., 207; Jarman v. Woolloton, 3 T. R., 620. The limitation over of a personal chattel was unknown, until it was effected by the invention of trusts; but it is absurd to say, if property is given to A, for the use of B, that the estate in it is not in B.

The second question is, as to the effect of not recording the several deeds. All the writers on the subject speak of ante, and post, nuptial settlements. Battersbee v. Farrington, 1 Swan., 106; Atherly on Mar. Set., 155; Reeve's Dom. Rel., 174; 1 Rop., Hus. and Wife, 301. If a marriage be had, a settlement made, and a portion paid, this is a good marriage settlement. Hylton v. Biscoe, 2 Ves., 304.

Marriage settlements are divided into ante-nuptial, and post-nuptial; and this division is recognized by the Act of 1792, 5 Stat., 203, which in the proviso makes a particular provision for such marriage settlements as are made before marriage. So, too, in the deliberate opinion of the late Constitutional court, in the case of Lubbock v. Cheney, 1 N. & M., 444, it is laid down distinctly, that both sorts are comprehended in the recording Act. "The preamble of the Act of 1785," it is said, "speaks in general terms of marriage settlements; and the first enacting clause says, all and every marriage settlement now existing; nor is there anything to be found in any of the enacting clauses of either Act, which points to a distinction between settlements made before, and those made after marriage.

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*All, then, are comprehended in the enacting clause." 1 N. & M., 448.

If post-nuptial settlements are within the enacting clauses of the Act, it follows that settlements made in pursuance of a decree, enforcing what is called the wife's equity, must submit to the same rule; for the Court of Equity cannot dispense with, nor abrogate, a law of the land, and order that a settlement, which the law says must be recorded, in order to its standing good, shall be made, and stand good, without recording; and respect for the character of the Judges of the court, obliges us to conclude that when they directed a settlement, they intended a lawful settlement; and neither meant to overrule the law, nor to take away from creditors the benefit, and security, which the law provides for them, in requiring such settlements to be recorded within three months. Neither did they mean to give their decree an extraordinary operation, and to make it stand in the place of a conveyance; for the plain words in which they have spoken, import the contrary, and there is no authority for the position, taken for the first time in this case, that a decree is notice to all the world.

Mr. Price became entitled to the estate, in virtue of his marital rights, and the motive to a settlement was, that the fortune came to him in virtue of his marriage; so that in any view, the settlement must be regarded as having been made in consideration of his marriage. If a fortune accrue to the wife, and the provision already made, is inadequate, she is entitled to have a further provision made for her; and this is another instance of a post settlement made in consideration of the marriage. Clancy, 515. All the motives which apply to the publicity of ante-nuptial, apply equally to post-nuptial settlements.

The third question is, whether the decree can be considered as notice of the settlement, so as to dispense with the necessity of recording. Decrees in equity are not, of themselves, notice, except to parties. Sug. on Ven., 538. Lis pendens is notice, and necessarily so, for the purchaser pendente lite takes the place of the party; but no one is bound to take notice of the decree, except the parties to the suit. Worsley v. Earl of Scarborough, 3 Atk., 392.

Equity acts upon the person, and not upon the thing. It is otherwise at law: there the judgment operates upon the thing. Equity, by acting upon the person, can compel a conveyance; but when the conveyance is made, it is regarded as the act of the party, and as such, is subject to all the regulations imposed by law. Co. Litt., 290 b. note 249. Whaley v. Dawson, 2 Sch. and Lef., 372. Recording is one of the regulations to which marriage settlements are subject; and it must be observed, whether the parties make it in pursuance of a decree or not. Ordering titles to be made by the master, is an usurpation peculiar to our courts; but it has never gone so far as to make the decree stand for a title, without a deed executed by any one.

But it is said, that the property is bound by the decree. This, however, is not the law, as is well illustrated by the cases of Glaister v. Hewer, 8 Ves., 196, and Murray v. Lord

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Elibank, 10 Ves., *90. Could the court say by their decree, that the settlement should bind creditors, although not recorded? Certainly not; and yet this is, in effect, what is claimed.

Ford, contra. It is not true that courts of Equity act only on the person and conscience of the party. They act sometimes in rem; and decrees in equity are put upon the same footing with judgments at law. Herbert's case, 3 P. Wms., 117; Self v. Madox, 1 Vern., 458; 2 Mad. C., 325; Murray v. Ballou, 1 John. C. R., 578.

The Act of 1784, P. L., 338, 7 Stat., 208, expressly recognizes the operation of decrees in chancery on real estates; and the Act of

1785, P. L., 361, 7 Stat., 211, subjects them to sale under writ in nature of a fi. fa. On a decree in the same manner as on judgments at law. And in Telfair v. Telfair, 2 De S., 275, where a specific performance was decreed against a vendor of land, the judgment of the court proceeds upon the ground, that its decree should stand for a title. It is said, that the execution of titles by the master, in this State, is a usurpation; but if it be so, it is a very wholesome one. The practice is coeval with the existence of the court, and it is consecrated by time, and constitutes the law of the court.

It is said, that the deeds executed under the decree of 1796, are marriage settlements. Settlement is a generic term; marriage settlement is specific. A settlement may be made, upon other than the consideration of marriage. A settlement may be made by will; and this surely is not a marriage settlement. Those settlements made before, or at the time of marriage, or after, in pursuance of marriage articles, or a previous agreement, are the only settlements which rest upon the consideration of marriage; and they alone can with any propriety be denominated marriage settlements. The rights which accrue to the wife after marriage, are technically called her equity; and although the court will compel a settlement, before letting the husband into the possession, this is a settlement of her equity, and not a marriage settlement.

The whole of Mrs. Price's estate fell to her after the marriage. It was incumbered with a trust. The husband could not at law recover the possession. His remedy was in equity only, and the court would assist him upon no other terms, than his making an adequate settlement. The consequence is, that he takes subject to the terms of the decree; and the wife's equity so fastens on the estate in his possession, as to be inseparable from it. Philips v. Brydges, 3 Ves., 127; Ainslie v. Medlycott, 9 Id., 17; Lady Elibank v. Montolieu, 5 Id., 737; Clancy, 516.

(Mr. Ford was proceeding to argue the question as to the lands, when the defendant's counsel conceded, that Mr. Price having recently died, his interest in his wife's real estate was at an end; and they disclaimed any right to either of the tracts of land.)

Mr. Ford continued. Mrs. Price took possession of the slaves, conveyed to her trustee by the deed of separation of 1812, and remained in the exclusive possession of them for more than five years. It is true they went into the possession of her husband afterwards, but it was upon hire, and his possession must be regarded as the possession

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*of his wife's trustee. The defendant, White, knew that these slaves had been relinquished to Mrs. Price, by her husband; and as the factor of the husband, he paid the annual hire of $2,000. Although, therefore, he may not have known the particulars of the settlement, he did know of her separate possession, and as to him, that possession must be regarded as adverse.

The settlement of 1796 is preserved by the deed of separation of 1812, and must be taken as part of it. The legal estate was in the trustee, and the statute of limitations is a bar to both Price, and his assignees. The deed of 1812 is not within the purview of the registry Acts. It is not a marriage settlement, but the reverse: a deed of partition made upon a divorce, or separation. The evils to be provided against by the Act of 1785, were those which resulted from the identity of possession, whilst the interests were distinct; but a deed of separation destroys the identity of possession, and so destroys the necessity for recording.

Besides, the Act of 1785, literally subjects the property only to the payment of the debts of the person, for the benefit of whom the settlement was made. P. L., 358, 4 Stat., 656; 6 Stat., 636. The settlement in this case was made for the benefit of Mrs. Price and under the terms of the Act the property is liable for her debts; but there is nothing in the Act to make the property liable to the debts of Mr. Price. Let it not be said, that this is a merely literal construction. Surely the terms of an Act are not to be strained for the purpose of visiting a forfeiture upon the widow and orphan; upon the helpless, and defenceless; upon those whose rights, it is the especial object of the law to protect. Precisely the same construction was given to a similar statute of Virginia, by the Supreme Court of the U. S., in the case of Pierce v. Turner, 5 Cranch, 154; and all we ask, is the benefit of that decision.

But Price has never had any such possession of the property, as renders it liable to his creditors. The possession of a husband as executor, or administrator, is not such a possession as will attach the jus mariti. Ex Parte Wells and Elms, 3 De S., 155. Price's possession was only as administrator. His own assignment, or an assignment by operation of law, would not divest the wife of her equity. His assignees, therefore, could not be in a better situation, than himself. He was bound by the deed of settlement, although not recorded, and so are they. Clancy, 442; Rob. on Fr. Conv., 291; Bosvil v. Brander, 1 P. Wms., 458, and see Mr. Cox's note to that case; Macaulay v. Philips, 4 Ves., 18.

A mere equitable interest cannot be taken in execution on a fi. fa., at the suit of a creditor. Cadogan v. Kennett, Cowp., 432; Doe v. Routledge, 1d., 706; Nunn v. Wilsmore, 8 T. R., 521; Scott v. Scholey, 8 East., 467. Price's interest was purely equitable, he could have come at it only in equity, and he would have been compelled to make a more favorable settlement. If an estate accrue to the wife during coverture, and the court decree a

settlement of the wife's equity, it is secured from the creditors of the husband. Clancy, 443. The husband cannot charge, or assign, his wife's equity, even for a valuable consid-

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eration, or in payment *of his debts, without an adequate settlement on her. Pryor v. Hill, 4 Bro. C. C., 139; Kenny v. Udall, 5 John. C. R., 464; Haviland v. Myers, 6 Id., 25; Haviland v. Bloom, Id., 178; Sexton v. Wheaton, 8 Wheat., 239.

If the husband has got possession by improper means, the court will decree him to be a trustee for the wife; and much more will it protect a settlement made under its own authority; and whenever the husband makes such a settlement of his wife's equity, as the court would impose, the court will equally interpose its authority, to protect it against his creditors. Rob. Fr. Conv., 281; Bennet v. Davis, 2 P. Wms., 316; Tyrrel v. Hope, 2 Atk., 561.

Mr. Price, the husband, obtained possession of the property, on the faith and assurance of his making the settlement required. The court itself ordered it; and it would be unjust, that this should operate to exclude the wife.

King, same side. The books do not furnish any description of what constitutes a marriage settlement. 1 Rop. H. and W., 306; Campion v. Cotton, 17 Ves., 271. The law recognizes two sorts of marriage settlements; those made before, and those made after marriage; but they must be on the consideration of marriage, to constitute them marriage settlements; and that consideration renders the deed valid, even as to creditors.

A merely voluntary settlement to the use of wife and children, is void as to creditors; and cannot, therefore, be regarded as a marriage settlement. 4 Cruise, Dig., 383; Power v. Bailey, 1 Ball & Beatty, 49; Forrest v. Warrington, 2 De S., 254. It follows, that deeds of the latter description, do not come within the purview of the registry Acts as marriage settlements. Ward v. Wilson, 1 De S., 401; Lennox v. Gibbes, Id., 305; Garner v. Garner, Id., 437; Taylor v. Heriot, 4 De S., 227; Hanion v. McCall, Harp. E., 170.

In all the cases of post-nuptial settlements, it will be seen, that they refer to a portion, or some other good consideration, and not to a settlement merely voluntary. Ramsden v. Hylton, 2 Ves., 304; Ward v. Shallet, Id., 15. But suppose that a stranger, as the father, covenants with the husband to pay money, or do any thing else, in consideration that the husband would settle an estate, of which he was possessed, to the use of the wife and children. Is this a marriage settlement? Certainly not. It is a purchase for a valuable consideration. So, if, as in this case, the husband, in consideration that the executor, or trustee, will deliver up to the husband the estate held in trust for his wife, agrees that he would make a settlement on her; this is not a settlement in consideration of the marriage, but in consideration of the surrender of the trust estate.

But was it ever heard of, that a settlement made under the decree of the court, was a marriage settlement? The Court of Equity will, if the situation of the wife require it, give her a third, a half, or even the whole, of her equitable estate, in exclusion of the assignees of her husband, if he is a bankrupt. Vandenanker v. Desbrough, 2 Vern., 96; Ex Parte, Coysegame, 1 Atk., 192; Worrall v.

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Marlar, 1 Cox Ca., 153; Basevi v. *Serra, 3 Mer., 674. And if the husband do voluntarily, that which equity would have compelled, and which would have bound his creditors, will the court say, that she is in a worse situation? Anonymous, 1 De S., 113; Cape v. Adams, Id., 567.

A settlement made by the husband for the use of his wife and children, although not recorded, was held good against creditors, even without notice, in Hudnal v. Teasdall, 1 McC., 227. A marriage settlement, although not recorded, was held good against creditors with notice, in Givens v. Branford, 2 McC., 153. And see May v. Simons, Charleston, 1827, Dec. Bk., p. 168. Randall v. Morgan, 12 Ves., 97.

The statute does not vest the use in personal chattels. It follows, then, that the legal estate was in the trustees, and the liens of Price's creditors could not attach upon it. The answer of a co-defendant is evidence, if he succeeds to the right of the other, and becomes a privy in estate. Osborn v. U. S. Bank, 9 Wheat., 739, 831. The answer of Price states, that Mrs. Price was neither a party to, nor was she examined in, the suit determined in 1796; and, therefore, she is not bound by it. Murray v. Palmer, 2 Sch. & Lef., 484; Sperling v. Rochfort, 8 Ves., 464.

She is not bound by the recitals in the deed of settlement and separation. A recital proves nothing. Stoughton v. Lynch, 2 John. C. R., 210; Co. Lit., 352, b.

It may be admitted, for argument, that a decree is not notice to a purchaser; but it has nowhere been determined, that a creditor stands in the situation of a purchaser. It is said that decrees are upon the same footing as judgments at law; and every one knows that judgments at law bind lands, even in the hands of a purchaser without notice. Sug., 557. It may be said, that this is no decree, because it was not enrolled; and, therefore, was not notice. The enrollment of decrees has never been in use in our courts; at least, not as a general practice, and the instances of enrollment at all are very rare. Courts of Equity act in rem as well as in personam; and if so, the decree of 1796 fixes the rights of the parties, and is notice to creditors. Thompson v. Brown, 4 John. C. R., 619, 633; Kershaw v. Thompson, Id., 609, 614; Farley v. Farley, 1 McC. C., 517.

It may be urged, that the deeds of 1812 and 1813 are void, on the ground that they violate the law of marriage, as they are agreements for separation; but even the laws of England are opposed to this conclusion, and there is no question, that these contracts have always been allowed and enforced in this State. The distinction is, that equity will not enforce contracts of this sort between husband and wife, except through the intervention of trustees. 1 Mad. C., 385; Worrall v. Jacob, 3 Mer., 256.

The defendant has sold a part of the negros secured by the settlement of 1813, and according to the rule in equity, complainant has a right to indemnity from him. 2 Mad. C., 148; Ashe v. Livingston, 2 Bay, 80.

Hunt, in reply. Is the deed of 1796 a marriage settlement? If so, it is void, for want of recording. If it is not, then recording

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*was not necessary. The rule in equity is, that if the husband can get at the wife's fortune, without the aid of the court, the court will not interfere, and the intervention of trustees makes no difference. 1 Mad. C., 484, 485; Howard v. Moffatt, 2 John. C. R., 206. The distinction between trusts executed and those that are not, consists in the nature of the trust. If there is anything which requires the active agency of the trustees, the trust is not executed, and the legal estate remains in the trustee; but if he is a mere passive agent, the law executes the trust, eo instanti; and the rule is the same as to real and personal estate. Burgess v. Wheate, 1 Eden, 195, 223, 249; Carwardine v. Carwardine, Id., 36, and see note; Brydges v. Wotton, 1 Ves. & Bea., 137; Lord Deerhurst v. Duke of St. Albans, 5 Mad. R., 232; Jervoise v. Duke of Northumberland, 1 Jac. & Walk., 550; Sir Edward Turner's case, 1 Vern., 7; Jewson v. Moulson, 2 Atk., 421.

Are the limitations in the will of Philip Smith, so far as they restrict the absolute interests given to Mrs. Price, void? They, unquestionably, are so. The limitation to the heirs of her body is too remote as a limitation, and the whole vests in her; and the restriction, with regard to the liability for debts, is inconsistent with the right of property, and, therefore, cannot stand with the bequest of property in the thing.

But it is contended that the decree of 1796 binds the property as to creditors. It is certainly true, that lis pendens is notice to a purchaser; but it is denied that decrees are so, or that they bind the estate. Equity acts only in in personam, and not in rem. The proceedings in rem are an usurpation; but admitting that usage has sanctioned it, the right to proceed in personam is not taken away. The proceedings in 1796 were in personam, and they must be governed by the appropriate rules. Style v. Martin, 1 C. C., 150; Bishop of Winchester v. Paine, 11 Ves., 194; Gaskell v. Durdin, 2 Ball & Beat., 167.

The deed of 1796, made under the decree, is then the act of Price. It is a marriage settlement, and ought to have been recorded. The considerations recited are, the marriage and a fortune accruing. If it is not a marriage settlement, then it is without consideration, and therefore void.

As to the deed of separation of 1812. Price was in debt at the time of its execution, and unless it had marriage for a consideration, which would make recording necessary, it was voluntary and void. If separation was the consideration, then the deed is void, as being against marriage. At law, if the vendor remain in possession of chattels sold, so long as to hold himself out as the owner, and gain a credit on them, creditor's rights attach. It is a legal fraud. Price remained in the exclusive possession of the slaves given to his children, and, according to this rule, they are liable for his debts. The slaves in the possession of Mrs. Price are in no better situation. Husband and wife cannot separate their identity; they remain one in law, notwithstanding a deed of separation; and her possession is his. How were the creditors to know that they were separately entitled under this deed? Be-

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sides, Price resumed *the possession, but then it is said he paid the annuity. How were creditors to know this? All they knew was that Price was in possession,

COLCOCK, J. In reviewing the decree of the Chancellor in this case, it will not be necessary to make any previous statement of the facts, as they are sufficiently stated in the decree and brief; and I will refer only to such of them as may be necessary in the argument.

The case depends, in a great measure, on the construction of the Act of 1785, (*f*) requiring marriage settlements to be recorded within three months of the time of their execution; and I shall, therefore, in the first place, state the views of the court on that point. On the one hand, it is contended, that the Act embraces only such deeds as are founded on the consideration of marriage, that is, either made before marriage, but in contemplation of it, or after marriage, in consequence of articles entered into, or a bond given to make the settlement, before the marriage. On the other hand, it is said, that the Act embraces all settlements, whether made on the marriage, as a direct consideration, or at any subsequent period of time, by a husband on his wife, either of her property possessed before or after marriage, or of his property, or a part or the whole of both. And I am free to confess, that I have had great difficulty in coming to a conclusion on the subject, and that I have considered it as one of the first importance to the community.

(*f*) Ante, 250, note.

On the marriage of a woman, her property becomes her husband's: but the law does allow a separate interest to be created. Inasmuch, however, as even in such cases the property usually remains in the possession of the husband, and, of course, under his control, it is impossible that the community can distinguish between that which belongs to the husband, and that which is the separate property of the wife, unless there be some public place of record in which the deed which creates such interest should be found. To effect this purpose, then, was certainly the great object of the legislature in passing the recording Acts. The term used seems to have been intended as a general one, and is comprehensive enough to embrace both kinds of settlements; but although I have not been able to find anything in any of the books like a definition of a marriage settlement, I think it must be admitted, that they do seem to favor the distinction which is contended for by the complainant's counsel. Mr. Atherly, in treating on the subject of settlements, does speak of some made after marriage as "marriage settlements;" but it is only of those which have been so made in consequence of articles previously entered into; and when he pursues the subject, and comes to speak of other settlements made after marriage, he uses the terms post-nuptial settlement as if in contradistinction to marriage settlements, eo nomine.

We must, then, look to the mischief which the legislature intended to guard against, and see if it does not or may not exist as well in regard to the one kind of marriage settlement as to the other, pursuing the distinction made in the argument: and, I think, but little observation is necessary to shew

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that it is as important to *the interests of the community, that settlements made after marriage, although arising out of the connection, should be recorded, as those made before, and in which it may be said that marriage is the direct consideration. All property which comes to the husband during the coverture, from whatever source, or at whatever time, may be considered as much the property of the husband as that which he acquires with his wife on his marriage; and if this could be secretly conveyed to her use, a deception might be as well practised, as it may be by a secret conveyance of that which she may have possessed before marriage. But, it is replied, that the rights of creditors were already sufficiently protected by the statute of Elizabeth and the common law in such cases, and, therefore, it was not intended that the Act should embrace them; for if a man, who is in debt, settles his property on his wife it may be avoided: and if he be not in debt, no injury is done. This is certainly a strong view of the subject, and would be conclusive, if it covered the whole ground. But it is obvious, that a settlement, such as those we are now considering may be made of a wife's equity, which the creditors could not touch; but if the deed be not recorded, a further indulgence, or even a further credit might be given on the faith of the property; and so, too, in the case of a man who is not at all in debt at the time of making the settlement. He might obtain a credit on the faith of the property seen in his possession, which might be prejudicial to the rights of others; and, indeed, it has been questioned whether, under any circumstances, such settlements were not injurious to the interests, not only of the community, but of the parties themselves, by encouraging indolence and luxury in the husband, and exciting expectations or hopes in the creditors, which are, for the most part, disappointed. Upon the whole, I am satisfied, that post-nuptial settlements are within the mischief which the legislature intended to guard against by the recording Act, and, therefore, to be considered as embraced within its provisions.

This construction of the Act would put an end to the claims of the complainants, but for some peculiar circumstances, which have been relied on by her counsel. In their very elaborate argument, anticipating the possibility of such a construction as we have given to the Act, it was contended as to the first deed of 5 March, 1794, that if the deed is void, the parties are to be considered as standing in their original rights; and that the twenty-five slaves mentioned in the deed, and purchased with the money left by her grandfather, must be considered as held by the executor, her grand-uncle, in trust for her. But this is at war, both with the facts of the case, and with the law arising out of them. They were not held in trust for her, and were delivered to the husband, under the impression that the deed would secure them to her. Once they were reduced into possession, they were absolutely the property of the husband, and, as to them, therefore, we concur with the Chancellor, that they must go to the creditors.

The same argument was also urged as to the property left to the complainant by the will of her father. That, it is clear, was giv-

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en *to trustees for her use; but by the decision of a competent tribunal, it was decided, that she took an absolute estate in the personal property, which vested in the husband, who, by the decree of that court, was ordered to make a settlement. I say, was ordered to do so; for this is putting it in the strongest light, for the complainant; and even then I think the deed must be recorded. The Chancellor, however, says, that the court had no right to interfere with the will of the father, as the property was settled on her by that will, by being placed in the hands of trustees, to be held for her benefit. I have

before said, that this was the decision of a competent tribunal, and, therefore, we could not now disturb it; but if it were still open for consideration, we should give the same construction to the will. And I cannot doubt that although the court may have refused to interfere, yet as all the parties were before them, and the trustees consenting, and relinquishing their trust, the court had the power to order the settlement.

But on this point it was urged by the complainant's solicitors, that as to the deeds made by order of the Court of Equity, it is not necessary that they should be recorded, for the decree of the court, was notice to all the world; and the same view of the subject is taken by the Chancellor in his decree. No direct authority has been produced to support this position, and the cases to which we have been referred, only show, that the decrees of the Court of Equity are considered, in the distribution of assets, as equal to judgments at law. They go no further. The case of Brown v. Thompson from 4 John. C. R., 634, is to this point: and so is the great case, as it is called, of Morrice v. The Bank of England, Cas. Temp. Talb., 217; but they establish no more. In the last mentioned case, in a contest between creditors who had obtained judgments at law, and others who had decrees in chancery, Sir Joseph Jekyll, the master of the Rolls, directed that the decree creditors, being prior in time, should be first paid; and this is the extent of that case. The case of Coit v. Owen, 2 De S., 456, determines nothing more, than that a decree, formerly made, cannot be revised by a subsequent decision; and it lets in some creditors to be paid out of a fund subject to their debts. The case of Woddrop v. Price, 3 De S., 203, decides no other matter, than that the decrees of the Court of Equity, are put on the same footing as judgments at law.

But if the power of the Court of Equity, when acting directly on the property, be admitted in the fullest extent, it cannot apply to this case: nor could this decree, by any possibility, operate practically as a notice. For the court did not act on the property, except through the husband. They ordered him to make a settlement of a certain portion of the property. Now, suppose one should go to the records of the court to obtain information. He would find an order by the court, that Mr. Price should settle so many negros, and so much land, on his wife: but that would not enable him to determine what negros, or what land was settled. He would still have to go further, and would naturally be led to the recording offices.

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*I am not aware of any case, decided either in the Court of Equity, or in a court of Law, in this State, where any thing, short of direct notice, has been considered as equivalent to recording; and I am one of those who think, that the courts went too far, even in admitting that; for my experience has satisfied me, that it leads to perjury, besides being a departure from the positive requisitions of a legislative Act; which, it must be admitted, is at all times dangerous, and invariably produces litigation. Wherever a settlement is ordered by a court of Equity, I think it should make a part of the order, that the deed be immediately recorded; for it certainly is an interference intended for the benefit of the wife, and, therefore, should be completed by the officers of the court.

The court, however, concurs with the Chancellor, on the last ground, on which he rests the complainants' right to the slaves, intended to be conveyed by the deed of 1812, and contained in the schedule annexed to that deed. As they passed directly into the hands of the trustee, with the consent of the husband, and before he had reduced them to possession; and remained in his possession for upwards of five years; and this was known to the principal creditor, who was the factor for both husband and wife; such possession must be considered adverse to the claims of both husband and creditors, and consequently vests the property in her. No one could be defrauded by this arrangement, for no credit could have been given on the faith of this property. The decree is therefore affirmed in this particular, but must be, in other respects, so reformed, as to accord with the views, which are herein expressed, of the rights of the respective parties. And as the counsel for the defendants have abandoned all claim to the real estate, it is only necessary to say, that the decree of the Chancellor, as to that, is also affirmed.

As some of the conveyances disposed of the estate, and inheritance, of the wife, particularly the deed of 4 May, 1813, whereby she conveyed her lands to a trustee, for the purpose of conveying them to her husband, Thomas W. Price, it is proper that all such deeds made by her should be cancelled, that they may not embarrass her title at law. It is, therefore, by the consent of all parties, ordered and decreed, that all such deeds, and especially the deed of 4 May, 1813, be cancelled.

After the delivery of this opinion, it was contended, that the claim to the Toogadoo plantation must be excepted, as standing on different grounds from that to the other lands; and the counsel on both sides have submitted their arguments in writing. These have been duly considered, and the court are unanimously of opinion, from a review of the origin, and all the circumstances relative to the Toogadoo plantation, that it is the rightful inheritance of the complainant, Charlotte Price, and that, consequently, she is entitled to the immediate possession.

JOHNSON, J., concurred.

NOTT, J. I concur in the opinion which has been delivered in this case, in relation to the deeds of 1794 and 1796. I consider these as marriage settlements, or contracts, within the meaning of the Act of 1785, and therefore void, for the want of recording. I

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*differ in opinion with regard to the deed of separation. I think that directly the reverse of a marriage settlement; and that it did not, therefore, come within the provisions of that Act. Besides, the wife had the separate and exclusive possession and enjoyment of the property, of which Mr. White had notice, as he was her factor. The children may be considered as standing in a different situation. The property given to them, continued in the possession of the father. He continued to receive the rents and profits of the land, and the services of the slaves; and to use and enjoy the property, and to exercise every act of ownership over it, as if he had the sole and exclusive right. It might, therefore, very well be considered as fraudulent against creditors.

With regard to the Toogadoo plantation, it cannot, in any point of view, be considered as a marriage settlement. It was an actual purchase, or exchange, by the trustees, for the use of the wife. It was not necessary, therefore, that it should have been recorded in the office of the secretary of State. It was sufficient that it was recorded in the office of the register of mesne conveyances, where all deeds of that sort are required to be recorded.

I do not think that we have any thing to do with any other deeds, and particularly where other persons are concerned. I am opposed, therefore, to interfering with them by canceling, or in any other manner. I am, also, further of opinion, that it does not belong to this court to determine in what order the debts shall be paid. There is no such question involved in the case; and it was one, therefore, on which we ought not to express any opinion.

Decree modified.

Bailey, Eq. *268

*DAVIDSON & SIMPSON v. ADMIRAL GRAVES and Others.(a)

(Charleston, March, 1831.)

[1. *Fraudulent Conveyances* ⇐187; *Husband and Wife* ⇐33.]

A settlement of his real estate by a husband on his wife, made prior to, and in contemplation of the marriage, under which settlement she would have been entitled to the enjoyment of the estate, if she survived him, having been declared fraudulent and void as to his creditors, it was, at the same time, ordered, that a portion of the wife's fortune, which had been suffered to go into his possession, on the faith of the vacated settlement, should be repaid to her, and that the settled real estate should stand charged with the payment. *Held*, that she was entitled to interest on the amount from the death of the husband.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 594; Dec. Dig. ⇐187; Husband and Wife, Cent. Dig. § 202; Dec. Dig. ⇐33.]

[2. *Fraudulent Conveyances* ⇐313.]

Slaves purchased by the husband, and included in a settlement on his wife, which settlement had been declared fraudulent and void as to his creditors, ordered to be delivered up by the wife, and to be sold and applied to the payment of creditors, conformably to the principles of the decree vacating the settlement.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 968–970; Dec. Dig. ⇐313.]

[3. *Dower* ⇐25; *Judgment* ⇐739.]

Where a settlement of the husband's real estate upon his wife is set aside, she is entitled to dower, if she has survived him; and it is not too late to make the claim, after a decree for the sale of the settled estate, for payment of the husband's creditors; but she takes subject to incumbrances on the estate existing prior to the marriage.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 77; Dec. Dig. ⇐25; Judgment, Cent. Dig. § 1105; Dec. Dig. ⇐739.]

[4. *Dower* ⇐94.]

Dower ordered to be assessed, by allowing the widow one-third of the interest for seven years, on the net value of the whole estate, after payment of prior incumbrances.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 337–339; Dec. Dig. ⇐94.]

[5. *Dower* ⇐12.]

[Where land was conveyed to a husband by an absolute deed in fee, a secret parol trust attending the conveyance could not be set up to deprive the wife of dower.]

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 48; Dec. Dig. ⇐12.]

Heard by De Saussure, Chancellor, at Charleston, May, 1829.

The complainants were creditors of Admiral Graves, and of his son, Samuel Colleton Graves; and filed the bill in this case, in 1824, to set aside certain conveyances by Admiral Graves and his wife, to their said son, and also the marriage settlement of the son, executed upon his marriage with Miss McPherson. The conveyances to Samuel Colleton Graves, included a very large and valuable real estate, which was the inheritance of his mother; and the marriage settlement comprised this real estate, and all the estate, real and personal, of Samuel Colleton Graves, including three hundred slaves; to the enjoyment of all of which Mrs. Graves, by the terms of the settlement, would be entitled in the event of her surviving her husband. Miss McPherson had a very ample fortune of her own, which was also settled upon her; with the exception of certain stocks, of the value of about $10,000, which were permitted to go into the possession of Mr. Graves, after the marriage, without being protected by any settlement. The cause was heard in January, 1828, by Thompson, Chancellor, who, by his

(a) See Bil. E., 219; 5 Rich. E., 519, for other portions of this case. Ante, 237, 208.

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decree, set aside *the conveyances, by Admiral Graves, to his son, and also the settlement made by Samuel Colleton Graves, of his own property, as void against the creditors of himself, and his father. This decree was affirmed by the Court of Appeals, in April, 1828, with some modifications; and by that decree it was ordered, amongst other things, that the real estate of Samuel Colleton Graves, derived from his mother, should stand charged with the repayment of the value of the stocks of his wife, which were suffered to go into his hands without a settlement; to which stocks his wife, who, on his death, had intermarried with Nathaniel G. Cleary, was declared to be entitled, on the ground, that it was fair to presume that Mr. Graves had been permitted to reduce them into possession, on the faith of the settlement of his own property, which was set aside. See the decree of the Court of Appeals, in Riley's Eq. Ca., 232.

A sale was ordered to be made by the master, and the accounts were referred to him; and the cause now came up, upon exceptions to his report, which will be sufficiently understood from the decree of the Chancellor.

De Saussure, C. The complicated rights of the parties have been settled by the luminous decree of the Court of Appeals, in April, 1828; and nothing remains to be done, but to carry that decree into effect. To accomplish that object, a reference to the master was ordered, and he has made a report, to which various exceptions have been filed by the parties interested.

On the part of Mr. and Mrs. Cleary, and her trustees, it is contended, that the master ought to have reported interest on the amount of the stocks transferred to Samuel Colleton Graves, which had not been included in the marriage settlement of Miss McPherson's own property, on the faith of the large settlement made by Mr. Graves, of what he stated to be his property; which last settlement, the Court of Appeals has set aside as to the creditors of Samuel Colleton Graves.

The claim to interest was resisted by the complainants; but it appears to me, that the principle, which led the Court of Appeals to order the payment of the principal amount of the stock, leads also to the conclusion, that interest thereon should be allowed, at least from the death of Mr. Graves. If the deceptive settlement by Mr. Graves, of his own estate, (deceptive from his being so largely in debt that he was not at liberty to make such a settlement,) had not been made, this portion of the fortune of Miss McPherson would have been included in the

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settlement of her own *estate, which, as was said in the argument, is unquestionable, and unquestioned. In that case, on the death of Mr. Graves, it would have survived to her, by the terms of the settlement, and she would have had the use and enjoyment of it. I am, therefore, of opinion that she was entitled to interest on the amount reported, as the value of the stock, at least from his death; and it is ordered, and decreed, accordingly, to be paid, with the principal, out of the sales of the estate reported, conformably to the decree of the Court of Appeals.

The next question made by the exceptions, relates to certain slaves, purchased, by Samuel Colleton Graves, from Mrs. Wainwright.

It is contended, for the complainants, that these slaves, now in the possession of Mrs. Cleary, should be delivered up as part of the estate of Admiral Graves, and liable to his debts; or at all events, if considered as part of Samuel Colleton Graves' estate, and included in the settlement, made by him of his own property, they should be delivered up to pay his debts, and those in which he was jointly bound with his father.

The facts in relation to these Wainwright slaves appear to be as follows: Samuel Colleton Graves purchased them from Mrs. Wainwright, on his own account, and took the bill of sale in his own name. It is alleged, however, that he paid for them with the funds of his father; and Mr. Robertson testifies that he did pay for them with the proceeds of the sale of the Fairlawn tract, which belonged to his father; and as it does not appear, that he had any distinct estate of his own, it seems to be pretty fully established, that they were so paid for. Whether this state of things ought to induce the court to order them to be delivered up, would seem, however to be questionable; for it is not so clear, that the father, or his creditors, could follow these slaves identically. He might stand a creditor of his son, for the amount of his funds received by him, and put to his own use; but as a creditor without a lien on these slaves, more especially as he delivered them up to the widow, voluntarily, after the death of his son, by the advice of counsel. The Court of Appeals did not decide the particular question now made in relation to the slaves; for it was not made distinctly to that court.

There is, however, another view, which strikes me as a very strong one. It is this. Allow that these slaves really belonged to Samuel Colleton Graves, and that they were included in the marriage settlement of his property, yet the Court of Appeals has de-

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*cided that this settlement is void as against his creditor; and upon that ground, there was restored to the widow of Mr. Graves, a fund, originally belonging to her, but which had vested in the husband jure mariti. These slaves then really belonged to Mr. Graves, unprotected by the settlement; and therefore are subject to his own debts, as well as to those in which he was bound with his

father. The consequence is, that they ought to be delivered up, as the whole subject is now before the court. It is therefore ordered that the slaves purchased from Mrs. Wainwright, by Samuel Colleton Graves, be delivered up for the benefit of the creditors, with a reasonable allowance for their hire and labor since his death, to be ascertained by the master. The said slaves to be sold, and the proceeds applied to the payment of the creditors, according to the principles of the decree of the Court of Appeals.

Mrs. Graves, now Mrs. Cleary, finding herself deprived of the benefit of the settlement, made by her husband, of his property, has applied by petition, to be allowed dower in the lands of which her late husband was seized during the coverture. The lands in question are those conveyed to him by his father, and mother. Several objections are set up against this claim.

The first is, that she comes too late, after the decree of the Court of Appeals, the order for sale, and the appropriation of the funds to the payment of creditors. It does not strike my mind, that she comes too late. Whilst she stood upon the settlement, which included all the lands, it would have been absurd to have made a claim of dower in them. It was not until the decree had avoided the settlement, that it was proper to set up the claim: and the doctrine is well settled, and supported by the authorities, that where a provision is made for the wife, which fails, she may come in and claim her dower; and she is not too late whilst the fund remains under the control of the court.

Other objections are, however, set up, which go against the right of dower altogether. It is contended that the conveyance of the lands by the father and mother to Samuel Colleton Graves, although absolute on its face, was really upon implied trusts, and that the right of dower in his wife cannot attach; and further that the decree of the Court of Appeals having set aside the conveyance as fraudulent and void, no right of dower in the widow of the grantee can arise.

It is argued, that the deed of conveyance was absolute on its face. No trusts appear, and if the son chose, afterwards, to make certain limited provisions out of this real estate,

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under any private *understanding, they do not, of themselves, affect the validity of the conveyance. The nature and extent of such implied trusts, do not clearly appear; as far as appears, in relation to one of them, it seems to have been, in part, a provision for a daughter of Admiral and Mrs. Graves, who had married Baron Vandersmissen, of a very small part of the estate previously conveyed to the son Samuel, and presupposes the validity of that conveyance. It would be very mischievous, to allow such secret parol understandings to set aside the whole conveyance, and to defeat the just claim of the widow to dower, under the absolute conveyance, and vested fee simple in her husband. It is her last plank, when defeated of her settlement. Besides, it was a conveyance of the mother, in whom the inheritance of the land was, in which inheritance the creditors of the husband, Admiral Graves, had no interest beyond his life, except as far as she chose. It was competent to her to make the conveyance, without regard to the claims of the creditors of her husband: and I do not, therefore, think that the first objection is well founded.

With respect to the decree of the Court of Appeals, it does not appear to me, that it was intended to go the length which is contended for by the complainants. According to my reading of the decree there is a reserve, as to the extent to which the conveyance of the lands to the son is avoided. It, doubtless, struck the clear and acute understanding of the court, that the conveyance of the mother to her son, of her lands of inheritance, which were not subject to the debts of her husband, made a different case, from that of a father making a voluntary conveyance of his own lands, and thus attempting to withdraw them from the just claims of his creditors. It does appear to me, that it was not the intention of the court to set aside the conveyance from the mother to the son, so absolutely as to bar the widow of dower: for, besides other reasoning, we find the court taking the ground, that the land considered as the son's, was still liable to his own debts, as well as to the debts of his father, in which he was joined. Besides, the decree protects the mortgage to Vandersmissen, by Samuel Colleton Graves, which it would not have done, if it had been intended to set aside the conveyance to him, absolutely. Indeed, the decree explicitly says, that the deed should be set aside, "so far as it was necessary to effect its object." Unless, therefore, I have misapprehended the decree of the Court of Appeals, I feel bound to say, that the fee was vested in the son, and his widow was, and is, entitled to her dower.

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*It is, therefore, ordered and decreed, that it be referred to the master to ascertain the amount which, under all the circumstances, ought to be allowed to the widow, out of the sales, in lieu of dower. On the minor points of the case, I concur with the report, and the same is hereby confirmed, except so far as it is modified by this decree.

The creditors appealed from so much of this decree as related to interest on the stocks, and the claim of dower: and Cleary and wife appealed from the order in relation to the Wainwright slaves.

King, for the creditors.

Lance, contra.

O'NEALL, J., delivered the opinion of the court.

We concur with the Chancellor, that Mrs. Cleary is entitled to interest from the death of her former husband, Samuel Colleton Graves, on the amount of the stocks transferred to him on the faith of the marriage settlement, and which, by the appeal decree, was charged on the lands. And we likewise concur with him in relation to the Wainwright slaves.

We also concur with the Chancellor, that Mrs. Cleary is entitled to dower in the land conveyed by his father and mother to Samuel Colleton Graves, and that the allowance of this claim is not precluded by the former decree. But, notwithstanding that we think she is entitled to dower, we do not think that she takes it, discharged from the incumbrances existing actually, or constructively, at the time of the marriage. Her rights, arising from the marriage, cannot be in a greater estate than the estate which her husband then owned. His estate in the land was incumbered at the time of the marriage, with Vandersmissen's mortgage, Hasell's mortgage, and with the value of her stock, which has been considered and allowed, as a charge on the land at the time of the marriage. His real estate, therefore, of which she was dowable, was its net value, after the payment of these then existing incumbrances.

It is, therefore ordered and decreed, that it be referred to the master, to assess the dower of Mrs. Cleary, according to these principles. He will first, out of the proceeds of the sale of the land, satisfy Vandersmissen's and Hasell's mortgages, and the amount of stock, with the interest thereon, charged on the land, and decreed to be paid to Mrs. Cleary; and, upon the residue of the proceeds, he will compute interest for seven years, and allow one-third of the amount so ascertained, with interest on it, from the time when the sale of the land was due, for her dower, which he is directed to pay out of the proceeds of the sale of the land. In

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*all other respects, the decree of Chancellor De Saussure is affirmed.

Decree modified.

Bailey, Eq. 274

MARY STEPHENSON, and Others, v. JOHN AXSON, Executor of John Fowler Percy and SARAH E. MITCHELL.(a)

(Charleston, March, 1831.)

[1. *Annuities* ⇐5.]

The bequest of an annuity is payable annually, from the death of the testator, and the annuitant is entitled to interest on the arrears, if not paid, when due.

[Ed. Note.—For other cases, see Annuities, Cent. Dig. §§ 9–12; Dec. Dig. ⇐5.]

[2. *Wills* ⇐734.]

A pecuniary legacy, payable on the legatee's attaining the age of twenty-one years, does not carry interest in the meantime, unless the will gives interest; but if the legacy is not paid when due, the legatee is entitled to interest after that period.(b)

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1849; Dec. Dig. ⇐734.]

[3. *Wills* ⇐729.]

The testator directed his debts and legacies, including some annuities, to be paid out of the crops of his estate, and prohibited the sale of any part of his estate, except the crops; and the crops in some years exceeded, but in others fell short, of the charges upon it. *Held*, that the residuary legatee was not entitled to the surplus crops of each year, after payment of the annuities for that year, and of such legacies as were then payable; but that the annuities and other legacies constituted a charge upon the whole income of every year, until they were fully paid, and that the surplus of the productive, must be applied to make up the deficiency of the unproductive years.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1781–1784; Dec. Dig. ⇐729.]

[4. *Annuities* ⇐6; *Executors and Administrators* ⇐310.]

If an executor delivers over the estate to the residuary legatee, without retaining a sufficient fund for other legacies, it will be a devastavit, and the other legatees may recover against him; and it makes no difference, that the other legacies are payable at a future and distant day; but it is the duty of the executor to provide for them, whenever they are to be paid. So if the legacies are directed to be paid out of the income only, he is bound to keep possession of the estate until a fund has accumulated from the income, sufficient to pay all the legacies; and if some of the legacies are annuities, he should accumulate and retain such a sum, as, being invested, will, by the annual interest meet the annual payments; and if he delivers over the estate, or pays any part of the income to the residuary legatee, he will be liable to the other legatees, for all sums so paid over, and for the income of the estate in the hands of the residuary legatee, with interest on the annual balances.

[Ed. Note.—For other cases, see Annuities, Cent. Dig. § 18; Dec. Dig. ⇐6; Executors and Administrators, Cent. Dig. § 1264; Dec. Dig. ⇐310.]

[5. *Executors and Administrators* ⇐318.]

A residuary legatee, receiving the estate, or any part of it, from the executor, with a knowledge that the other legacies have not been paid, or provided for, may be required to refund, with interest, to the same extent to which the executor is liable to the other legatees.(c)

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1319; Dec. Dig. ⇐318.]

[6. *Bonds* ⇐113.]

[Property of a testator, delivered to a bond creditor, will be treated as a payment of the bond, though delivered to him as residuary legatee.]

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 124; Dec. Dig. ⇐113.]

This was a bill to recover the arrears of

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certain annuities, and *also certain pecuniary

(a) 1 Hill E., 193; 2 Id., 15; 4 Rich. E., 39.

(b) Chesnut v. Strong, 1 Hill E., 121—5; Id., 224; Allen v. Crosland, 2 Rich. E., 68; Chisolm v. Chisolm, 4 Id., 269.

(c) McMullin v. Brown, 2 Hill E., 457; McLure v. Askew, 3 Rich. E., 162.

legacies, devised and bequeathed to the complainants respectively, by the will of John Fowler Percy. The cause was heard at Charleston, in January, 1826, by Thompson, Chancellor; and, upon appeal, it was sent back by the Court of Appeals, for inquiry into the accounts, reserving the questions made by the appeal. In pursuance of this order, the accounts were referred to the master; and the cause came on for hearing, in May, 1830, upon exceptions to this report, before Harper, Chancellor, from whose decree the case will be fully understood.

Harper, C. John Fowler Percy, by his will, devised to the complainants Mary Stephenson and Elizabeth Rose, annuities of $200 each, for life; and to the complainants, John Rose, Elizabeth Percy Rose, and William Rose, legacies of $1,000 each, payable on their respectively attaining the age of twenty-one years, and the will contained the following clause: "It is my particular desire and order, that my executors shall not, on any pretence whatsoever, sell or dispose of any part of my estate, except the crops, which I hereby direct to be applied to the payment of my debts." The testator devised and bequeathed the residue of his estate to the defendant, Mrs. Sarah E. Mitchell. A decree has been made in the cause at a former term, by Chancellor Thompson. The points decided by this decree are, that the annuitants are entitled to interest on the arrears of their annuities, from the time when the several payments ought to have been made; and that the other legatees are entitled to interest on their legacies, from the time of their respectively attaining the age of twenty-one years, but not before; and the decree directs the legacies and arrearages to be paid by the defendants. This decree was appealed from, and the Court of Appeals has directed an inquiry, "to ascertain the amount of crops of the estate of John Fowler Percy, deceased, since his death, and how the same were disposed of; how much of the annuities due to the complainants, under the will of the said John Fowler Percy, has been paid to them, and how much still remains due; and that an account be taken of the executor's administration in relation to the matters in issue between the parties." In pursuance of this direction, the accounts were referred to the master, and he has now reported.

The material facts stated by the master, are these: The executor, John Axson, regularly paid the annuities for several years, up to the end of 1817, out of the proceeds of the crops; and during these years, he paid to the defendant, Mrs. Sarah E. Mitchell, at various times, the aggregate sum of $2,762.-

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63, arising from the *surplus of the crops, after payment of the annuities. Of these payments, the sum of $2,000 was expressed to be on account of her residuary legacy. In 1818, the executor delivered over the whole estate to Mrs. Mitchell, and she regularly paid the annuities for the years 1818, 1819, 1820, and 1821; and in those years she received the aggregate sum of $2,341.77, over and above the payments on the annuities. From that time, no part of the annuities was paid up to 1827, when the estate was sold by order of this court; but Mrs. Mitchell, in the last mentioned period, received from the crops, the sum of $3,514.69. Mrs. Mitchell holds a bond given by the testator in his lifetime; which the master recommends to be set off against the surplus received by her, after payment of the annuities in the years 1818, 1819, 1820, and 1821. The master makes several recommendations, as to the manner in which the defendants shall be charged; and various exceptions have been filed, on the part, both of the complainants, and the defendants, to the report.

The complainants' fourth, and the defendants' second, exceptions apply to the subject of interest on the legacies, from the time when they became payable. These are points decided by Chancellor Thompson's decree, and it is not for me to review it. That decree is now before the Court of Appeals, and the present reference is for the purpose of enabling the court to decide upon it.

I think it will enable us to decide on the matter of the other exceptions, to consider how the executor ought to have acted, in the discharge of his trust under this will. In general there can be no doubt, but that a residuary legatee is entitled to nothing, until all the debts and other legacies are paid. There is as little doubt that if the executor deliver over the estate to the residuary legatee, without retaining a sufficient fund for other legacies, it will be a devastavit; and the legatees may recover against him. So, if legacies are payable at a future day, he should retain enough to satisfy them when they become due. Regularly he should invest such a sum as will meet the payment at the day. So, if the legacy be an annuity, he should retain such a sum, as being invested, will, by its annual interest, meet the annual payments. This is what the court directed an executor to do in Slanning v. Style, 3 P. Wms., 337; viz., to bring in bonds and securities sufficient to raise the annual amount coming to the annuitant. The residuary legatee will, in the meantime, be entitled to the principal sum in remainder, after the annuity shall fall in.

Such are the general rules. The only pe-

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culiarity in this case *is, that the annuities and legacies are directed to be paid out of a particular fund, the annual crops. But the only difference this makes is, that if the fund proves insufficient, the legatees must abate. If the fund is sufficient, they must be paid, and the residuary legatee can, of course, be entitled to nothing of that fund, until they are paid in full. I think the executor's duty required him, after making the first year's payments of the annuities, to invest any sur-

plus, with a view to such an accumulation as would meet the annual payments of the annuitants and the legacies, when they should become due. When that was effected, and not before, he might properly deliver over the estate to the residuary legatee. The annuity, although payable in instalments, is an entire legacy, and the residuary legatee can be entitled to nothing out of the fund provided for it, until it is paid in full. This is involved in the very idea of a residuary legacy. The executor might have retained the estate in his hands, and gone on paying the annuities out of the annual crops, and paying the surplus to the residuary legatee; but it must have been at his own risk, if future crops should prove insufficient to meet future payments. It is idle to say that the executor was not bound to provide for the payment of the legacies, so long before they were directed to be paid. Whenever a legacy is to be paid, it appertains to the executor to provide for it.

It follows from the view I have taken, that the executor, John Axson, is chargeable with the amount paid to Mrs. Mitchell, previously to 1818, together with interest from the time of the several payments. He is also chargeable with whatever the estate has produced since, with the surplus received by Mrs. Mitchell, over and above the payment of the annuities, up to 1823; and with all that she received after she ceased to pay the annuities, together with interest on the annual balances. This was the fund for the payment of legacies which he suffered to go out of his hands. By delivering the estate to Mrs. Mitchell, he seems to have constituted her his agent, to discharge his trust; and he must be responsible for his agent.

But I think Mrs. Mitchell also chargeable to the complainants to the same extent. She concurred with him in the misapplication of the assets, and received the benefit of the misapplication. Those entitled to an estate, may, in many cases, either charge the executor, or follow the funds in the hands of those who have received it. She was a volunteer; and she was, of course, aware of the will, under which she claimed; and although I have no idea that any thing dishonest was intended, yet, in a legal point

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of view, it must be regarded *as a case of collusion. If the complainants had proceeded against the executor alone, she would have been answerable over to him; and the court having all the parties before it, will do complete justice.

As to the bond held by the defendant, Mrs. Mitchell, it is immaterial out of what moneys received by her, it must be regarded as having been paid. The interest charged against her, will balance the interest accruing on the bond.

I believe the views I have taken, dispose of all the objections on both sides. It is therefore ordered, that the report be referred back to the master, to be remodelled, according to the principles herein expressed.

From this decree, the defendants appealed; and the cause now came before the Court of Appeals, upon the appeals from the decree of Thompson, Chancellor, and the last decree.

Cruger, for the defendants.
King, for the complainants.

O'NEALL, J., delivered the opinion of the court.

The annuitants, under the testator's will, are entitled to interest on the arrears of their annuities, from the time when they respectively became due; and so also the pecuniary legatees are entitled to interest on their legacies, from the time of their respectively attaining the age of twenty-one years. These points were settled by the decree of Chancellor Thompson, and the court is satisfied with his opinion, and the reasons which he has assigned for it. It is a rule of universal application, both in law, and in equity, that a sum certain, payable on a day certain, bears interest from that day. The annuities in this case, were payable annually, from the death of the testator; and where they have not been paid, it follows from the rule, that the arrears will carry interest from the time when they ought to have been paid. To allow interest on the arrears of an annuity, is the established practice of the court. The pecuniary legacies are directed to be paid, on the legatee's attaining the age of twenty-one, and they are entitled to interest from that time; but there is no ground for the claim set up to interest from an earlier period. Where a legacy is directed to be paid at a particular time, the legatee is not entitled to interest in the meantime, unless it is given by the will.

The income of the estate arising from the crops of each year, and the net proceeds of the sale of the estate, since it was sold, constitute the fund for the payment of the debts, and legacies, including the annuities. The

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capital of the estate cannot be broken *in upon for the payment either of the annuities, or the pecuniary legacies; but the whole income is applicable to them, without reference to the years in which it accrued. As in some years the crops exceeded the charges upon the fund, and in others fell short, the years of plenty must aid those of scarcity and want.

The annual balances left in the hands of the executor, and the residuary legatee, Mrs. Mitchell, must be accounted for by them, with interest, and applied to the payment of the debts, annuities, and pecuniary legacies, as directed by the decree of Chancellor Harper,

and for the very satisfactory reasons which he has assigned.

It is, therefore, ordered and decreed, that his decree be affirmed.

Decree affirmed.

Bailey, Eq. 279

The Executors of MARY C. DUPONT v. ISAAC A. JOHNSON, Administrator, de Bonis Non, of John Dupont, and Others.

(Charleston, March, 1831.)

[1. *Appeal and Error* ⟸1195.]

A decree of the Court of Appeals, sending back a cause for specified purposes, concludes everything settled by the decree appealed from, and not reserved by the appeal decree; and no matter so concluded, can be litigated in the further progress of the cause.(*a*)

[Ed. Note.—Cited in Hill v. Watson, 10 S. C. 278.

For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. ⟸1195.]

[2. *Parent and Child* ⟸3.]

A father will not be allowed maintenance for his children, out of their separate property, unless he is totally incapable of providing for them, or, from having a numerous family of children, borders upon necessity; and still less will an allowance be made, if he comes for arrears of past maintenance. Where no claim for maintenance has been made by the father, in his lifetime, it is doubtful whether it will ever be allowed to his legal representatives, after his death, even as a set off to an account for the profits of the property of his children received by him; at least it would not be allowed, unless in an extreme case; as, where some of the children, or the wife, would be left destitute, while the others had ample fortune.(*b*)

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 55, 56; Dec. Dig. ⟸3.]

[3. *Costs* ⟸71.]

A party, entitled to recover the general costs of the suit, will, nevertheless, be ordered to pay such of the costs, as were incurred by his litigating groundless claims.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 297–303; Dec. Dig. ⟸71.]

[4. *Executors and Administrators* ⟸456.]

In general, executors will not be ordered to pay costs, personally; but where they litigate their personal interests, they will be ordered to do so.

[Ed. Note.—Cited in Clark v. Wright, 26 S. C. 197, 1 S. E. 814.

For other cases, see Executors and Administrators, Cent. Dig. § 1960; Dec. Dig. ⟸456.]

At Charleston, January, 1830.

Harper, C. The complainants are the executors, and residuary legatees, of Mrs. Mary

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Dupont, deceased, who is the wi*dow, and administratrix, of John Dupont, deceased. After her death, the defendant, Isaac A. Johnson, administered, de bonis non, on the estate of John Dupont. The other defendants are the children of John Dupont, by a former marriage, and distributees of his estate. The bill was filed for an account of the rents and profits of a separate estate, which had been settled on Mrs. Mary Dupont, on her marriage with the said John Dupont, which rents and profits were charged to have been received by him; and also for an account of the said John Dupont's estate, and for his widow's distributive share. The claim for the rents and profits of Mrs. Dupont's separate estate, was long since disposed of by a decree of the Circuit Court, made by Chancellor Gaillard, in 1820. By that decree, the bill was ordered to be dismissed with costs, on the ground, that the rents and profits of the separate estate, were applicable to the joint use and support of Mr. and Mrs. Dupont, and had been so applied by him. The Court of Appeals reversed that decree, so far as to order an inquiry, whether there was not a surplus of rents and profits, which had not been so applied; and also to direct an account of the estate of John Dupont; and reserved the question of costs. No such surplus of rents and profits has appeared; and a report of the commissioner, finding that there was no such surplus, was confirmed by Chancellor Thompson, without appeal.

In accounting for the estate of John Dupont, a single litigated question has arisen. It is, whether the deceased, John Dupont, was entitled to, and his legal representatives can now be allowed maintenance for the support of the defendants, his children, by a former marriage, out of their private property. The defendants were entitled, by the gift of a relation, to fourteen slaves; thirteen of which went into their father's possession, and the other was sold by him, in 1806, for $350. The commissioner reports the hire of these slaves, with interest on the annual accounts, to be about $10,007.50. This calculation is not accepted to; but the complainants contend, that an allowance, for the maintenance of the defendants, ought to be set off against this demand.

I consider this a perfectly clear case. The rule is, that a father, if he be of ability, must maintain his child. Unless totally incapable, or, by having a numerous family of children, he borders upon necessity, the duty of providing for them devolves on him; nor will the court direct the interest of a contingent legacy to be applied for the child's maintenance, unless from the poverty of his parent, he is in danger of perishing through

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want. Butler v. Butler, *3 Atk., 60, Jeffreys v. Jeffreys, Id., 123. The commissioner reports, that at the time the father took possession of the property, he owned a plantation worth $4,100, and seven slaves, besides

(*a*) Ante, 98; Brown v. Postell, 4 Rich. E., 77; 1 Id., 1; 7 Id., 375, 461; 1 Strob. E., 257; 2 Id., 90; 5 Rich. E., 38; 6 Id., 352; 2 Hill E., 335.

(*b*) Presley v. Davis, 7 Rich. E., 109 [62 Am. Dec. 396]; 1 Hill E., 1.

stock, &c.: that at the time of his death, the net value of his estate, as it actually sold, was about $11,000, subject to this claim of his children; and that his income, for fifteen years of the immediate time, including what was derived from his children's slaves, was $3,000, per annum, exclusive of the income of his second wife's separate estate, which was adequate to their support. At the first period mentioned, his judgment debts amounted to something more than $4,000. His other debts at that time, if he owed any, are not known. Under these circumstances, if Mr. Dupont, himself, had applied for future maintenance, at any time during their minority, would the court have allowed it? He certainly appears, through the whole period, to have been of ability to maintain his children; although, perhaps, for a part of the time, in a moderate way. It is argued, that from the circumstance of his fortune's not having accumulated more, notwithstanding his considerable income, and his frugality in expenses, I ought to infer that his debts were greater than appears. I might as well infer, that notwithstanding his apparent frugality, there was some improvidence, and wastefulness, that does not appear. If the court would not have allowed future maintenance to the father, on his application, still less will it allow past maintenance. The old rule was, as is observed by Lord Eldon, in Reeves v. Brymer, 6 Ves., 424, that if the father had by any means maintained his children, the court would not reimburse him. I have met with no case, in which past maintenance has been allowed to the father's representatives, after his death. I do not mean to express an opinion, whether an extreme case might not exist, in which such an allowance would be made; as where some of the children, or a wife, would be left destitute, while the others had ample fortunes. Yet there would be difficulty in making out, that where the father had not thought proper to set up such a claim, but had left part of his family in poverty, they might set it up. Would it be allowed in favor of creditors? It would open a wide field to set such a precedent. If it were a matter within the discretion of the court, however, I should not incline to exercise it in favor of the second wife, who has a sufficient fortune of her own; and still less in favor of her residuary legatees.

I have some difficulty on the question of costs. The complainants had a right to an account of the estate of John Dupont; and of that proceeding the cost ought to be paid

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out of the estate. I *understand that the principal costs in the case, which are said to be very large, have been incurred in litigating the claim to an account of the separate estate of Mrs. Dupont, and this particular claim of an allowance for maintenance. As to the costs of the first litigation, I consider that point settled by the former decrees. The question of costs was reserved by the Court of Appeals, to abide the event of an inquiry as to a surplus of the rents and profits of Mr. Dupont's estate; and no surplus has appeared. The claim for maintenance, I think groundless, and that the defendants, who are creditors, ought not to be burdened with the costs of it. In general, executors will not be ordered to pay costs, personally; but these executors were litigating their personal interests.

It is ordered and decreed, that the commissioner's report be confirmed: and that the defendants recover of the estate of the said John Dupont, the hire of their slaves which were in his possession, according to the commissioner's report, with interest on the annual amounts of hire; together with the price of the slave sold in 1806, and interest thereon. If any surplus of the estate shall remain, after satisfying the defendants' demand, partition to be made thereof, allotting one-third to the complainants, and dividing the residue among the defendants, according to their respective interests. The costs of the bill and answer, to be paid out of the estate; the residue of the costs, by the complainants.

The complainants appealed from this decree, and also from the decrees of Gaillard, and Thompson, Chancellors, on various grounds, including exceptions to both of the commissioner's reports, referred to in the foregoing decree; but from the disposition made of the case, by the Court of Appeals, it is unnecessary to state the several grounds more particularly.

Grimke, for appellants.
McCrady, contra.

HARPER, J., delivered the opinion of the court.

We are of opinion, that the decree of Chancellor Gaillard, and that of the Court of Appeals, settled every thing in relation to the claim for an account of the rents and profits of Mrs. Dupont's separate estate, except in the event of there being found a surplus of rents and profits, over and above the amount of family expenses; and that so much of the case is not properly before us. The decree of Chancellor Thompson, on exceptions to the commissioner's report on the subject of these rents and profits, was in the nature of a final decree, and was not appealed from; but if it were now properly before us on appeal, we do not perceive the errors of the com-

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*missioner's report, nor have we the means to correct them. In the last decree of the Chancellor, which is the immediate subject of appeal, we concur. The ground in relation to interest on the annual hire of the slaves, was abandoned in the argument; and

we see no reason to vary the direction in relation to costs. The appeal is therefore dismissed.

JOHNSON, J., and O'NEALL, J., concurred.

Decree affirmed.

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CHARLES IZARD MANIGAULT, Administrator, de Bonis Non, of David Deas, and Others, v. CHARLES RUTLEDGE HOLMES, Administrator of Mary Deas.

(Charleston, March, 1831.)

[1. *Judgment* ⇐743.]

A husband mortgaged the absolute property in certain slaves, which he had acquired with his wife; but after his death, the wife who was also the executrix of the mortgagor filed a bill in the Court of Equity against the mortgagees, to enjoin their proceeding under the mortgage, claiming that she was entitled, in her own right, to an estate for life in the slaves mortgaged, to her sole and separate use, with remainder to her children: and in this suit it was determined, by the decree of the court, that her children where entitled in remainder, but that her interest, which was for her life only, was not an estate to her sole and separate use, and had vested in her husband jure mariti, and was subject to the mortgage executed by him; and it was therefore ordered, that the slaves should be sold for the term of her life, in satisfaction of the mortgage, which was done. At the sale under this decree, the wife became the purchaser of the interest for her life, and remained in possession of the slaves until her death; after which, in a subsequent suit, by other creditors of the husband, to which his administrator, de bonis non, was a party, it was decided, that the wife's original interest in the slaves was absolute, and that the whole had vested in the husband, and was liable for his debts. *Held*, first, that the wife took nothing, by her purchase under the first decree, but an estate for her own life: and that, being executrix, neither she, nor her representatives, could set up the absolute conveyance, contained in the mortgage, to defeat the claim of her testator's creditors to the slaves, after the termination of her life estate, although the mortgagees might be estopped, by the decree and sale, from claiming them under the mortgage. Second, that the possession of the wife would not avail to give her children, as remaindermen under the first decree, a title by the statute of limitations; but that her possession must be referred to her title as executrix, which only terminated at the same time with her title as purchaser, to wit: at her death; and that the children could derive no benefit from the decree declaring them entitled

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as *remaindermen, as they were not parties to it, nor privies, inasmuch as they were not remaindermen in fact, or in law. Third, that the sale under the first decree, was an extinguishment of the mortgage; and that the mortgagees were estopped, by the decree and sale, from any claim to the slaves, under their mortgage, after the termination of the life estate sold, although the slaves were, in fact, a part of the mortgagor's assets, and liable for his debts.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1253; Dec. Dig. ⇐743.]

[2. *Executors and Administrators* ⇐114.]

Neither an executor, nor his representatives, can deny the title of his testator to property in his possession as executor, to which no other person has a valid title, although the testator may, in his lifetime, have parted with the entire interest in it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 465, 466; Dec. Dig. ⇐114.]

[3. *Adverse Possession* ⇐61.]

An executor cannot hold adversely to his testator, so as to mature a title by the statute of limitations, although he have a title inconsistent with that of the testator; but his possessions will be referred to his title as executor.(*a*)

[Ed. Note.—Cited in Henry v. Archer, Bailey, Eq. 535.

For other cases, see Adverse Possession, Cent. Dig. §§ 315–322; Dec. Dig. ⇐61.]

[4. *Judgment* ⇐665.]

A decree, or judgment, neither binds, nor protects, any one, but those who are parties, or privies, to it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1177; Dec. Dig. ⇐665.]

[5. *Mortgages* ⇐584.]

A decree of foreclosure, ascertaining the extent to which the property is liable under the mortgage, is conclusive on the parties; and when executed, extinguishes the mortgage, although it afterwards appear, that the property was, in fact, liable to a larger extent.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1682; Dec. Dig. ⇐584.]

[6. *Judgment* ⇐668.]

A direct, final judgment, or decree, of a court of competent jurisdiction, is forever conclusive and binding, as to the subject matter, between the same parties, and all who are privies in law, or in estate; although a contrary decree, upon the same subject matter, be subsequently made as to other persons, who were neither parties, nor privies, to the first decree, and who are not therefore bound by it.(*b*)

[Ed. Note.—Cited in Shettlesworth v. Hughey, 9 Rich. 390; Parker v. Legett, 12 Rich. 200; McDowall v. McDowall, Bailey, Eq. 324; Schmidt v. Schmidt, 7 Rich. Eq. 218; Mauldin v. Gossett, 15 S. C. 576; Ex parte Knox, 17 S. C. 209; Fraser & Dill v. City Council of Charleston, 19 S. C. 399; Kirven v. Virginia-Carolina Chemical Co., 77 S. C. 508, 58 S. E. 424.

For other cases, see Judgment, Cent. Dig. § 1181; Dec. Dig. ⇐668.]

[7. *Judgment*, ⇐670, 689.]

A decree in a suit brought by an executrix in her own right, but to which she was a necessary party as executrix, and in which the rights of her testator were adjudicated, is conclusive between the administrator de bonis non, and the other parties to it, and cannot be re-examined in a subsequent suit between them.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1185, 1212; Dec. Dig. ⇐670, 689.]

[8. *Executors and Administrators* ⇐271.]

To entitle the creditor of an executor to resort to the estate of the testator, for payment of a debt contracted by the executor, for the benefit of the estate, it must appear that the contract was made with the executor, in his representative character; and the creditor must further shew: first, the necessity of the contract for the estate; second, that the executor has no funds of the estate in his hands; and third, that the executor is insolvent. If either of these requisites is wanting, the creditor will

(*a*) Broughton v. Telfaer, 3 Rich. E., 439; Post, 535.

(*b*) Ante, 107, note c.

be referred to his personal remedy against the executor, vide Guerry v. Capers, ante, 159.

[Ed. Note.—Cited in Henshaw v. Robertson, Bailey, Eq. 311; Ex parte Chappell, 34 S. C. 103, 12 S. E. 934.

For other cases, see Executors and Administrators, Cent. Dig. § 1045; Dec. Dig. ⟸271.]

[9. *Equity* ⟸447.]

In this state, a bill of review will lie only for new matter, discovered since the decree, and of which the party could not have the benefit in the first instance, making a new case, and one proper for equity jurisdiction. It will not lie for error in law apparent upon the face of the decree.(*c*)

[Ed. Note.—Cited in Hill v. Watson, 10 S. C. 277.

For other cases, see Equity, Cent. Dig. §§ 1091–1094; Dec. Dig. ⟸447.]

[10. *Contribution* ⟸3; *Costs* ⟸98.]

Where a creditor files a bill for the discovery of assets, whether specifically for himself, or jointly for all the creditors, and the court by

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that *means gets possession of the assets, the possession draws after it the entire distribution of the fund. And a creditor who comes in under the decree, must contribute ratably to the expenses of the suit; although he had a judgment and execution, which he might have enforced at law, but neglected to do so, until the fund was in court; nor will a fee paid to his own counsel, to watch over his interests in reference to his claim, be taken into the estimate of the expenses of the suit.(*d*)

[Ed. Note.—Cited in Allen v. Barkley, Speers, Eq. 268.

For other cases, see Contribution, Cent. Dig. § 5; Dec. Dig. ⟸3; Costs, Cent. Dig. § 383; Dec. Dig. ⟸98.]

[This case is also cited in Hardin v. Melton, 28 S. C. 48, 4 S. E. 805, 9 S. E. 423, without specific application.]

The principal question originally made in this cause, was settled by a decree of the Court of Appeals, in March, 1829.(*e*) It now came up on appeals from the decree of De Saussure, Chancellor, upon several applications, by petitions, and motions in the cause, made before him at Charleston, in May, 1829. These will, all of them, be sufficiently understood, from the following opinion of O'Neall, Justice; with the exception of a motion made on behalf of Mrs. Hall, the opinion upon which was delivered by Johnson, Justice. In order to the proper understanding of this application, it is necessary to state that Mrs. Hall was a creditor of David Deas, by a bond dated in 1805, on which she obtained judgment, and sued out execution, in 1815. In January, 1826, an order was entered in the present cause, directing the master to advertise for the creditors of David Deas, and to ascertain the debts due by him. Under this order, Mrs. Hall, in August, 1826, presented to the master a statement of the amount due to her, for principal, interest, and costs of her debt. By the decretal order of March, 1829, the administrator, de bonis non, of David Deas, was directed to pay the judgment creditors according to their priority, "they contributing ratably to the expenses of the suit;" and on payment of Mrs. Hall's claim being demanded, she was required to abate the sum of $162.61, for her contribution to these expenses. This was resisted, on the ground that she was not a party to the order directing contributions, and had not been heard in opposition to it; that she had not employed the counsel who conducted the suit, and whose fees constituted the chief portion of the expenses, nor had she been consulted as to the selection of counsel; that she had, in fact, employed counsel of her own, to watch over her interests in reference to her claim, and paid him a fee of $200; and that she ought either to be exempt from contribution to the expenses, or the sum paid to her counsel should be taken into the estimate of the expenses, and allowed to her. The administrator refusing to pay the claim, unless the abatement for contribution was

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allowed, a motion *was made, before the Chancellor, to compel payment without abatement, or to order an allowance to Mrs. Hall, for the fee paid by her to her own counsel. In support of the motion, in addition to the reasons already stated, it was urged that Mrs. Hall had a legal lien on the property of Mr. Deas, by her judgment, and execution, which she could have enforced at law, without coming into equity; and the court could neither compel her to come in, nor deprive her of the benefit of her lien. The Chancellor refused the motion, and an appeal was taken from his decision, and brought up with the other appeals in the cause.

O'NEALL, J. In this case it will be useful to precede the consideration of the several questions involved in it, by a summary statement of the facts on which the claims now presented to the court are predicated.

Humphrey Summers, by his last will and testament, bequeathed to his daughter, Mary Summers, one third part of his slaves. This share was after his death, and conformably to the provisions of the will, duly ascertained; and, upon her marriage with David Deas, Esq., he received, and reduced into possession, the slaves constituting her share. He, some years after, to secure the payment of a large debt, mortgaged to the president, directors and company of the State bank, fifty-eight slaves, including thirty-six of those received by him on account of his wife's leg-

(*c*) 2 DeS. E., 34, 239, 412, 507; 1 McC. E., 22, 30; 2 Id., 406; Carr v. Green, Rich. E., C., 405; Id., 469; Hinson v. Pickett, 2 Hill E., 351; Dud. E., 24; Rice E., 1; Sp. E., 349; 1 Rich. E., 390; Hunt v. Smith, 3 Id., 466; Simpson v. Downs, 5 Id., 422; Ex parte, Vandersmissen, 5 Id., 519 [60 Am. Dec. 102]; Simpson v. Watts, 6 Id., 364 [62 Am. Dec. 392]; Tomlinson v. Tomlinson, 10 Id., 300; S. C. Columbia, May 1859; Bennett v. Bell, 10 Id., 461.

(*d*) Allen v. Barkley, Sp. E., 266.

(*e*) Vide post, next cause.

acy, under her father's will. He subsequently made, and executed his own will, constituting his wife the sole legatee and executrix, and died in the year 1822. His widow proved his will and qualified as executrix; and the president, directors and company of the State bank, having seized the mortgaged slaves, for the purpose of foreclosing their mortgage by a sale, Mrs. Deas, believing that under her father's will she had an estate, to her sole and separate use, for life, with remainder to her children, in the thirty-six slaves, derived from his estate, on 15 August, 1822, filed her bill in the Court of Equity, for an injunction to restrain the president, directors and company of the State bank, from proceeding under their mortgage, against the said slaves. To this bill they answered, styling her "widow, and executrix of David Deas, deceased;" and contended that under the will of her father, she took an absolute estate, which, by virtue of her marriage, vested in her husband; and they claimed that the whole of the slaves mortgaged to them should be sold by the decree of the court, to foreclose their mortgage. Upon the hearing of the cause, the Circuit Court, in March, 1823, by its decree, decided that Mrs. Deas had a life estate only, in the

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*thirty-six slaves, and that her children were entitled in remainder; but that her life estate was vested in the bank, by her husband's mortgage; and it was ordered, and decreed, that the mortgage should be foreclosed by a sale of the twenty-two slaves, which were admitted to be the property of David Deas, absolutely, and of the life estate of Mrs. Deas, in the thirty-six. On an appeal, on the part of the bank, this decree was affirmed, by the then Court of Appeals, in April, 1823; and the decree was, subsequently, fully executed, by a sale of the twenty-two slaves, and by Mrs. Deas' purchase from the bank of her own life estate in the thirty-six.

She afterwards contracted debts to Henry Gourdin, and McCartney & Gordon, for necessaries, as is alleged, such as blankets and clothing, for the use of the slaves held by her under her father's will.

The executors of Manigault, judgment creditors of David Deas, in February, 1824, filed a bill in the Court of Equity, against Mrs. Deas, as executrix of David Deas, for an account of the assets of his estate, and the payment of his debts; and her answer having come in, the matters of account were referred to the master, who was directed to advertise for the creditors of David Deas. In the progress of this suit, Mrs. Deas accounted before the master for the admitted assets of the estate, and was found to be largely in arrear to it; and she was also required by the complainants to account for the slaves held by her under her father's will, as part of the assets of her testator, David Deas, which she refused to do, on the ground that these slaves were not the property of David Deas, nor liable for his debts; and her objection was sustained by the master. Pending this litigation, Mrs. Deas died, and administration, de bonis non, with the will annexed, of the estate of David Deas, was granted to one of the complainants, Charles I. Manigault, who was also one of the executors of Manigault; and administration of the estate of Mrs. Deas, was committed to the defendant, Charles R. Holmes. The suit was, in September, 1827, revived by Charles I. Manigault, as administrator of David Deas, against Charles R. Holmes, as administrator of Mary Deas; and the cause came up for hearing, upon exceptions to the master's report, in January, 1828, before Thompson, Chancellor, who decided that the slaves held by Mrs. Deas, under her father's will, were her property for life, and, after her death, the property of her children. On appeal, the Court of Appeals, in March, 1829, reversed the decree of the Chancellor, and decided, that under her father's will, Mrs. Deas took an absolute estate in the slaves

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bequeathed to her; and that by *the marital rights of her husband, they had vested in him; and they ordered, and decreed, that these slaves should be delivered to, and sold by the complainant, as administrator, and the proceeds administered by him.

Under this decree, all the slaves acquired by Mrs. Deas, from her father's estate, including the thirty-six mortgaged to the State bank, have been sold, and the proceeds in part administered; but the proceeds of the sale of the thirty-six are now attempted to be subjected to several claims, hostile to that of the complainants.

These are, First—The creditors of Mary Deas, for necessaries furnished for the use of the slaves.

Second—Her children.

Third—The State bank, under the mortgage of David Deas, to the president, directors and company.

Out of these claims, which were, by various proceedings, submitted to the Circuit Court, in May, 1829, and on the several appeals from the decree, in relation to them, made by the Chancellor, which disallows the claims of the creditors, and of the children of Mrs. Deas, but sustains that of the State bank, the following questions have arisen for the consideration and judgment of this court. First, could Mrs. Deas hold, against all claimants, the thirty-six slaves purchased by her, under her decree against the State Bank? Second, can the proceeds of the sale of the slaves be made liable to the demands of her creditors, for necessary supplies for the slaves furnished to her? Third, regarding her children as now in possession of the thirty-six slaves, can they retain the possession from the complainants? Fourth, are the president, directors and company of the

State bank, estopped from claiming under their mortgage, by the decree of the Court of Equity, in the suit of Mrs. Deas against them? Fifth, can they file a bill to review the decree in that suit, for error in law? I will consider, as briefly as I can, these several questions, in the order in which they have been stated.

First. The statement of the facts, already given, would induce every one, not acquainted with the hidden difficulties, which start out of an apparently plain legal question, to say, that Mrs. Deas could only have a life estate in the slaves by her purchase from the State bank. This was all she bought, and all that was sold; but, as David Deas had conveyed the whole of his estate in the slaves, to the president, directors and company of the State bank, it is argued, that although they are estopped by the decree, and the sale to Mrs. Deas, from recovering against her, yet no other person can recover them.

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*All the consequences of this argument will be considered in the sequel; but at present, I propose only to shew, that it cannot have the effect to vest the property in Mrs. Deas. She was the executrix of David Deas; and, by operation of law, all his rights, in action, and in possession, vested in her. She was the legal owner of his property; and this legal estate she held for the payment of his debts and legacies. If one creditor failed to make the property in her hands liable for his debt, another, not a party to that suit, was not concluded by it; but might, by suit, subject it to the payment of his debt. Her possession, therefore, could be in no other character than as executrix, at least as against the creditors of David Deas. Upon her death, the administrator, de bonis non, succeeded to her rights as executrix, and was entitled to the possession. Her administrator could not say, that it was her property by virtue of a purchase under the decree: for that, at most, would only shew a right to an estate during her life. Neither would the mortgage to the bank avail her administrator: for the administrator, de bonis non, of David Deas, as between him and Mrs. Deas' administrator, could shew the decree of foreclosure, as a legal extinguishment of the mortgage. The complainant then, in a suit against Mrs. Deas' administrator, for the recovery of the thirty-six slaves, would only have to shew, as he has already done in this case, that by the will of Humphrey Summers, she took an absolute estate in the slaves bequeathed to her, which, by the marital rights, vested in the husband, and his legal title to the property, as administrator, would be complete. Indeed, it would not be necessary for him to do more than to shew, that Davis Deas had possession of the slaves, and that Mrs. Mary Deas succeeded to his possession, as his executrix. She, or her administrator, would be estopped from denying the title of her testator; or, at most, she, or her administrator, could only be permitted to shew a derivative title from him, and consistent with his. She could not, by operation of law alone, acquire a title adverse to his.

The second question is one of less difficulty than the first. It does not appear, that these contracts were ever made with Mrs. Deas, as executrix; and it would not be going too far to say, that it is manifest they were not. For after the decree in the suit of Mrs. Deas against the State bank, the estate of David Deas was regarded as hopelessly insolvent. Credit was given to her on the faith of the property in her possession, but it was on her individual, and not on her representative credit. She was the apparent owner of a large estate, and out of it her creditors, very

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naturally, ex*pected her to make payment. That she has turned out not to be the owner, and thus defeated their reasonable expectations, is the misfortunate of her creditors; but it is the common misfortune of every one, who credits another, supposing him able to pay, when in fact he is not. Conceding, however, to her creditors, that their contracts were made with her, as executrix of David Deas, their case will not be improved by the concession. As a general rule, the income of the estate is the fund for current expenses. This fund, in the hands of the executrix, is that to which the creditor may have the right to look for payment; and in some cases, he may have the aid of the court to made it available to him. But before he could make a fund, out of the hands of the executrix, or the capital of the estate, liable, he must shew: first the necessity of the debt for the trust estate; secondly, that the executrix has no funds of the estate in her hands; and thirdly, her insolvency. These three positions require neither argument, nor illustration, to prove them. They are the result of the adjudications of this court,(f) in the cases of Boggs v. Reid [3 Rich. 450], Smith and Brown v. Killingsworth, Guerry v. Capers, and in that of Henshaw v. Administrator of Freer [Bailey, Eq. 311], decided at Charleston, in April, 1828.(g). In the claim now made by Mrs. Deas' creditors, the second prerequisite to its allowance cannot be made out; for, according to the master's report, she is largely in arrear to her testator's estate. The creditors must therefore look to her estate for payment; and if it is unable to pay, the loss must fall on them, and not on the estate of David Deas.

Third. Assuming as has been done in the argument, that the children of Mrs. Mary Deas ought not to be prejudiced by the sale of the thirty-six slaves, in this suit, to which

(f) Vide ante, 161; Car. L. J., 327; 3 Rich. L., 450.

(g) Vide post, 311, for a report of this case. —R.

they were not formally parties, and regarding them as now in possession, and this as a suit by the complainant, as administrator of David Deas, for the recovery of the slaves, I propose to consider, whether he would be entitled to recover. To solve an apparently difficult question, it is generally best accomplished, by resolving it into its simplest elements. To entitle the administrator of David Deas to recover his property, it would be, prima facie, enough for him to prove the possession by the deceased, in his lifetime, and a conversion, or detention, either before, or after, his death. This would cast upon the defendants, the proof of a better title. How could this be accomplished by the children of Mrs. Mary Deas? They could not rely on her possession, to acquire a title by the statute of limitations, for two rea-

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sons: *first, it would be referred to her title as executrix, and could not, therefore, raise the presumption of a title adverse to her testator; and second, her title under him, both as executrix, and by purchase from the bank, terminated at her death. They cannot set up the decree of the Court of Equity, in the suit of Mrs. Deas against the bank, as evidence of their title: for that part of the decree, which decides that they were entitled to the remainder, is extra-judicial, being on the rights of parties, the children of Mrs. Deas, not then before the court.

In 1 Poth. on Obl., by Evans, 560, it is said, "the judgment, as to all who were not parties to it, either by themselves, or those under whom they claim, is res inter alios judicata, and cannot be opposed, either by, or against them; and this is the case, although the question is the same, to be decided upon the same principles, and depending upon the same facts." In 1 Stark. on Ev., 195, it is stated to be a general rule, "that a verdict shall not be used as evidence against a man, where the opposite verdict would not have been evidence for him." In 1 Phil. on Ev., 249, the general rule is stated to be, "that a verdict is only evidence between the same parties, or between such as claim under the same parties; and that a stranger cannot give a verdict in evidence against one, who was a party to the former suit." The result of the rules stated by these great elementary writers, is, that a person, not a party to the former suit, cannot give the judgment in evidence, to estop the other party from a recovery in a subsequent suit against him. The complainant may, and must, be regarded as a party to the suit between Mrs. Deas and the bank; but her children, not being parties to that suit, cannot now, by that decree, estop him for his recovery against them. If the decree had been against their claim, it is obvious, that, not being parties, they would not have been in any way affected by it. They would have had the right to claim a readjudication of the same matter; and the decree could not have been "opposed" by the complainant, as an estoppel against them. It is true, that if they could, by any process of reasoning, shew, that they were privies in estate with the complainant, in that suit, then they would be entitled to the benefit of the decree. If, for example, they had been remaindermen in fact, as they were supposed to be, it might have bound them, and they might have claimed under it. But by the decision of the Court of Appeals in this case, which receives my entire concurrence, they have been decided to have no estate whatever in the slaves, bequeathed by the will of Humphreys

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Summers to their mo*ther. They, therefore, fail in connecting themselves in estate with the complainant in that case, and are of necessity strangers to the decree; and are neither injured, nor benefited by it.

It is said, however, that they may shew a title out of David Deas, and thus defeat a recovery by his administrator. This is true, but in shewing title out of him, they rely solely on the mortgage to the State bank. The legal effect of this was to vest in the bank his whole estate in the slaves mortgaged; but although the legal estate in the slaves was thus vested in the bank, yet like other legal estates, for legal purposes, it may be shewn, to be defeated by a satisfaction of the thing for which it was vested, or that its legal effect has ceased by an express adjudication. In the case of a levy under execution, the law vests the personal property levied on, in the sheriff, for the purposes of sale, and satisfaction of the execution; but if the debt is paid, or the execution is set aside by the judgment of the court from which it issues, the property is revested in the defendant, in the execution. So in the case of a mortgage of personal property, the law vests the legal estate in the mortgagee, for the payment of his debt; but so soon as the debt is paid, generally the property revests in the mortgagor. If the mortgagee, instead of relying on his legal estate, treats his mortgage as a lien, or incumbrance on the property, and claims to foreclose it by the judgment and decree of a court of Equity, the decree of that court, giving effect to that lien, according to its view of its extent, is a legal satisfaction, release, or destruction of the mortgage itself. Let us apply these principles to the defence made by the children of Mrs. Deas. They set up the mortgage to the bank, which thus becomes a part of their title to the possession; and they must, therefore, be regarded as claiming under it. The complainant, as administrator of David Deas, has the right to reply to it anything, which would be competent between the bank and him. Standing in the place of Mrs. Deas, who was, in the suit between her and the bank, the executrix of David Deas, he has the right to introduce the decree in that case, and to shew, that it had been executed, by

the sale ordered by it. The effect of this is a payment, release, or destruction of the mortgage, by the judgment of a court of competent jurisdiction. In other words, it is the judgment of the Court of Equity, that David Deas mortgaged to the State bank, thirty-six slaves, for the life of his wife, and that they should be sold for that term, to foreclose the mortgage. This decree has been executed, and thus both the lien, and the legal estate, created by the mortgage, are ended and deter-

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mined. With the *reasons of that decree we have nothing to do. They may be bad: and indeed the decree is even against the letter of the mortgage, and its legal effect. But justice is represented to be blind, and the propriety of the representation can never be better illustrated than by the case before us. For the sake of the country, and the ending of litigation, it is the duty of the ministers of the law to shut their eyes to the manifest error in the decree, in the case of Mrs. Deas and the State bank; and to give effect to a legal and technical rule, against both the words of the decree, and what ought to have been the legal operation of the mortgage.

Fourth. In discussing the previous question, I have necessarily touched upon the fourth, and have, in some degree, indicated the conclusion which may be anticipated upon it. Before, however, I proceed to consider it in detail, I may remark, that I feel the justice of this case to be with the bank; and were I at liberty to indulge the feeling of right, I should have no hesitation in saying, that the mortgage ought to be satisfied. But the law, not abstract justice, is that which we are to administer; and if, according to its rules, the bank cannot recover, it is a duty paramount to dismiss the claim.

It may be laid down, as a general rule, that a direct final judgment of a court of competent jurisdiction, on the same subject matter, between the same parties, and privies in law, or estate, is conclusive, and cannot be re-examined in a subsequent original action in the same, or any other court.(*h*) 1 Phil. Ev., 242, '3, '5, '6; 1 Stark. Ev., 198, 202, '5; 1 Poth. on Obl. by Evans, 552, '4, '6, '7. In the application of this rule to the case before us, it is necessary to look into, and examine, the case of Mary Deas against the State bank. It is conceded by all concerned, that the decree was a direct, and final judgment, on the point in controversy. But it is said, that the estate in the slaves, after Mrs. Deas' death, was not the subject matter of that decision; in other words, that the decision then made as to the remainder, was extra-judicial, being on the rights of persons, not parties. This is true, to its full extent, and the judgment, as to the rights of the remaindermen, is absolutely void; but still this cannot benefit the bank. The contest between the bank and Mrs. Mary Deas, was two-fold: first, whether they had any right to foreclose their mortgage at all; and second, if they had, then to what extent. Each of these points was decided, and the present application is to extend the right of foreclosure, beyond what the court then decided that the bank was entitled to. It is now calling on this court to decide, that the

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mort*gage conveyed to them an absolute estate, when the former decree decided, that it conveyed only an estate for the life of Mrs. Deas; so that it is manifest, that the subject matter, now in controversy, is precisely the same as it was in that case.

Are the parties the same, in law, and estate? If the complainant is a stranger to that suit, then, certainly, he can have no benefit from the decree. In order to test this question, it is necessary to see in what character Mrs. Deas, the complainant in that suit, was regarded. If, in law, she was to be regarded as in court, in her private, and not in her representative character, then I should concede, that the complainant, Manigault, would fail in establishing his identity in law, and estate, with her. She filed her bill, it is true, as the legatee, under the will of Humphrey Summers; but she was at the same time the executrix of David Deas, and, therefore, the legal representative of his rights. To enable the court to decide on the extent of them, it was necessary, as his executrix, that she should be a party. Accordingly, the president, directors, and company of the State bank, treat, and style her, in their answer, as "executrix of David Deas, deceased;" and pray a foreclosure of their mortgage, not only of the slaves claimed by her, as Humphrey Summers' legatee, but also of the slaves conceded to belong to her testator. And the court decreed, not only a sale of the slaves conceded to belong to her testator, but also of her life estate in the slaves in dispute, as belonging to him, and passing under his mortgage to the bank. This is conclusive that she stood before the court in the two-fold character of legatee under Humphrey Summers' will, and executrix of David Deas. "It is not essential," says Mr. Starkie, in his Treatise on Evidence, vol. 1, p. 194, "that either the parties, or the form of action, should be precisely the same, if they are substantially the same." And again, "so a record is evidence against one who might have been a party to it, for he cannot complain of the want of those advantages, which he has voluntarily renounced." Id. 194, '5. Mrs. Deas, as executrix, could never have questioned that decree against the bank, for in substance, if not in form, she was a party to it; and if she could not have questioned it, it follows, that the bank could not have objected to it, as evidence in her favor. Suppose the president, directors, and company,

(*h*) Ante, 107 note c.

relying on the legal estate conveyed by the mortgage to them, had brought trover against Mrs. Deas, for the slaves, and had recovered the value of her life estate. In the suit so brought, she could not have been sued as executrix, but must have been treated, and considered, in it, as in her private, and not

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*her representative capacity. Could they have maintained a second action for the same cause against her, or her successor, the administrator de bonis non? It is clear that they could not; for they have recovered, against the legal representative of the rights of David Deas, to the full extent of what the law held to be their legal right. All the questions, necessary to the determination of that right, were involved in the issue made, and they cannot be again reagitated.

Let us put another case. Suppose the president, directors, and company of the State bank, had sued Mrs. Deas, as executrix of David Deas, on his bond, and she had pleaded plene administravit præter, a given sum, arising from assets, other than the slaves in dispute; and that the plea had been confessed by the plaintiffs, or found for her; could they, in a subsequent action against her, have made the slaves liable as assets to be administered? I am fortunately relieved from answering the question by any reasoning of my own, by the case of McDowall v. Branham, 2 N. & M., 572, in which it was held, that slaves in the hands of an administratrix, at the time when her plea of plene administravit was filed, and judgment rendered upon it, were not liable to the plaintiff's judgment against assets quando acciderint.

The decree in the case of Mrs. Deas against the State bank, would, as between her, as legatee under Humphrey Summers' will, and as executrix of David Deas, and the bank, be conclusive. How stands the case between the complainant Manigault and the bank? Is he the same party in law, and estate, as Mrs. Deas, executrix of David Deas, deceased? It cannot admit of a question that he is. He, on her death, and the grant of administration to him, of David Deas' estate, succeeded to all the rights of that testator, which she had not administered. As to whatever belonged to the testator, she, and the complainant, are identical in law. One is the executrix in fact, and in law; the other is the law's substitute for her, after her death. Whatever would conclude Mrs. Deas, as executrix, will conclude him as administrator. Whatever, as against her, as executrix, would conclude others, must conclude them against him.

The slaves in dispute, were administered by Mrs. Deas, for her life; and at her death they were undisposed of, and unadministered beyond it; and of course, they belong to her substitute, as executrix of David Deas, his administrator de bonis non. They have according to law, that is according to an adjudication of a court of competent jurisdiction, in a suit between the executrix and the

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*bank, been administered, so far as to afford to the president, directors, and company, all the benefit of their lien by mortgage, which that decision admitted them to have; and I conclude, therefore, that the bank is now estopped, by the decree in that case, from setting up their mortgage against the slaves, in the hands of the administrator de bonis non. This conclusion receives greater force from the fact, that it does not render the situation of the bank worse, or that of the other creditors better, than it was in the lifetime of Mrs. Deas. In her lifetime, the president, directors, and company of the State bank, did not pretend, that they were not concluded from attempting to make the slaves liable to their claim. The other creditors could, at any time, have made them liable to these debts, either by the suit in equity, which Manigault's executors instituted; or by actions at law, in which she must have pleaded plene administravit præter, and they could have replied assets ultra, and on this issue have made them liable. The effect of Manigault's administration, and of this decision, is to leave all parties exactly on the footing which they occupied, or might have occupied, in Mrs. Deas' lifetime, as to the property of her testator.

Fifth. The fifth question requires neither argument nor illustration. In the case of Perkins v. Lang, reported in a note, 1 McC. Eq. 30, 31, it was decided, that a bill of review will lie, only where new matter has been discovered since the decree, and of which the party could not have had the benefit in the first instance, making a new case, and one proper for equity jurisdiction. In the case of Haskell v. Raoul, 1 McC. Eq. 30, the Court of Appeals decided, that a bill of review will not lie for error in law apparent on the face of the decree. This is a point regarded as settled, and both policy, and the safety of suitors, require, that it should not be open for argument.

The decree of Chancellor De Saussure, dismissing the claims of Henry Gourdin, McCartney & Gordon, and the children of Mrs. Deas, is affirmed; but so much of his decree as sustains the claim of the State bank, is reversed, and the petition of the president, directors, and company, of that bank, dismissed; and the administrator of David Deas, is directed to administer the assets of his estate, conformably to the decree of the Court of Appeals, heretofore pronounced in this cause.

JOHNSON, J. I concur in the foregoing opinion, and am instructed to deliver the opinion of the court, on the appeal of Mrs. Hall, in the same case.

The claim of Mrs. Hall, to be exempted

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from contributing to the *expenses of this suit, is founded on the lien, which her judgment and execution gave her, on the estate of David Deas; and if she had thought proper to pursue her remedy at law, and obtained satisfaction, before the fund, out of which alone it could be satisfied, came into the Court of Equity, there is no question, but that she could not have been obstructed in doing so; but it is very well settled, that when a creditor files a bill for the discovery of assets, whether specifically for himself, or jointly for all the creditors, and the court, by that means, gets possession of the assets, the possession draws after it the entire distribution of the fund. Thompson v. Brown, 4 John. C. R., 619. Mrs. Hall's lien was then gone, and the only means of obtaining satisfaction, was by coming in under the decree; which, in effect, would make her a party, and in that character, she is bound to contribute to the expenses. In another view, it would seem but reasonable and just, that she should contribute. There was no other possible way, in which she could have come at her rights, without litigating all the questions, which have grown out of this interesting, and expensive suit. She was well advised, therefore, to await the result, as it has, probably, saved her a much greater expense. But that furnishes an additional reason, why she should contribute ratably to those that were necessarily incurred. The money paid to her own counsel did not contribute, in any degree, to promote the prosecution of the suit; nor does it appear to have been intended for that purpose; and it cannot, therefore, enter into the estimate of the expenses. This motion must, therefore, be dismissed; and, in this respect, the decree of the Circuit Court is affirmed.

O'NEALL, J., concurred. HARPER, J., concurred in both opinions.

J. G. Holmes and I. E. Holmes, for the children of Mrs. Deas.

King, for Gourdin, and McCartney & Gordon.

Toomer and Cross, for the State Bank.

Hunt, for Mrs. Hall.

Petigru, for complainants.

Decree modified.

Bailey, Eq. *298

*CHARLES IZARD MANIGAULT, Administrator de Bonis Non, of David Deas, and Others, v. CHARLES RUTLEDGE HOLMES, Administrator of Mary Deas.

(In the Court of Appeals, Charleston, March, 1829.)

[1. *Wills* ⇐614.]

The testator directed his slaves to be kept, and employed, for the use of his three daughters, until the eldest attained the age of sixteen years, and then bequeathed the use of one-third of his said slaves, to his eldest daughter, "during her natural life, and her heirs lawfully begotten, forever;" the remaining two-thirds of his slaves, to be kept, and employed, for the use of his two younger daughters, until one of them attained the age of sixteen years, and then "to be equally divided betwixt his said two daughters, share and share alike;" and if either of his said three daughters should die, "without leaving issue, lawfully begotten," limitation over to the survivors, or survivor of them. *Held*—That the terms of the bequest to the eldest daughter, could not be applied to restrict the bequest to the two younger daughters; that the latter took absolute estates, subject only to be defeated by the limitation over, in the event of their dying without leaving issue; and that their issue could not take as purchasers.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1398; Dec. Dig. ⇐614.]

[2. *Wills* ⇐614.]

Although almost every rule of construction yields to the manifest intention of the testator, yet the courts are not permitted to give an effect to his will, contrary to the plain and obvious import of the terms used by him, upon mere conjecture as to his intention; and where he has made bequests to different children, in terms which give to them estates of a different character, in their respective legacies, the bequest to each must take effect according to its legal import, although no reason appears for his having made this distinction between his children.(a)

[Ed. Note.—Cited in Mobley v. Cummings, 35 S. C. 124, 14 S. E. 721.

For other cases, see Wills, Cent. Dig. § 1398; Dec. Dig. ⇐614.]

[3. *Wills* ⇐595.]

Where there is no direct gift to issue, they cannot take as purchasers, by implication from the terms of a valid limitation over, in the event of dying without leaving issue.(b)

[Ed. Note.—Cited in Mendenhall v. Mower, 16 S. C. 313; Shaw v. Erwin, 41 S. C. 214, 19 S. E. 499.

For other cases, see Wills, Cent. Dig. § 1300; Dec. Dig. ⇐595.]

[This case is also cited in Edwards v. Barksdale, 2 Hill, Eq. 199, without specific application.]

(a) Post, 353, note.

(b) Carr v. Porter, 1 McC. Eq. 78; McLure v. Young, 3 Rich. E., 578; Addison v. Addison, 9 Id., 61; post, 535.

An apology will not, perhaps, be deemed necessary, for the publication of a decision, which has been the subject of so much conversation, and some misapprehension also, among the profession, as the above has been; and which, it is believed, has never until now been in print. The judgment of the court upon the main question, is, it will be seen, in strict conformity to the principle, settled by the decision in Carr v. Porter, 1 McC. Eq., 60, that issue cannot take as purchasers, by implication; but it has been supposed to have gone much further, and to have determined that the issue could not take as purchasers, although they were mentioned in the words of the bequest, as well as in the terms of the limitation over; and so was inconsistent with the decision in the latter case of Henry v. Means, 2 Hill, 328. This, it will now appear, from the opinion of the court, was a misapprehension. It is true, that the bequest to Ann Olney Summers, in this case, is analogous to that of Elizabeth Bell, in the case of Henry v. Means; for it may be conceded, that there is no difference in effect, between the gift to "her heirs, lawfully begotten," in the one

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*On appeal from the decree of Thompson, Chancellor, at Charleston, January, 1828.

JOHNSON, J. All the questions that have been made in this case, arise out of the following clause in the last will of Humphrey Summers, deceased, to wit: "My will is, that my negroes be kept, and employed, on my plantation at the discretion of my executors, hereinafter named, or the survivors, or survivor of them, for the sole use, benefit and advantage of my said three daughters, Ann Olney Summers, Susannah Summers, and Mary Summers, until my said daughter, Ann Olney, shall arrive at the age of sixteen years: when it is my will, and I do hereby direct, my said negros to be divided, by my said executors, into three equal parts, or shares, respect being had to the real value thereof; the use of one-third part, or share,

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of which *said negros, I give and bequeath, unto my said daughter, Ann Olney Summers, during her natural life, and her heirs lawfully begotten, forever: and the other remaining two-third parts, or shares, of my said negros, to be kept together, and employed to the best advantage by my said executors, for the sole use and benefit of my other two daughters, Susannah Summers, and Mary Summers, until my said daughter Susannah shall attain the age of sixteen years; when it is my will, that the said remaining two-third parts, or shares, of my said negros, be equally divided betwixt my said two daughters, Susannah and Mary Summers, share and share alike. But in case it shall happen, that either of my said three daughters, Ann Olney Summers, Susannah Summers, and Mary Summers, shall die, or depart this life, without leaving issue lawfully begotten, then, and in such case, it is my will, and I do hereby give, devise and bequeath, that part, or share, of my estate, real and personal, herein before given, devised, and bequeathed, to such my daughter, or daughters, so dying, unto the survivors, or survivor of them, and to their respective heirs lawfully begotten, forever."

David Deas, the complainants' testator, intermarried with Mary Summers, the daughter, and during the coverture, reduced into his possession, the slaves allotted to her, under the direct bequest of one-third part. He afterwards died, leaving a will, of which his said wife qualified as executrix; and this suit was originally instituted against her, on behalf of creditors, for an account of her administration, and to subject the slaves derived from her father's estate, to the payment of the debts of her husband. Mrs. Deas has died since the commencement of the suit:

case, and the gift to "the lawful issue of her body," in the other; and the limitation of the use to Ann Olney Summers, "during her natural life," only, could but render the claims of issue, as purchasers, stronger. It is also true, that the learned Judge, in delivering the opinion, intimates, that Ann Olney Summers, took an absolute estate; but it is manifest, that he is speaking only of the legal effect of the terms of the direct bequest; without reference to the influence of the limitation over, in restraining the generality of the terms of the gift to Ann Olney Summers, and her heirs. That the effect of the direct bequest was to give her an absolute estate is unquestionable, Hinson v. Pickett, 1 Hill Eq. 37; but it is not said in any part of the opinion, that this effect is not restrained by the subsequent limitation over. The contrary, indeed, may be inferred from several parts of the opinion, as well as from the reference to the case of Carr v. Porter; in which Mr. Justice Nott, in delivering the opinion of the court, distinctly recognizes the doctrine of the cases of Read v. Snell, 2 Atk., 643, and

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*Lampley v. Blower, 3 Atk., 396, that on a bequest to one, "and his issue," or "the heirs of his body," if there be a limitation over, on his dying without issue, living at his death, the issue will take as purchasers. 2 McC. Eq. 88.

But the bequest to Ann Olney Summers, was not the subject of the judgment of the court, and what is said in relation to it, is said obiter merely. The question to be decided was, as to the interest taken by Mary Summers; and the decision, on this question, is based upon the concession, that Ann Olney Summers took only an estate for life, and the position, sustained by the court, that the terms of the bequest to her, could not be applied to restrain the plain legal import of the bequest to her sisters. The bequest to Mary Summers, was, then, simply a bequest to herself, without mentioning her issue, who are introduced for the first time, in the terms of the limitation over; and there they are mentioned, "not for their own sakes, but for the sake of the remainder over." The case was thus identical in principle with that of Carr v. Porter, and the decision was of course the same, and for the same reasons; but both of these cases differ from Henry v. Means, in the fact, that in them there was not, and in the latter case there was, an express gift to the issue; and, therefore, there is no inconsistency in the decisions.

It would be a work of utter supererogation to enter into any defence of the principle settled by the case of Henry v. Means. The question was reconsidered in the subsequent cases of Henry & Talbird v. Archer, and Ferril v. Talbot & Henry, both founded on the same bequest, in the same will, with the case of Henry v. Means; and, after the fullest discussion, the doctrine of the latter case was deliberately affirmed, by the concurrent judgment of the Chancellors, and of the Law Judges. See the opinion of the former, delivered by Chancellor Harper, and of the latter, by Mr. Justice Richardson, in Riley's E. C., 247, 260. The argument has been exhausted by the opinions delivered in these three cases; but it will not be out of place to remark, in conclusion, that the rule recognized and acted on in these cases—that where there is a gift to issue, generally, a limitation over, in the event of dying without issue living at a particular time, will have the effect to limit the generality of the gift to issue, and confine it to the issue living at that time, so as to entitle them to take as purchasers—conforms to, and is a fine illustration of, the canon, deduced by Mr. Preston, from a careful analysis of all the cases on the subject of the rule in Shelly's case, and the exceptions to it, to wit: that "after the intention" (to give to heirs,) "is fixed, the law decides on the gift; allowing the intention to govern, as often as it is clear that the word heirs is not used as descriptive of the class of legal successors, but in designation of an individual, or of particular persons." 1 Prest. Est., 275. —R.

and administration, de bonis non, of her husband's estate, having been granted to Charles Izard Manigault, one of the complainants, the suit has been revived by him against the administrator of Mrs. Deas; and the question as to the liability of these slaves to the debts of Mr. Deas, is the matter now in issue. There can be no doubt, but that the marital rights of Mr. Deas vested in him the whole interest which was vested in the wife; and what that interest was, is the present subject of controversy. The creditors insist that she took an absolute and unconditional property in these slaves; and that this interest vested in him, and was liable, to the whole extent, to the payment of his debts; whilst, on the other hand, it is contended that Mrs. Deas took only a life estate, with a limitation over to her children, as purchasers; and, consequently, that the rights of the creditors could only be enforced, subject to this limitation.

If the clause of the will, above referred to, be taken up and dissected, with a view to ascertain its meaning, according to the terms used, it will be found to contain three distinct, independent and substantive provisions. The first, gives to Ann Olney Summers, during her natural life, and the heirs of her body, lawfully begotten, forever, one-third part of the testator's slaves. The second, directs, that when Susannah Summers shall arrive at the age of sixteen years, the remaining two-thirds "shall be equally divided betwixt" Susannah and Mary Summers, "share and share alike," without any restriction, condition, or limitation. The third, and last,

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limits *over the respective portions of each, to the survivor, or survivors of them, in the event of their "dying without leaving issue, lawfully begotten," and to their respective heirs, lawfully begotten, forever, by way of cross remainders.

The second provision, according to this division, contains, it will be remarked, no direct gift or bequest, to Susannah and Mary Summers, of the portions allotted to them; but supplying what is the necessary inference from the whole context of the will, and from the direction, that the remaining two-thirds of the slaves shall be equally divided betwixt them: and construing this as an independent provision, the daughter Mary took an absolute property, in her portion of the slaves. It is conceded, that this consequence necessarily results from this mode of construction; but it is contended, and the argument of the counsel opposed to the motion has been principally directed to the establishment of these positions; first, that Ann Olney Summers took only a life estate, in her portion of the negros, with a limitation over to the heirs of her body, lawfully begotten, and if she died without leaving issue, then over to her surviving sisters; secondly, that the dispositions of the will were, according to legal construction, the same in respect to all the daughters; and thirdly, that under the limitation over to the survivor, and the heirs of her body, on a dying without "leaving issue lawfully begotten," the issue took as purchasers, and, consequently, that Mary Summers took only a life estate. I shall not undertake to follow the counsel opposed to this motion, through all the cases and authorities which have been put in requisition, and which have been brought to bear, with great force and propriety, on these questions. The case, itself, appears to me to fall within a very narrow compass, and its solution, to depend upon a few well-settled principles; the whole difficulty consisting in their application to particular circumstances, and to this I shall chiefly direct my attention.

And first, with respect to the interest, which Ann Olney Summers took under this bequest. In considering this question in reference to the direct bequest to Ann Olney Summers, it will be observed, that there is no direct limitation over to the heirs of her body; but the bequest is, in general terms, to her, and the heirs of her body, lawfully begotten, forever. The words used in this bequest are precisely those which, according to their legal definition, constitute an estate tail, in relation to real estate; and the authorities all agree, that a limitation over of a personal chattel, in terms creating an estate tail, is void, and that the whole vests in the first taker. According to this rule, Ann Olney Summers, took an absolute estate in her portion of the negros. But I regard the determination of this question as wholly unnecessary to the decision of the case under consideration. Let it be conceded, that Ann Olney Summers took only a life estate in the slaves bequeathed to her, with a good limitation over to her issue, and in the event of her dying without leaving issue, then over to Susannah, and Mary Summers; and yet it does not follow, that Mary Summers took no greater estate in those bequeathed to her.

In the direct bequest to Ann Olney Sum-

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mers, the gift is to her, *and the heirs of her body, forever. In the direct bequest to Susannah, and Mary Summers, there is no restriction, condition, or limitation, whatsoever, except in relation to the survivorship, the effect of which will more properly fall under the consideration of the third proposition; and the conclusion, that they took the same estate, is attempted to be sustained on the rule of construction, founded on intention, conceding that it is in violation of the strict grammatical construction. The foundation of this argument, is, that the legatees all stood in the same relation to the testator, and that they were all infants; from which it was inferred, that there was no motive for any distinction amongst them; and it is then urged, that the bequests are in the same

clause, and that with respect to every thing else, the legatees are put upon a perfect equality: and hence it is concluded, that the intention of the testator, must have been the same with respect to all. If a deduction from this hypothesis were to prevail, I should conclude, very clearly, that the bequest to Ann Olney Summers, should conform to the bequests to Susannah and Mary Summers, rather than that theirs should be conformed to hers. The bequest to them disposed of two-thirds of the estate, and embraced two-thirds of the legatees: and if it be true, that the major always includes the minor, or that in things inseparable, the greater controls the less, then my conclusion is correct. The rules of interpretation are founded in good sense, and are calculated to meet all the variety of circumstances, incident to the framing of wills, inops concilii; and to effect an obvious intention, they permit the substitution of one word for another, the transposition of words, and sentences, and the violation of strict grammatical construction; one part of a will, may be construed by another part; and, in short, the canons of construction are so latitudinary, that almost every rule yields to the manifest intention. But we are not permitted to give an effect to a will, contrary to the plain, and obvious import of the terms used by the testator; and broad as the rule is, we are prohibited from making a will for him.

If speculations on the subject of intention were admissible, I should probably arrive at the conclusion, to which this argument leads. Ignorant of the feelings, which might have operated on the testator, I am ready to confess, that I can see no reason, why he should have made any distinction between these children. But we are forbidden by the rules of law to indulge in conjecture. The testator's power of disposition over his property is unlimited. If he will, he may indulge his partialities, and his prejudices, and exercise wisdom, or folly, in the disposition of his estate. There is no restraint upon his framing his will, even upon fanciful speculations, and remote probabilities: and every one who has had an opportunity of observing, will readily admit, that they are sometimes sufficiently visionary. Possessing then, as the testator did, the abolute power of disposition, we are not permitted to speculate as to his intention: but are bound to give effect to his will, according to the plain, obvious, and legal import of the terms, in which he has expressed it. And judging of the bequest to Susannah, and Mary Summers, according to this rule,

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it will not, I think, be seriously *questioned, that it imports a direct, and absolute gift, subject only to a limitation over to the survivor, in the event of a dying without issue living at the time of their death. The effect of this limitation I will now proceed to consider.

If the clause in question be read according to the foregoing conclusions, and in connection with the concession, that it contained a good limitation over to the issue of Ann Olney Summers, it will be found to contain the following dispositions: first, of one-third part to Ann Olney Summers, for life, with remainder to her issue living at the time of her death; secondly, the remaining two-thirds, to be equally divided between Susannah, and Mary Summers, without restriction, or limitation; and thirdly, in the event of a dying without issue, remainder over to the survivor, or survivors, and their issue, in cross remainder. Mary Summers, afterwards Mrs. Deas, died pending this suit, leaving issue; and the question now remaining to be discussed, is, whether the issue take under this limitation, or whether the slaves bequeathed to Mrs. Deas, are assets, for the payment of the debts of David Deas.

The solution of this question, does not, as has been sometimes supposed, depend on arbitrary rules, but on rules founded in reason, and such as are best calculated to effectuate the intention of the testator. Amongst these is found the well-settled rule, that issue cannot take as purchasers by implication; of which the case under consideration, will furnish a good illustration. The testator bequeaths to his daughter Mary, certain slaves, and if she die without leaving issue, then they are given over to her surviving sisters. Now here is no direct provision for the issue: and it may be asked, why they were introduced. The answer appears to me obvious. They were introduced, as marking the quantity of the estate, which their mother took in the slaves, and the event upon which they were, or were not, to go over to the survivor; or, as it is better expressed, in the quotation of the counsel from Cujacius, they are mentioned not for their own sakes, but for the sake of the remainder over; and it would be a violation of the intention of the testator, to give them anything as against their parent. But the case of Carr v. Porter, 1 McC. Eq. 60, is conclusive of the question. These are words of limitation, and not of purchase, and the issue are not entitled to take. The limitation over to the "survivor, or survivors, and to their respective heirs, lawfully begotten," like the bequest to the heirs of Ann Olney Summers, create an estate tail; and on that account, is void as to the personal estate, so far as it operates as a bequest to the heirs. Besides which, it could only operate in the event of the estate going over to the survivor: and that event has not happened, and with regard to Mrs. Deas, can never happen, she having died leaving issue.

It is therefore ordered, decreed, and adjudged, that the decree of Chancellor Thompson be wholly reversed; and that the defendants do account to the complainant, Charles Izard Manigault, administrator of David Deas, for the slaves bequeathed by the late

Humphrey Summers, to his daughter, Mary Summers, and deliver such of the slaves as may be in their possession, to the said Charles

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Izard *Manigault. And it is further ordered, that the slaves be sold by the said Charles Izard Manigault, and that he administer the proceeds of the said sale, and the other assets of the said David Deas; and that the judgment creditors, mentioned in the schedule filed with the master's report, be paid according to their priority; they contributing ratably to the expenses of this suit. It is further ordered, that the defendant, Charles Rutledge Holmes, as administrator of Mary Deas, do pay to the said Charles Izard Manigault, the amount due to the estate of David Deas, on account of her administration as executrix, or that he account before the master, for her estate. And it is lastly ordered, that the costs of this suit be paid out of the estate of David Deas.

NOTT, J., and COLCOCK, J., concurred.

H. S. Legare and T. S. Grimke, for the motion.

King and Harper, contra.

Decree reversed.

Bailey, Eq. 304

ANDREW WILLIAM SWINDERSINE v. ELIZABETH MISCALLY, and Others.

(Charleston, March, 1831.)

[1. *Limitation of Actions* ⇐102.]

An administrator purchased certain slaves at a sale, made by him of his intestate's estate, and remained in possession of them for a number of years, when he mortgaged them, to secure repayment of a sum of money advanced to him, and delivered the slaves to the mortgagee, who had no notice of any defect in the title of the mortgagor. The mortgagee remained in possession for three years, when he died, and the slaves went into possession of his administratrix, who remained in possession for six months, when she died, having previously, however, had the slaves sold under the mortgage, and bought them in: upon her death, the slaves went into the possession of her administratrix, who continued in possession for three years and eight months. Upon a bill then filed by the distributee of the first intestate, who was of full age when the mortgage was executed, *held*, that he could neither recover the slaves, nor follow them for payment of a balance due by the administrator, on his administration of the intestate's estate.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 501; Dec. Dig. ⇐ 102.]

[2. *Executors and Administrators* ⇐537.]

The remedy of a distributee against the surety of an administrator, for the recovery of a balance due by the latter on his administration, is in general at law; but if it be necessary, in order to obtaining satisfaction, to set aside a voluntary conveyance made by the surety of his own estate; or to require the executors of the donee to account for the property included in the voluntary conveyance; the distributee may proceed against them in equity, in the same suit by which the default of the administrator is established. But the surety, or if he be dead, his administrator, must be made a party.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2453, 2485-2581; Dec. Dig. ⇐537.]

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[3. *Executors and Administrators* ⇐439.]

*Leave given to amend, where a decree could not be made for want of administration on the estate of a necessary party, who died before the commencement of the suit.(a)

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765, 1766, 1770, 1771, 1774, 1786; Dec. Dig. ⇐439.]

[4. *Executors and Administrators* ⇐527.]

[A surety for an administrator, who became so by a bond subsequent to the execution of the original bond, was *held* liable for the final balance found due from the administrator, though it arose in part from acts prior to the execution of the latter bond.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2368; Dec. Dig. ⇐527.]

[5. *Fraudulent Conveyances* ⇐110.]

[A person largely indebted executed a deed of gift to his son of all his estate, reserving an estate for life. *Held*, that the creditors of the donor might follow the property into the hands of a devisee of the son.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 359; Dec. Dig. ⇐ 110.]

[6. *Limitation of Actions* ⇐47.]

[The statute of limitations does not begin to run against the liability of a surety on an administration bond until the liability of the administrator has been ascertained and fixed.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 257; Dec. Dig. ⇐47.]

Heard by De Saussure, Chancellor, Charleston, April, 1829.

Andrew Swindersine, the father of the complainant, died intestate, in November, 1802, leaving the complainant, and a daughter, both at that time minors, the distributees of his estate; and in December of the same year, administration of his estate was granted to Daniel Miscally. In February, 1803, the administrator, by permission of the ordinary, sold the whole of the personal estate, with the exception of two slaves, which were reserved for the use of the intestate's children; and, at this sale, he purchased, for himself, several slaves, and other property, to the amount of $1,019.76. The intestate's daughter, afterwards intermarried with William J. Berrie, and the administrator settled with them, in full, for her interest in her father's estate. He also made several payments to the complainant's guardian, and to the complainant himself, after he came of age, but never had a final settlement with him. The complainant came of age, in 1812, and in 1815, filed a bill against the administrator, for an account of his administration; and in the progress of the suit, an account was taken, and a balance, of $891.54, was ascertained, by the commissioner, to be due by the administrator; but before his report was

(a) 6 Rich. E., 111; 8 Id., 240.

filed, the suit abated, by the death of the administrator in August, or September, 1817.

In the month of July, 1817, the administrator, Daniel Miscally, was arrested by a ca. sa., at the suit of the United States; but was liberated, by his son-in-law, William Robinson's paying the debt, for which he was arrested, amounting to $940; to secure repayment of which sum, Miscally executed a mortgage to Robinson, of the slaves which he had purchased, at the sale of Swindersine's estate, in 1803; and, at the same time, delivered possession of the slaves to him. Robinson remained in possession of the slaves, until August, 1820, when he died, leaving a widow, and Elizabeth, an only child, then an infant of tender years, surviving him. The widow, Mary Ann Robinson, administered on his estate, and took possession of the slaves; and in January, 1821, had them sold under the mortgage, and became the purchaser, for the price of $850. She, shortly afterwards, to wit: in February, 1821, died, leaving her infant daughter, Elizabeth, before mentioned, surviving her; and administration of her estate was, in July, 1821, committed to her mother, Elizabeth Miscally, the widow of

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Daniel Miscally, *who took possession of the slaves, and remained in possession of them when this suit was instituted.

The sureties to the administration bond of Daniel Miscally, in 1802, were Alexander Gray, James Maul, and John Foy, all of whom, are since dead; but in the year 1806, Daniel Miscally, having been required to give additional security for his administration, executed a new bond, with Edward Thomas, as surety. Edward Thomas died in the year 1817, intestate, and no administration has ever been taken out on his estate. Some years previous to his death, however, he executed a deed of gift, of all his estate, to his only son, William Thomas, reserving to himself an estate for life; and upon his death, his son took possession of the estate under the deed of gift. William Thomas died in the year 1821, leaving a considerable estate derived from his father; and leaving a will, by which he devised, and bequeathed, his said estate to Jacob Givham, and Elizabeth Hughes, who has since intermarried with David Lawrence, and appointed the said Jacob Givham, and Elizabeth Hughes, executor, and executrix, of his said will.

On 14 September, 1820, the complainant took out administration of the estate of Daniel Miscally: but returned to the ordinary, that he could find no effects of his intestate, whereof to make an inventory. On 12 October, 1824, he filed this bill, to which Elizabeth Miscally, the administratrix, and Elizabeth Robinson, the only child of Mary Ann Robinson, and Joseph Givham, and David Lawrence, and Elizabeth his wife, executors, executrix, and legatees of William Thomas, were made the parties, defendants. And the prayer of the bill was, that the amount due by Daniel Miscally, upon his administration of the estate of Andrew Swindersine, might be ascertained and established, by the decree of the court; and that, as he had died utterly insolvent, this debt should be ordered to be paid, either by a sale of the slaves in the possession of the defendant, Elizabeth Miscally, or out of the estate of Edward Thomas, in the hands of the other defendants.

The answer of the defendant, Elizabeth Miscally, denied, as far as she knew, or believed, that Robinson had any notice that the slaves mortgaged to him, had been purchased by Daniel Miscally, at his own sale of Swindersine's estate; and she averred that the purchase had not been questioned up to the time of the mortgage, nor until long afterwards; but that Daniel Miscally supposed he had an unquestioned title to the slaves, and that Robinson would never have advanced his money, if he had suspected any defect in the security. This defendant also stated,

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that she held the slaves *for Elizabeth, the infant daughter of Robinson, and wife, and claimed the benefit of the statute of limitations.

The defendants, Lawrence and wife, by their answer, submitted, that the complainant's remedy against the estate of Edward Thomas, if he were entitled to any, was at law; and that these defendants, were not liable either in law, or in equity, to the complainant's demands against Edward Thomas, whom they did not represent. They also claimed the benefit of the statute of limitations.

The defendant, Givham, who was absent from the State, and had been made a party, by rule, had not filed any answer.

The cause was referred to the commissioner, who reported the balance formerly ascertained by him to be due on Daniel Miscally's administration, with interest; and the cause was heard upon his report, and other evidence.

De Saussure, C. There can be no doubt as to the amount due by Daniel Miscally on his administration; and the only question is, by whom it is to be paid.

The complainant contends, that he is entitled to recover the slaves mortgaged to William Robinson, from the administratrix of Mrs. Robinson. And the ground relied on, is, that the administrator purchased the slaves in question, at his own sale, of the intestate's estate, which he could not lawfully do; that the purchase therefore was void, and the slaves remained the property of the estate of Swindersine; and that Miscally had no right to mortgage them as his property, to Robinson, and the mortgage and sale under it were, consequently, void.

The defendants contend, that the rule, which forbids executors, and administrators, purchasing at their own sales, although not a

new one, had not been acted upon in this State, in the year 1803, and was not known when the purchase was made by Miscally; that the purchase was a fair one, as indicated by the price, and that the mortgage to William Robinson, was perfectly fair, as the latter paid a large debt due by Miscally to the United States, and took the mortgage to secure repayment of the money advanced, without notice of any objection to his title. It was further argued, that as Robinson held possession of the slaves, from 1817, until his death, in 1820, and his representatives have been in possession ever since, with an intermediate sale, in 1821, to foreclose the mortgage, the statute of limitations would protect his title; for even if Robinson were to be considered a trustee, it was by implication, and construction only, and the statute

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runs in such cases. *And that besides, this suit is not for the recovery of the slaves, which would be properly at law, but for the recovery of the debt due by Miscally, on the balance of his accounts.

These points were ably argued by the counsel, and I have considered them fully: and I concur in opinion with the counsel for the defendants, the administratrix of Mrs. Robinson, and the infant, Elizabeth Robinson. The bill must, therefore, be dismissed as to them.

It remains to inquire, whether the complainant is entitled to demand payment of the balance due by Miscally, on his administration, out of the estate of his surety, Edward Thomas, in the hands of the other defendants.

This demand is repelled by them, first, on the ground, that Edward Thomas was not an original surety for the administration, and was not responsible for the acts of the administrator, prior to his becoming such surety; and that as Miscally's purchase was long prior to Edward Thomas becoming surety, the estate of the latter cannot be made liable for that purchase. To this it was answered, that this suit is not for the recovery of the slaves, but for an account of the general administration of the estate, to which Miscally, upon taking the account, is found to be indebted in the sum of $891.54, with interest, as appears by the report of the commissioner; and that the estate of Edward Thomas, must be held liable for that balance, or else the taking his bond in 1806, was a mere nullity: and that in executing that bond, Edward Thomas became the substitute, and consented to the discharge, of the other sureties; who are all dead, in doubtful, or insolvent circumstances. I acknowledge that I feel considerable difficulty on this point, but have concluded, with much hesitation, that Edward Thomas' estate is liable, under the circumstances stated.

Another objection made by these defendants is, that they do not hold any property of Edward Thomas, but claim under William Thomas, and have no relation with the complainant, in any capacity, and are not liable to his demand. The defendants, it is true, claim under William Thomas, but all the property was derived from Edward Thomas, under his deed of gift to William, which was executed, long after the donor became the surety to Miscally's bond. It is conceded, that William Thomas had no other property, but that so given to him by his father. Under the circumstances of this case, two questions arise out of this objection. First, can this property be made liable to the complainant's demand? Second, can it be made so in this form of proceeding?

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*There is no doubt that voluntary gifts, of moderate portions of a man's property, to his children, on their setting out in life, will be sustained, although he may be somewhat indebted at the time. But a voluntary gift of all, or most, of a man's estate, especially when he retains the possession, and enjoyment of it, for his own life—and this at a time when he is in debt, or under responsibilities—has always been considered fraudulent as to creditors: and, I think I am bound, so to consider the voluntary deed in this case, so far as it interferes with creditors.

On the next question, whether the complainant can get at the property in dispute, in this form of proceeding, and in the relation in which the parties stand to each other, many objections are stated on the part of the defendants. It is urged, that the defendants do not hold as the heirs, or representatives, of Edward Thomas, but from William Thomas, who had no privity with, or relation to, the transactions, on which the complainant's claim is founded; and, therefore, the complainant's claim cannot be maintained against them. The position is correct, although the conclusion is not sustainable. The defendants claim under the will of William Thomas, but the property was derived by him from his father's gift; and both they and William Thomas are mere volunteers. The question is, whether, under these circumstances, the complainant can pursue the property, wherever he finds it, and make it liable, in the hands of its present possessors, for the default of Edward Thomas, the original holder; and it seems to me, that it would be extraordinary, if persons holding property, thus acquired, could not be made liable to a just demand. In principle, it is just that they should be made liable, to the extent of the value of the property. In practice, property has been so pursued, and those who hold it, made liable for the demand of creditors.

One other objection remains to be considered. It is contended, that these defendants are protected by lapse of time, and the statute of limitations. The statute would not commence to run in favor of Edward Thomas, until the responsibility of his principal

was fixed by the judgment of a court, or his default ascertained in some other satisfactory way. An administration may last twenty years; and it is only on the failure of the administrator to account, and pay over the balance, that the liability of the surety commences. Under the facts of this case, it does not appear to me, that the statute of limitations, or lapse of time will protect the defendants.

It is, therefore, ordered and decreed, that the report of the commissioner, establishing the sum due by Daniel Miscally, the adminis-

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trator *of the estate of Andrew Swindersine, be confirmed; and that the defendants, David Lawrence, and Elizabeth his wife, and Jacob Givham, do pay the same, with interest, as far as the funds of William Thomas, derived from the estate of Edward Thomas, came to their hands. The costs of suit to be paid by the defendants.

From this decree the defendants, Lawrence and wife, appealed; and the complainant, also appealed from so much of it, as dismissed the bill, as to the defendants, Elizabeth Miscally, and Elizabeth Robinson.

Grimke, for the complainant.

Hunt, for the defendants, Lawrence and wife.

De Saussure, for the other defendants.

O'NEALL, J., delivered the opinion of the court.

In this case the court concurs with the Chancellor, that the complainant was not entitled to recover against Elizabeth Miscally, the administratrix of Mary Ann Robinson, who was the administratrix of William Robinson, nor against their daughter, Miss Elizabeth Robinson. His decree, therefore, so far as it dismisses the bill as to these defendants, is affirmed.

As to the other defendants, until Edward Thomas is properly represented in court, no decree can be made against them. The court will not, however, for want of an administrator of the estate of Edward Thomas, turn the complainant out of court; but the bill will be retained, and leave given to amend, so as to make the administrator a party, when the complainant shall have procured administration to be granted.

On the general jurisdiction of the court, it appears to me, that the case stated in the bill is such, as entitles the complainant to the relief of this court. Edward Thomas was the surety of Daniel Miscally in his second administration bond; and the effect of that may be, to render him accountable for the whole of the funds in the hands of the administrator, when that bond was executed. Under ordinary circumstances, the complainant's remedy would have been at law; but in the case before us, Edward Thomas voluntarily conveyed away his whole estate, after he had incurred this liability; and to have this conveyance set aside, is essential to the complainant's remedy. This furnishes a ground for his coming into the Court of Equity, which can alone afford adequate relief. Besides this, the donee of Edward Thomas is dead, and has, by his will, disposed of his property; and his executors are, therefore, called upon to account for it. And if the complainant should, on the merits, be entitled to recover, this is another circumstance,

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which renders *the aid of the Court of Equity necessary, to the assertion of his rights. The objection to the jurisdiction of the court is, therefore, overruled.

The cause is remanded to the Circuit Court, to enable the complainant to amend his bill, which he has leave to do, by making the administrator of Edward Thomas, when administration of his estate shall have been granted, a party to this suit, and after such amendment is made, then for the trial of the cause upon its merits.

JOHNSON, J., and HARPER, J., concurred.

Decree opened, and cause remanded.

Bailey, Eq. 311

VIVIAN HENSHAW v. WILLIAM ROBERTSON, Executor of William Blacklock, and JOHN H. WILSON, Administrator, de Bonis Non, of Charles Freer.

(Charleston, March, 1831.)

[1. *Appeal and Error* ⇐203.]

The incompetency of a witness is no ground of appeal, if he were not objected to at the hearing.(a)

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1064; Dec. Dig. ⇐203; Witnesses, Cent. Dig. § 190.]

[2. *Witnesses* ⇐120.]

A party to the suit, whose admissions would be evidence to affect another party, may be examined as a witness, by the opposite party, if he himself consent.(b)

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 215; Dec. Dig. ⇐120.]

[3. *Executors and Administrators* ⇐120.]

The acknowledgments of an executor will prevent the operation of the statute of limitations, if the debt were not barred at the death of the testator.(c)

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 485; Dec. Dig. ⇐120.]

[4. *Limitation of Actions* ⇐165.]

If a creditor of the executor, who resorts to the estate of the testator, for payment of a

(a) 7 Rich. E., 45.

(b) Ante, 126, note c.

(c) Fortune v. Hayes, 5 Rich. E., 120, and cases cited there; McTier v. Hunter, Ril. L., 160; Reigne v. Desportes, Dud. L., 121; 2 Bail. L., 278, 92, 283, 308, 425.

debt contracted by the executor for the benefit of the estate, is not barred by the statute of limitations as against the executor, he is not barred as against the estate, although the statutory period had run out, before the commencement of the suit.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 649; Dec. Dig. ⇐165.]

[5. *Wills* ⇐827.]

Where services have been rendered to an estate, under a contract with the executor, and the executor is insolvent, the creditor may be subrogated to the rights of the executor, and demand payment out of the estate, if the executor would be entitled to do so, on paying the debt himself; but the creditor cannot resort to the estate for payment, unless the estate has received the benefit of the debt, and the executor is insolvent, and not in debt to the estate. Vide Guerry v. Capers, ante, 159, and Manigault v. Deas, ante, 284, 290.

[Ed. Note.—Cited in Manigault v. Holmes, Bailey, Eq. 290; Ex parte Chappell, 34 S. C. 104, 12 S. E. 934.

For other cases, see Wills, Cent. Dig. §§ 2139, 2140; Dec. Dig. ⇐827.]

[6. *Appeal and Error* ⇐185.]

Quære. Whether the creditor of an executor can proceed against the estate in equity, until he has established his debt, and the insolvency of the executor, by proceedings at law. Where the objection is made for the first time in the Court of Appeals, that court will not turn the party round to a new course of litigation, if the facts can be otherwise satisfactorily established.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1166; Dec. Dig. ⇐185.]

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[7. *Appeal and Error* ⇐1195.

*Where a cause has been sent back by the Court of Appeals, for a further account, so much of the account as was reported prior to the decree, needs not to be supported by proof; nor can the evidence by which it was established be objected to, as it was a proper subject for exception to a former report. But it seems, that the party may falsify any part of the account by evidence. Ob. dict., as to the last point, per Harper, C.(*a*)

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4663; Dec. Dig. ⇐1195.]

[8. *Account* ⇐20; *Executors and Administrators* ⇐472.]

Where a party is ordered "to render a full and fair account, on oath," it is no objection to the account presented, that it is in a book, which contains a variety of other matters; nor is the omission of a formal affidavit material, if the party attends in person, and is examined on oath as to the account.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 109; Dec. Dig. ⇐20; Executors and Administrators, Cent. Dig. § 2033; Dec. Dig. ⇐472.]

[9. *Executors and Administrators* ⇐504.]

If an executor, or other person, rendering an account, fail to give proper credits, the other party may supply the deficiency by proof. Or if the accounts, from any cause, appear to be defective, or erroneous, the court will scrutinize them with rigor, and make all just allowances against the executor; and if there be any deficiency which he is able to supply, will compel him to supply it. If the accounts appear to be defective, wilfully, or through fraud, the court will compel him to account further, or to answer on interrogatories; and if he is suing to be reimbursed for advances, will forbear making a decree in his favor, until he does so. But when all accessible sources of information have been exhausted, the court, although the account may not be perfectly satisfactory, will not refuse, especially where the rights of third persons are in question, to make a decree, in relation to the account, according to the evidence before it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2157–2167; Dec. Dig. ⇐504.]

[10. *Executors and Administrators* ⇐128.]

Where the creditor of a deceased, insolvent, executor, resorts to the estate of the testator, for payment of his demand, the recovery enures to his own benefit, and the sum recovered is not assets of the deceased executor.

[Ed. Note.—For other cases, see Executors, and Administrators, Cent. Dig. §§ 531, 532; Dec. Dig. ⇐128.]

This cause came before the Court of Appeals, at Charleston, in April, 1828, on appeal from the decree of Thompson, Chancellor; and on that occasion the following decree was pronounced:

JOHNSON, J. The dates, and some other circumstances connected with this case, have, in the multifarious proceedings which have been had in it, been involved in some confusion; and an analysis of them will, therefore, be necessary to convey a correct idea of the view which the court have taken of it.

Charles Freer died in 1809, and by his will appointed William Blacklock his executor, who qualified, and took upon himself the burden of its execution. The complainant was in the employment of Freer, as an overseer, at the time of his death, at the annual wages of $400; and, under a contract with Blacklock, the executor, he continued in the same

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employment until the latter part *of the year 1815, for which period he claimed the same wages. Blacklock died in February, 1816, having appointed the defendant, Robertson, his executor; and in June, 1816, the defendant, Wilson, was appointed administrator, de bonis non, of the estate of Freer. In the latter part of this year the complainant brought an action at law against Wilson, as administrator of Freer, in which he declared for wages due him in the lifetime of Freer, and also upon the contract with the executor, Blacklock; but being advised on the trial, in November, 1821, that he could not, in that form of action, recover on the latter, he discontinued as to that demand, and took his judgment for the amount due him on the contract with Freer.

In April, 1822, the complainant filed the present bill, in which he charges, that there is yet due to him, on the contract with Blacklock, the sum of $1,200; that Blacklock, was, at the time of his death, in advance for the estate of Freer, to a large amount, to which his executor, Robertson, was entitled; and that he had frequently applied to the said

(*a*) Bivingsville Co. v. Bivings, 7 Rich. Eq. 455; S. C., MS.

Robertson, for the payment of this demand, who declined to pay it, on the ground, that he had no assets of the estate of Blacklock in his hands: and the prayer of the bill is, that the said Robertson shall discover, and admit assets in his hands, to pay the amount, or that complainant should stand in the place of the said Robertson, and receive payment from the estate of the said Charles Freer, through his administrator, the defendant, John H. Wilson.

At May term, 1826, the cause came on for trial, before Chancellor De Saussure, when an objection was raised, that the complainant's remedy was at law, and that the estate of Freer was not, in any event, liable on the contract with the executor. This objection was overruled, and a reference was ordered, to ascertain the state of the accounts between Blacklock, the executor, and the estate of Freer.

The defendant, Robertson, has never yet put in any answer to the bill: but the master reported that from the returns of Blacklock, filed in the ordinary's office, up to 31 December, 1812, it appears that Blacklock was, at that time, in advance for the estate, $12,845.07. He has not, however, reported any account of his receipts, and disbursements, from that time, up to Blacklock's death, in 1815; although from the returns made, it appears, that the annual income, arising from the sales of crops, was from $5,000, to upwards of $7,000: so that it is apparent, that the accounts are imperfect, and incomplete. The master, nevertheless, recommends that the complainant's demand, which

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he ascertains to *amount to $891.31, should be paid by the defendant, Wilson, out of the estate of Freer.

In this state of things, the case came on for hearing, before Chancellor Thompson, at the last January term, upon exceptions to the master's report. At the hearing before Chancellor De Saussure, the defendant, Robertson, had been called by the complainant and sworn as a witness; and the facts, then stated by him, were now used as evidence. He stated, that the estate of Blacklock was utterly insolvent; the whole having been swallowed up in a debt due to the United States; and that he had no knowledge of the state of the accounts between Blacklock and the estate of Freer, except what was exhibited by his books; but what they exhibit, does not appear. He also stated, and admitted, that the sum reported by the master, was justly due to the complainant, on the contract with Blacklock, and that it was unpaid. Under these circumstances, the Chancellor confirmed the master's report, and decreed, that the defendant, Wilson, should pay to complainant, the amount of his demand, out of the amount of the advances made by Blacklock, on account of the estate of Freer; and that in the settlement of his accounts with the estate, that amount should be allowed him.

From this decree, an appeal has been brought up; the grounds of which may be comprised in the following propositions: 1. That William Robertson, one of the defendants, was not a competent witness for the complainant. 2. That the complainant's demand is barred by the statute of limitations. 3. That the circumstances of the case do not justify the decree against the estate of Freer.

1. The admissibility of Robertson, was not, it is said, objected to in the Circuit Court: and the objection, therefore, comes too late now. I incline to think, however, that he was admissible on principle, at least so far as it regards the statute of limitations; that being, as I shall hereafter have occasion to shew, a matter exclusively between himself and the complainant. His admission; that the demand was still due, and unpaid, could only operate against the estate which he represented; and his declarations to that effect, out of court, would have been evidence; and there can be no reason, why, if he thought proper to make them in court, under the solemnity of an oath, they should not be received. See Norden v. Williamson and Twibill, 1 Taun., 378; Miller v. Starks, 13 John C. R., 517.

2. It is agreed, on all sides, that the present demand, as against Blacklock, was not barred

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by the statute, at the time of his death, *in 1816; and although the time intervening between that period, and the commencement of the present suit, would have operated as a bar under the statute, the acknowledgment of his executor, Robertson, made as late as the trial before Chancellor De Saussure, in 1826, which was full and unequivocal, takes it out of the statute. Pearce v. Zimmerman, Harp. L. R., 305. So that, as between the immediate parties to the contract, the statute cannot operate.

The defendant, Wilson, the administrator, de bonis non, of Freer, whom the complainant now seeks to charge, claims the benefit of the statute, and denies to Robertson the power to bind him, or the authority to compromit his rights. But this objection is, I think, founded on a misconception of the nature and foundation, of the complainant's claim upon him. His legal demand is against the estate of Blacklock; but being, as he alleges, unable to obtain satisfaction from that source, he asks, on the grounds of equity stated in his bill, that he should be put in the place of Blacklock, or more technically, that he should be subrogated to his rights.

In the investigation of such a demand, the first inquiry would be, as to the rights of complainant against Blacklock. In this inquiry, the defendant, Wilson, or the estate which he represents, can have no interest; for whether any thing was due, or not, or wheth-

er the complainant had, or had not, the right to be subrogated, can in no way affect his liability. If he were indebted, it could make no manner of difference, whether he paid to the one, or the other: and these proceedings could not, by any possibility, raise a debt, when none existed before.

Let us suppose, by way of illustration, that the complainant's right to be put in the situation of Robertson, as executor of Blacklock, was, upon the well-known principles of equity, free from all doubt: and that Robertson had admitted the debt to be justly due: would the defendant, Wilson, be permitted to say, that this demand was on a simple contract of ten years' standing and barred by the statute of limitations: and I am, therefore, discharged from my liability to the estate of Blacklock? Certainly not. And yet this is the case now before us.

The subrogation of one to the rights of another, which is frequently resorted to in courts of Equity, for the purpose of doing ample, and summary justice, clothes him with all the powers, and subjects him to all the disabilities, of that other, in relation to the matter in controversy. He can have no rights, nor can his adversary have any advantages over him, which did not attach to the person

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*whom he represents. They must, for the occasion, be completely identified. Now, as between Blacklock, and the estate of Freer, it is not pretended that the statute would operate. He stood in the relation of executor to that estate, in which it is agreed, on all sides, that the statute would not be a protection, and, consequently, cannot be used against him, if, in truth, he is in advance for the estate. In any possible view of the case, the statute cannot, therefore, operate as a bar to the complainant's demand.

3. The third, and only remaining proposition, has been placed by the argument in a double aspect: 1, on the assumption, that the estate of Freer was indebted to Blacklock, the executor, for advances; and 2, on the supposition, that the estate was not so indebted: and it is contended, on behalf of the complainant, that in either case, the estate was liable for this demand, if the estate of Blacklock is insolvent, and unable to pay it, which is assumed to be proved.

Admitting the truth of the facts assumed, that the estate of Freer was indebted to Blacklock, and that he was insolvent; and taking it for granted, as has been done throughout the case, that the services of the complainant, under the contract with Blacklock, were meritorious, and for the benefit of the estate; the conclusion drawn, is, I think, fully sustained by the authorities. The cases of Cater v. Eveleigh, 4 De S., 19, [6 Am. Dec. 596], and James v. Mayrant, Id. 591, [6 Am. Dec. 630], proceed on that principle; which is fully recognized by the court, in the matter of Bloomfield and Wife v. Sundry Creditors, decided at the last January term: and it is supported by the high authority of Chief Justice Marshall, in Riddle v. Mandeville 5 Cranch, 329 [3 L. Ed. 114], cited at the bar. In that case, the defendant, who was the payee of a promissory note, had endorsed it, and put it into circulation: and after having passed through several hands, the plaintiff finally got possession of it. The maker proved insolvent, and the plaintiff pursued his immediate endorser also to insolvency: but it seems, that by the laws of Virginia, where these things happened, he had no legal remedy against any previous endorser, but that each in his turn, had a right to sue his immediate endorser; so that, ultimately, the defendant would have been liable. And in granting the relief prayed in that case, Judge Marshall lays down the rule broadly, that equity will make that party responsible, on whom the burthen must ultimately fall.

If, as this view of the subject supposes, the estate of Freer was indebted to Blacklock,

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there is no doubt, that it was bound to *account, and would be ultimately liable, for this demand, and according to the rule, would be immediately so.

But it is denied, that there is sufficient evidence, either of the indebtedness of Freer's estate to Blacklock, or that his estate is insolvent: and for reasons that appear to me unanswerable.

The returns to the ordinary's office, bring up Blacklock's accounts with the estate of Freer, only to the end of the year 1812, and these, it is true, shew a balance in his favor: but it is equally true, that for three years after, he was in possession of the estate, which had before brought in an income of from $5,000, to $7,000, of which there is no account: and it will scarcely be credited, that there were neither receipts, nor disbursements, during that period. And although the court cannot now determine, whether the estate is in arrear, or not, we cannot shut our eyes to the fact, that the whole truth has not come to view. It was the duty of the defendant, Robertson, to render that account; and that was the matter referred to the master, by the decree of Chancellor De Saussure. It was in the power of the complainant, to have compelled the production of this account, and until it is produced, the court will not undertake to determine the question, on this partial view of the evidence, when more ample is attainable.

In relation to the insolvency of the estate of Blacklock, it is true, that the executor, Robertson, stated, that it was swallowed up by a debt due to the United States, and is utterly insolvent. But by taking that as evidence, the right is conceded to Robertson, to determine, for the court, of what the

estate consisted, and whether the United States, or any one else, had any demand against it, or were entitled to a precedence. But these are powers not vested in him by law. They are reserved to the court, and when he shall have accounted in the usual mode, the court will be able to determine these matters.

We come now to consider the alternative of the proposition, viz: whether the complainant is entitled to recover against the estate of Freer, supposing the estate not to be indebted to Blacklock, and that he died insolvent.

The contract was entered into with Blacklock, and the law imposed on him the obligation to pay the complainant his wages. He had no authority to bind any one else. Upon what principle is it, then, that the complainant calls on the legatees under the will of Freer, through the administrator, de bonis non, to contribute to discharge it? It is said, that these services were rendered to the estate, to which they are entitled.

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But if they were rendered on the *responsibility of Blacklock, and he has reaped the fruits, how is the estate benefitted, and where is the equity of subjecting them to the liability? The claim of the complainant is well established, by the cases before referred to, to be one of pure equity; and to entitle him to recover, he was bound to show, that the estate of Freer received a benefit from it.

The complainant, it is true, was employed on the plantation, and had the management of the negros belonging to the estate; and it is said, and believed, that he managed it discreetly, and profitably, and rendered it productive; but if Blacklock has wasted the proceeds, the estate is no more benefitted, than if the whole rescources of the estate had been employed in sinking a pit, with a view to ascertain the centre of gravity. And I can scarcely persuade myself, that the zeal of the counsel would carry them so far, as to contend, that the estate would be bound to pay the wages of the complainant, in the pursuit of so unprofitable, and visionary a project. I come, therefore, to the conclusion, that the right of the complainant to recover against Wilson, the administrator, de bonis non, must depend on the circumstances, that Blacklock was in advance for the estate of Freer, and that his estate is insolvent; neither of which are proved.

I was myself strongly induced to the opinion, that, under these circumstances, the bill ought to have been dismissed, for want of sufficient proof; but on more reflection, and on being fully satisfied that the complainant's claim is meritorious, I am disposed to give him another opportunity of establishing these facts, by referring it again to the Circuit Court, to enable the complainant to ascertain the state of the accounts, between Blacklock and the estate of Freer, and the solvency, or insolvency, of Blacklock's estate; and it is accordingly so ordered and decreed.

A suggestion, which was thrown out by one of the counsel for the defendant, deserves to be noticed. It is, that the complainant's claim against Blacklock, was purely legal, and that he was bound first to establish it at law, before he asked the aid of the Court of Equity, to enforce it against the estate of Freer. In the cases of Cater v. Eveleigh, James v. Mayrant, and Riddle v. Mandeville, (supra,) that the course had been pursued, and the process of law had been exhausted to obtain redress of the parties primarily liable; and it is worthy of consideration, whether the Court of Equity would, ordinarily, take cognizance of a cause of this sort, until the right of the creditor, and the insolvency of the debtor, had been ascertained in that way; the only mode per-

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haps in which, in some *cases, these facts could be fully ascertained. But this case has been already tried before the Circuit Court, and this objection is now started for the first time, and that too by way of a side blow; and if it should appear, that there is anything in it, I am not disposed to turn the complainant to a new course of litigation, if he can establish the facts, in the way proposed, as I think he may; and the objection is only now noticed, to reserve the question, when it shall come before the court at a proper time, and under other circumstances.

NOTT, J., and COLCOCK, J., concurred.

A reference was ordered pursuant to this decree; and at February term, 1829, the cause came on for hearing, before Harper, Chanceller, upon exceptions to the master's report, which will be sufficiently understood from the decree.

Harper, C. This cause has been before tried, and was sent back from the Court of Appeals, to ascertain the state of the accounts between Blacklock and the estate of Freer, and the solvency, or insolvency, of Blacklock's estate. It has been referred to the master, who reports, that there was a considerable balance due from the estate of Freer, to the executor, Blacklock, at the time of his death, amounting to about $5,-082.02; and that the estate of Blacklock is utterly insolvent. So far as respects the insolvency of Blacklock's estate, no exception has been taken to the report; but in relation to the accounts between Blacklock and the estate of Freer, the following exceptions have been filed:

1. That the accounts certified by the ordinary, were not admissible as evidence of the disbursements against creditors.

2. That, under the decree of the Court of Appeals, the executor of Blacklock was bound

to have furnished a full and fair account, with Freer's estate, to the time of Blacklock's death, on oath.

3. That the statements of the annual income, as imperfectly furnished, were falsified by the defendant's evidence: so that no reliance could be placed upon those statements.

4. That the books offered in evidence were irregular, and not such as were competent evidence, conceding that the items were to be regarded as furnished by Blacklock.

5. That upon a comparison, and analysis of the evidence before the master a full account of Freer's estate has not been taken.

6. That the accounts furnished, and statements made, are imperfect, and not such as were required by the decree, to shew the indebtedness between the estates.

I do not consider the matter of the first

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exception to be before *me. The accounts of Blacklock with the estate of Freer, which were passed before the ordinary, from the commencement of his administration, in 1809, until the end of 1812, were in evidence on the former reference; and no exception was then taken to them. The appeal was on other grounds; and the Court of Appeals has sent the case back, on the specific ground, that there was a period of Blacklock's administration, from the end of 1812, to his death, in the beginning of 1816, for which no account was taken. If testimony had been offered to invalidate the accounts, or to disprove any particulars of them, that would have made a different question. I think the defendants were at liberty to give such evidence, but none such was offered. The accounts seem, on the face of them, perfectly fair and regular; and I do not conceive the question of their admissibility as evidence to be now open.

The second exception, I understand to apply to the form of the account, and to its not being rendered on oath: whether it be a "full and fair" account, is the matter to be tried. It seems to me sufficiently formal. It is rendered, to be sure, in a book, which also contains a variety of other matters; but I am not aware that this constitutes an objection to its form. Such an account ought certainly to be sworn to. In general, an account forms part of the answer, and is sworn to along with it. The account in this case was new matter, not included in the answer. But Robertson, the executor of Blacklock, was sworn as a witness, on the reference before the master, and the other defendant was at liberty to examine him as to any particulars of the account. This seems to be swearing to the account; and, indeed, in a mode more advantageous to the other defendant, than a formal authentification of it, by annexing an affidavit. In this case, the affidavit was less material, as the account was rendered by the executor of an executor, who had no personal knowledge of the transaction, and could only swear to his knowledge, and belief. On his examination, he explained the sources, from which he derived the materials to make up the account.

The remaining exceptions I shall consider together. As explained in the argument, I understand them to mean, that the income of the estate arising from the sale of crops, had not been fully accounted for. No exception was taken to any of the charges for disbursements, made by the executor, on account of the estate, which, I understand were properly vouched. The objection is to the credits; the charges made by the executor, against himself. It was said, that no credit ought to be given to this side of the account; and that, from inspection of the account, as

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well as from the *testimony given on the reference, it appears that more was received than is accounted for; and as the excess cannot certainly be ascertained, the counsel seemed to think, that the court should forbear to conclude, that there was any balance in the executor's favor, or to give a decree for any apparent balance. I suppose that credit may fairly be given to the charges which the executor makes against himself. It can hardly be contended, that they are not sufficient evidence of the executor's having received, what he states himself to have received. If by not giving credit to that side of the account, be meant, that it is not to be regarded, conclusively, as a full account, the position is correct. It is not so regarded. If an executor, or any other person, rendering an account, fail to give proper credits, the other party is at liberty to supply the deficiency by proof. An executor, suing to be reimbursed for advances, will be required to exhibit his accounts; and I can very well conceive, that if they should appear to be defective, wilfully, or through fraud, the court would order him to account further, or to answer on interrogatories, and forbear to make any decree in his favor, until he should do so. If the accounts, from any cause, appear to be defective, or erroneous, the court will scrutinize them with rigor, and make all just presumptions against the executor; or, if there be any deficiency, which he is able to supply, the court will order him to supply it. In this case, however, I am satisfied, that it would be useless to order any further account. I see not the slightest reason to believe, that the executor of Blacklock has not rendered as full and fair an account as it was in his power to render. In effect, by submitting to examination, before the master, he has answered on interrogatories. If the original executor, Blacklock, were living, he, perhaps, might make a more satisfactory account; but we have not this resource, and I must decide, as well as I can, from the evidence before me.

The account is concluded to be defective, in respect to giving proper credits, first, from the testimony of the complainant Henshaw, which was used by the administrator, de bonis non, of Freer; and, secondly, from the internal evidence of the accounts themselves. It may be observed, that if we take the testimony of Henshaw, alone, as evidence of the account of the crops, there is still a considerable balance due to the estate of Blacklock, and the administrator of Freer, cannot complain, it would seem, if we rely exclusively on the evidence produced by himself. I do not understand that there is any objection to the account of the proceeds of the crops, so far as it was rendered by Blacklock, him-

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self, and passed *before the ordinary. The exception is to the subsequent account, rendered by the executor of Blacklock. This includes the crop of 1812, which must have been disposed of chiefly in 1813; that of 1813; that of 1814; and part of that of 1815, which was sold in January, 1816, just before Blacklock's death. According to the statement of Henshaw, the aggregate of these was nine hundred and sixty-seven barrels of rice and nineteen bales of cotton. As the master reports, there is accounted for, of the crops of these years, eight hundred and seventy-one barrels of rice and eleven bales cotton; leaving a deficiency of ninety-six barrels of rice and eight bales of cotton. I make the rice accounted for to amount to nine hundred and twenty-three barrels. The difference is occasioned by my applying four credits in Blacklock's account, passed before the ordinary, for rice sold in November and December, 1812, amounting to fifty-two barrels to the account of the crop of 1812. From the season at which they were sold, they were, in all probability, part of the crop of that year. This makes a deficiency of forty-four barrels of rice, and at the price assumed by the master, would amount to $830. This, and the amount of the eight bales of cotton, $490.08, deducted from $5,982.02, the balance made by the executor's account, would leave a balance of $4,661.94, due to the estate of Blacklock. It is true, that there is considerable difficulty in making the account correspond with Henshaw's statement. In some years, considerably less is credited than he makes the crop amount to: in others, more. This may, perhaps, be accounted for, by supposing part of the crop to have been left on hand from one year to the next. For the years for which Blacklock returned the accounts to the ordinary, somewhat more is accounted for than the amount of Henshaw's statement, excluding the four credits on the last of 1812, which I have applied to the crop of that year. The account, however, nearly corresponds with the statement, and serves to corroborate it.

The argument against the account, from internal evidence, is, that for the year 1812, and, subsequently, after Blacklock ceased to account before the ordinary, the crops accounted for appear to have been smaller than in the previous years. This might be a ground of suspicion, but is not conclusive of anything unfair. According to Henshaw's testimony, the crops of the latter years appear to have been smaller. But if we were to take the average of the crops of 1808, 1809, 1810, and 1811, and charge an equal amount of produce for the subsequent years, the result, according to my calculation, would be, that but a very small balance, consider-

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ably *less than the complainant's demand, would be left in favor of Freer's estate.

I may observe here, that, as I understand the equity of the case, it is immaterial what the balance may be in favor of Blacklock's estate. If there were nothing due, on either side, the complainant's equity would still exist against the estate of Freer. He comes to make the party directly liable, who would be liable in the last resort. His right at law was against Blacklock, and if he had received the amount, Blacklock might have had recourse to the estate of Freer, although there was nothing due him, on any other score. If Blacklock were in arrear to the estate of Freer, to the amount of complainant's demand, then, to be sure, he could recover nothing, though he had paid the demand. The complainant's equity is, to be put in the situation, in which Blacklock would stand, if he had paid the demand; and if he had paid it, he might recover any balance that is now due to him, and that amount besides.

This view of the subject, furnishes an answer to a point made at the hearing. It was, whether any balance due to the estate of Blacklock, from the estate of Freer, is not assets, and liable to the judgment creditors of Blacklock. Any balance now due, is certainly assets; but that balance will not be diminished, by what the complainant is to recover in this case. If Blacklock had paid the complainant's demand, the balance, whatever it is would have been increased by so much. The complainant's demand, was, at law, against Blacklock; in equity, it is against the estate of Freer; but an equitable debt to Henshaw, is not assets of the estate of Blacklock.

It is ordered and decreed, that the administrator, de bonis non, of Charles Freer, pay to the complainant, the amount due him, for services rendered by him, as an overseer, to the estate of the said Charles Freer; and, that the costs of suit, be paid out of the said estate.

From this decree, the defendant, John H. Wilson, appealed; and, at the present term, moved that it might be reversed.

Per curiam. O'NEALL, J. This court concurs, unanimously, in the views taken by the Chancellor, of this case; and, it is, therefore, ordered, that his decree be affirmed.

Hunt, for the motion.

Finley and Petigru, contra.

Decree affirmed.

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*SARAH McDOWALL, and Others, Infants, by Their Next Friend, v. MARY McDOWALL and ALEXANDER BLACK.(a)

(Charleston, March, 1831.)

[1. *Wills* ⇐789.]

The testator made several bequests to his widow, including an annuity of $500, and added, "this settlement on my good wife, I hope she will consider a full compensation for any right of dower on my estate, as I fully do;" and in a codicil speaks of the surplus of his estate, after paying all gifts, and his "wife's dower of $500 per annum." The widow received her legacies, but subsequently sued out a summons in dower, from the Court of Common Pleas, against the executor; who shewed for cause the foregoing clauses in the testator's will; and the court overruled the cause shewn, and ordered a writ of admeasurement to issue; whereupon the widow's dower was assessed by the commissioners at $6,560, for which sum judgment was entered, and the amount was paid to her by the executor. There being no evidence of fraud, or collusion, *held*, that although the provision for the widow was expressly in satisfaction of her dower, yet the judgment at law was conclusive of the question of satisfaction, which could not, therefore, be re-examined in equity; and that the judgment, until it was reversed, was binding on the residuary devisees and legatees of the testator.

[Ed. Note.—Cited in Buist v. Dawes, 3 Rich. Eq. 298; Crocker v. Allen, 34 S. C. 461, 13 S. E. 650, 27 Am. St. Rep. 831.

For other cases, see Wills, Cent. Dig § 2042; Dec. Dig. ⇐789.]

[2. *Wills* ⇐782, 789.]

A provision for the widow, made expressly in satisfaction of dower, if actually received by her, is a good defence to proceedings at law for the recovery of dower; and if this defence is made in such proceedings, and overruled, or, it seems, if it be neglected to be made, and the widow recover her dower, she cannot afterwards be called upon in equity to restore the provision accepted by her, or to elect between it and her dower. The equity jurisdiction is not exclusive, except in cases of implied satisfaction, and in those cases of express, satisfaction, where the widow has not actually received the provision made for her in lieu of dower.(b)

[Ed. Note.—Cited in Avant v. Robertson, 2 McMul. 218.

For other cases, see Wills, Cent. Dig. §§ 2019, 2042; Dec. Dig. ⇐782, 789.]

[3. *Judgment* ⇐713.]

When a matter has once been adjudicated by a competent jurisdiction, it shall not again be drawn in question; nor will parties be permitted again to litigate, what they have once had an opportunity of litigating in the course of a judicial proceeding; but whatever might properly have been put in issue in that proceeding, shall be concluded to have been put in issue, and determined. Vide Manigault v. Deas, ante, 284.(c)

[Ed. Note.—Cited in Hibler v. Hammond, 2 Strob. 107; Shettlesworth v. Hughey, 9 Rich. 391; Lowndes v. Pinckney, 1 Rich. Eq. 179; Stoney v. Bank of Charleston, 1 Rich. Eq. 276; Clarke v. Jenkins, 3 Rich. Eq. 339; Willoughby v. North Eastern R. R. Co., 52 S. C. 175, 29 S. E. 629; Abbeville Electric Light & Power Co. v. Western Electrical Supply Co., 66 S. C. 342, 44 S. E. 952; Kirven v. Virginia-Carolina Chemical Co., 77 S. C. 508, 58 S. E. 424; Greer v. Western Union Telegraph Co., 89 S. E. 782.

For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. ⇐713.]

[4. *Judgment* ⇐645.]

Under the Act of assembly regulating the proceedings in dower, if the heir be an infant, and have no guardian, the summons may be issued to the executor, or administrator; and where there has been a judgment at law, in dower, against the executor, equity will not inquire whether the executor was properly the party, against whom the proceedings should have been instituted. If there was error, it belongs to the Court of Law to correct the error; and whilst the judgment stands unreversed on the record, it is conclusive, and binding, on the estate, and all persons interested in it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1158; Dec. Dig. ⇐645.]

[5. *Judgment* ⇐423.]

*Irregularity, or error, in proceedings at law, furnishes no ground for reviewing the judgment in equity. If a party were under a disadvantage, as if he needed a discovery, or was prevented from making his defence by accident or surprise, this might form a distinct ground of equity jurisdiction; but mere laches in making his defence, is not a ground for appealing to another jurisdiction; and the Court of Law must judge of the regularity of its own proceedings, and the correctness of its judgment.(d)

[Ed. Note.—Cited in Buist v. Dawes, 3 Rich. Eq. 298; Darby & Co. v. Shannon, 19 S. C. 535; Crocker v. Allen, 34 S. C. 461, 13 S. E. 650, 27 Am. St. Rep. 831.

For other cases, see Judgment, Cent. Dig. §§ 797–801; Dec. Dig. ⇐423.]

[6. *Executors and Adminstrators* ⇐457.]

An executor is not bound, by any general rule, to appeal from a judgment against the estate, upon a disputed point of law; nor is it his duty to plead in abatement for the purpose of changing the jurisdiction, when there is no reason beforehand to expect any advantage from the change. In both cases, if he litigates in good faith, and is guilty of no actual laches and especially if he acts under the advice of counsel, he cannot be made liable for the result.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1969; Dec. Dig. ⇐457.]

[7. *Justices of the Peace* ⇐128.]

[The court will not relieve against the decision of a justice, on the ground of irregularity in the proceedings, where there is no obstacle to prevent a decision of the question at law.]

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 405; Dec. Dig. ⇐128.]

(a) See Ril. E., 152.

(b) 4 McC. E., 277, Hill v. Hill.

(c) Ante, 107, note c.

(d) Farrow v. Dial, 1 McM. L., 292 [36 Am. Dec. 267]; Mills v. Dickson, 6 Rich. L., 492; Edings v. Whaley, 1 Rich. E., 316; Aldrich v. Kirkland, 8 Rich. L., 365; Hastie v. Baker, 3 Rich. E., 212; Atty. Gen. v. Baker, 9 Id., 530; 1 Hill, L., 263; 1 McM., L., 292; 4 Strob, L., 28.

The complainants, Sarah McDowall, Mary McDowall, Sophia McDowall, John McDowall, and William McDowall, all of whom were infants, and sued par prochein amy, were the children of William McDowall, and residuary devisees and legatees, under the will of their grandfather, John McDowall, deceased. The defendants were the executrix and executor of the said testator; and this was a bill against them for an account of his estate. The cause came on to be heard at Charleston, in February, 1829, before Harper, Chancellor, from whose decree the questions made at the hearing will be fully understood.

Harper, C. John McDowall, deceased, by his will, dated in 1819, devised and bequeathed to his wife, the defendant, Mrs. Mary McDowall, his household furniture, plate, and carriage and horses, with the privilege of living five years, rent and tax free, in the house, behind house No. 194 King street; and also an annuity of $500, payable quarterly, out of his estate, with the use of the fellow Tom, and washerwoman Mealy, during her life only, and at her death, the said slaves to be set free from their mistress. And the will adds, "this settlement on my good wife, I hope she will consider a full compensation for any right of dower on my estate, as I fully do." In a codicil, the testator speaks of the surplus of his estate, after paying all gifts, and his "wife's dower of $500, per annum." The testator appointed the defendants, Mrs. McDowall, and Alexander Black executrix, and executor, of his will. The defendant, Mrs. McDowall, admits, that she has received the annuity of $500, from the estate, and that the furniture and plate were delivered to her, not amounting, in value, to more than $500; that she received but one of the

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carriage horses, the other *having died; that she received the negro woman Mealy, the man Tom having been sold by the testator in his lifetime; and that she had the use of the house, for the five years directed by the will. Both of the defendants qualified; but it seems, that the defendant, Mr. Black, acted, principally, in the execution of the will, and delivered the property bequeathed, and made the payment of the annuity, to his co-executrix. In 1824, Mrs. McDowall sued out a summons in dower against the executor, Mr. Black, in the Court of Common Pleas for Charleston district. This was pending until June, 1826, when the following order appears on the minutes of the court. "Mrs. McDowall's claim of dower—clause in testator's will—after hearing the Attorney General, for the motion for a writ of admeasurement of dower, and King contra, ordered, that the writ do issue." The writ issued accordingly, and the dower was assessed by the commissioners, at $6,560; for which judgment was entered, and the amount paid by the executor, Mr. Black, out of the funds of the estate.

The present bill is against the executor and executrix, for an account of the estate; and the only question at present submitted preparatory to taking the account, is whether the widow, Mrs. McDowall, is entitled to retain, both the bequests to her contained in her late husband's will, and the amount recovered by her, as dower; whether the bequests to her were not intended in satisfaction, or bar of dower; and whether she is not bound to elect, and, indeed, whether she has not already elected, by accepting, the provision made for her by the will, in the first instance.

If the question were properly before me now, whether, on the face of the will, this bequest appears to have been intended in satisfaction of dower, I have no hesitation in saying, that it does appear to have been so intended; expressly so; and it is only by undue refinement, that I could arrive at any other conclusion.

But the question which strikes me, as being of much more difficulty, and importance, is, whether I am not bound to consider this as a matter already adjudicated, by the Court of Law. There is no doubt about the rule; and it is one of the utmost importance, and binding on this, and every other court; that when a matter has once been adjudicated, by a competent jurisdiction, it shall not again be drawn into question. Now, if this sort of defence, might have been made in the suit for dower; if it was actually offered, and considered, and the very question now presented, decided on; what authority have I, to review that decision, however clearly it may seem to me to have been erroneous, and

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notwithstanding, it *may have been a matter of concurrent jurisdiction, in the first instance? It is said, that to compel an election, appertains, exclusively, to the jurisdiction of this court. There is no doubt of that; and in order to exercise that jurisdiction, the court determines the questions, which arise on the construction of wills, whether a devise, or bequest was intended in satisfaction. But when the question of construction, has been settled, by a competent authority, and the provision, actually accepted, decided not to be a bar to the demand; what foundation is there, for the exercise of the jurisdiction of this court? It would amount to this. A court of Law, in the proper exercise of its jurisdiction, determines, that a party is entitled both to legacy and dower; and that the acceptance of one, on a just construction of the will, is no bar to a demand for the other; but in cases, where the party is entitled to but one of the provisions, it belongs only to this court, to compel the party to elect; and in order to clear the way, to an exercise of this jurisdiction, it may set aside the judgment of a tribunal of equal authority.

The first question is, whether this defence, might have been made, to the action of dower, at law. The rule seems to be, as laid down by Mr. Hargrave, in his note to Co. Lit., 36 b., note 6, that when a devisee is expressly in bar, or satisfaction, of dower, that is a defence at law; but that a court of Equity, will sometimes raise a case of election, from the special circumstances, when the will is silent; as that the party cannot take both provisions, without defeating some of the dispositions of the will. I believe, all the cases, which have been litigated in the courts, have relation to this doctrine, of implied satisfaction.

The doctrine, laid down by Mr. Hargrave, is recognized by the master of the Rolls, in Strahan v. Sutton, 3 Ves., 251. In Birmingham v. Kirwan, 2 Sch. & Lef., 444, Lord Redesdale examines the doctrine, and the grounds of the equity jurisdiction. I understand him to say, that when something has been given in satisfaction, and actually accepted, this is a defence at law; but if the party declines to elect, and it is uncertain, under what title he may take, it belongs to the Court of Equity to compel him to determine, and remove the uncertainty. In the present case, it is agreed, on all hands, that the provision made for Mrs. McDowall, by the will, had been accepted, before the institution of the suit for dower.

Lord Redesdale assimilates the case of a devise, in satisfaction of dower, to other cases of election, which are of frequent occurrence in courts of Equity; and these cases may serve to illustrate the present subject. A testator gives A a benefit, by his

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will, and by *the same will, disposes of a piece of property belonging to A. At law, A would be entitled to both; but it belongs to the equity jurisdiction, to compel him to elect. But if the testator, being indebted to A £100, bequeaths him a horse, or a piece of plate, expressly in satisfaction, and the legacy be actually received, there is no ground of equity here. It is like any other case of legal satisfaction, of a debt, and the testator's representative must defend himself at law, if he is sued for the debt. So if a testator makes provision for his wife by will, and, at the same time, makes such a disposition of his real estate, as would be defeated by his wife's taking dower of it; this is a case of election. Or if the provision be expressly in bar of dower, and she delays to elect, equity may, perhaps, interfere, to compel an election. But if the provision be expressly in bar of dower, and be actually received, this is a plain legal defence, to the demand of dower; as much so, as payment of a debt.

The case of Lawrence v. Lawrence, has been often referred to, as a leading case on this subject. That was a case of implied satisfaction. The testator gave his wife a provision for widowhood, and bequeathed away his real estate. At the first hearing, 2 Vern., 365, Lord Somers was of opinion, that the claims were inconsistent, and that the wife must elect. Dower, it appears, had been demanded at law, and the devise pleaded as a satisfaction; which defence, as I understand from a subsequent report, 1 Bro. P. C., 591, had been overruled, and the dower recovered. Lord Somers injoined the judgment. On the cause coming on to be re-heard, before Lord Keeper Wright, he was of opinion, that there was nothing in the will, to bar the wife of dower; "and in case any such thing did appear in the will, it would only be a bar at law, where the matter had been already determined." 1 Bro. P. C., 593. He therefore reversed Lord Somers' decree, as to the injunction, and dismissed the bill, so far as it respected the dower. Another bill, on the same matter, was afterwards brought, and heard before Lord Cowper, who declined to interfere with Lord Keeper Wright's decree; and, on appeal to the house of Lords, the bill was dismissed, as to the point of dower. 1 Bro. P. C., 594, 597.

That case seems perfectly in point with the present, except that it was a case of implied satisfaction, from the supposed inconsistency of the dispositions of the will, with the claim of dower. In that respect, the doctrine seems to have been modified, by the later authorities; but otherwise, the authority of Lawrence v. Lawrence, is undisputed. The master of the Rolls says, in Stra-

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han v. Sutton, * "I perfectly agree with Mr. Hargrave, that the principle of Lawrence v. Lawrence has never been impeached; and the only question has been, whether a gift, out of the same estate, was incompatible with the widow's claim of dower upon that estate." 3 Ves., 252. That is the question for a court of Equity. It is true, that in French v. Davies, 2 Ves. Jr., 578, the master of the Rolls says, referring to Lawrence v. Lawrence, "There the heir pleaded the will at law, in satisfaction of the dower. I do not know why that is not a good plea, if she accepted that provision, in bar of her dower; but never since that case, has it been attempted, to make that a defence at law; but a bill has been filed here, because the inconsistency of the claims is a ground of equity." The master of the Rolls plainly speaks here, not of express, but of implied bar, or satisfaction, where the inconsistency of the claims forms the ground of jurisdiction. These are the cases, which have never been tried at law, but have always been brought into equity; although he seems to intimate an opinion, that even these might be tried at law, if the widow accepted the provision, in bar of dower. This is further apparent, from the cases, referred to by the master of the Rolls, in

his opinion: Villareal v. Lord Galway, Ambl., 682, and note to Pearson v. Pearson, 1 Bro. C. C., 292; Foster v. Cook, 3 Id., 347; Arnold v. Kempstead, Ambl., 466; Pitt v. Snowden, cited in the note, 1 Bro. C. C., 292; Jones v. Collier, Ambl., 730; all of them cases of implied satisfaction, resting on the alleged incompatibility of the dispositions, with the claim of dower. But if we suppose, that, in every possible case, in which a widow may claim a provision under a will, and dower out of the estate, this court has jurisdiction to try her right to both, and put her to her election, if she be found not entitled to both, there can be no doubt, that the Court of Law has, at least, concurrent jurisdiction of the question of actual, and express satisfaction; and if it has actually exercised its jurisdiction, and determined that there was no satisfaction, but that the widow was entitled to both provisions, what is left for the jurisdiction of this court? It is res judicata.

It is argued, however, that this cannot be considered res judicata; for there appears no plea of satisfaction on the record at law, and the point was not in issue. In point of fact, it appears, pretty clearly, that the point was made and decided. The minutes of the Court of Law shew that a clause of the testator's will was read, and argument heard, previously to the order for a writ of admeasurement dower. There could be no dispute about the right to dower, unless barred by the will; and I cannot conceive of any

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*other point, on which argument could have been made. Indeed, no plea at all appears on the record, and it would seem irregular, that counsel should have been heard for the defence; unless the court so construed the Act of the legislature on the subject, as, that in the summary proceeding allowed by it, all matters of defence might be taken advantage of ore tenus. The terms of the Act are, that if the party "shall not shew sufficient cause against the petition, then the said court shall cause a writ for admeasurement of dower to be issued." Act of 1786, P. L., 409, 4 Stat., 742. If the Court of Law did make that construction, it is not for this court to make a different one. That court must judge of the regularity of its own proceedings. I am satisfied, however, that when the question is de re judicata, the true rule is this: that what the parties have once had an opportunity of litigating, in the course of a judicial proceeding, they shall not draw into question again; but that whatever might properly have been put in issue, shall be concluded to have been put in issue, and determined.

Such is the doctrine laid down in the elaborate case of Le Guen v. Gouverneur and Kemble, 1 John C. R., 436; a case, certainly, deserving much respect, from the ability and labor with which it was argued and determined. The doctrine seems to me of the utmost importance to the public peace. To be sure, if a party were under a disadvantage; if he needed a discovery, or was prevented from making his defence by accident or surprise; these circumstances might form a distinct ground of equity jurisdiction. But if from mere laches, he neglected to make a defence, which the court was competent to try, he has no reason to complain that other jurisdictions should be shut against him.

The other arguments are, that the complainants were not parties to the proceedings at law, and ought not to be bound by them; that the proceedings were irregular, in an executrix suing her co-executor; and that the defendants are trustees, accountable for the estate, and that if the dower has been improperly recovered, they are responsible for the injury the estate has sustained.

The Act of the legislature, for the admeasurement of dower, provides that the summons shall be directed "to the heir-at-law, of the deceased, if of full age, or to his or her guardian, if he or she shall be an infant, and if there be no guardian, then to the executor, or administrator, of the deceased, or to any other person, or persons, who may be in possession of any of the lands." P. L., 408. (Supra.) The complainants were not the heirs-at-law; but, perhaps, a liberal construction of the statute would require that

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the *hæres factus, or devisee of the land, should be summoned. The complainants sue in the present case, par prochein amy, which may afford reason to conjecture, that they had no guardian; in which case the Act directs the executor to be made the party. But, however, this may have been, if there was either error or irregularity, in the proceedings against the executor, it belongs to the Court of Law, to correct the error or irregularity. None, however, has been shown. I must hold the judgment to be valid, until reversed or annulled; and that the executor was properly made the defendant. If he were properly made the defendant, the Act must have intended that the estate, and all parties interested in it, should be bound by the judgment; otherwise, the proceedings would be nugatory. This is not extraordinary. A demand for dower is in the nature of a debt; and the executor alone is made a party when suit is brought for a debt, but yet the estate, and all parties interested in it, are bound.

It seems to me to have been irregular, that an executrix should sue her co-executor in a court of Law. If a third person sues one executor, without joining the other, this may be pleaded in abatement, and the action will fail; but if the defendant neglects to plead in abatement, judgment may be recovered, and will bind the estate. Still more, it seems to me, might the executor, who was sued by his co-executrix, have pleaded in abatement.

But he omitted to do so, and I cannot, therefore, say, that the judgment is void. I repeat, it belongs to that court, to correct its own errors and irregularities: and I must respect the judgment, whilst it stands unreversed on the record.

The defendants are certainly responsible for the estate, as trustees: and although I must respect the judgment of the Court of Law, determining their rights, yet, if they have been guilty of breach of trust, and, if the judgment was obtained by means of fraud, collusion, or laches, they must make good the injury, which the estate has sustained. If any third person had recovered against the executor, through his laches, he would certainly be responsible. The only fact of laches, which seems to be distinctly charged by the bill, is, that the defendant neglected to appeal. I would observe here, that I feel bound to disregard an argument, which is, perhaps, calculated to make the strongest impression, to wit: my own conviction that the judgment was erroneous, and might have been reversed on appeal. It is possible, that it might have appeared, as clearly, otherwise, to the Court of Appeals. As I must respect this judgment of the Court of Law, I am

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bound, whatever may be *my individual opinion, to acquiesce in its correctness. Apart, then, from my conviction in the particular case, the question is, whether, as a general rule, an executor is bound to appeal, when the judgment of the court, in the first instance, is against him, on a disputed point of law. I am not aware of any such rule. An executor is generally governed by the opinion of his counsel, and, I think, may safely and properly be so governed. Mr. Black states in his answer, that he delivered a notice to the gentlemen who had acted as the counsel of the complainants, in some other proceedings before this court, informing them of the judgment's having been rendered, and requesting their attention to it, if further proceedings should be thought advisable. It is true, that one of the gentlemen in question stated, that if such notice were left at his office, it was unknown to him, or the parties; but if the notice were left, although it was overlooked by the counsel, it seems to repel any imputation of laches, or ill faith. The defendant swears, that he resisted the claim strenuously, and in good faith; and that he endeavored, by the most obvious means, to give the parties who were chiefly interested, an opportunity of appealing, if those who were most competent to judge, should think it advisable. I think it would be new, and hard, that an executor should be held answerable for money, which he has paid under the sanction of a court of Law, deciding on the merits.

The other circumstances, which may be imputed as laches, are, that the executor failed to plead in abatement, and that he filed no plea of satisfaction. As to pleading in abatement, I think that was a matter fairly within the discretion of the executor. The tribunal, before which the suit was brought, was as proper a one, as any other, to determine the merits of the defence; and, I think, the most proper. I do not perceive that, beforehand, he could have expected to gain any advantage by changing the jurisdiction. As to the plea of satisfaction, I cannot undertake to say, that it was necessary, or that any advantage would have been gained by filing it. It appears that a defence was made, and that the order for the writ was made on argument. I think that no charge of laches is sustained against the executor.

Nor does any reason appear to impute collusion. There is nothing to show, that Mrs. McDowall did not prosecute her suit in good faith, and with a full belief of her rights: and she swears, that she acted by advice of counsel.

It may appear a matter of hardship, that the intention of a testator, which seems to have been so clearly expressed, should be

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*disappointed; but it would be a greater public detriment, that the boundaries of jurisdiction should be confounded.

It is, therefore, ordered and decreed, that it be referred to the master, to take the account of the defendants, as executor, and executrix, of John McDowall, deceased; and, that in such account, he do not charge the said defendants, with the money, or property, received by Mrs McDowall, by virtue of the bequests to her, contained in the will of her husband, the said testator, nor, with the money received by her, on the judgment in dower.

From this decree, the complainants appealed, on the following grounds.

1. That the will of the testator, in terms, declared the provision for his wife to be in lieu of dower, and as dower; and it was received by her as dower.

2. That the judgment at law concludes nothing but the widow's original right to dower, without reference to the question of satisfaction; and it determined her election, so as to render her liable to refund the legacies, which she had received.

3. That the attempt of the widow, who was also executrix, and, therefore, a trustee for the residuary legatees, to defeat the will, by a proceeding at law, is contrary to equity, and good conscience.

4. That, at all events, if the dower was properly assessed, and paid, equity will treat her as a trustee for the legatees, and compel her to account for it.

Hunt, for the appeal, cited: Middleton v. Quarles, 4 De S., 148; Adsit v. Adsit, 2 John. C. R., 448; Jones v. Collier, Ambl., 730;

Arnold v. Kempstead, Id., 466; Wilson v. Lord Townsend, 2 Ves. Jr., 693; Strahan v. Sutton, 3 Ves., 251; Greatorex v. Cary, 6 Id., 615; Arnold v. Kempstead, 2 Eden, 236; Gretton v. Haward, 1 Swanst., 413; Lawrence v. Lawrence, 1 Bro. P. C., 591.

King, and Petigru, contra.

PER CURIAM. This court concurs in the views taken of this case by the Chancellor; and it is, therefore, ordered and adjudged, that his decree be affirmed.

Decree affirmed.

Bailey, Eq. *334

*JOHN J. SCHNELL v. JOHN SCHRODER, JACOB H. BOYER, and JAMES H. MARSHBURN and Wife.

(Charleston, March, 1831.)

[1. *Executors and Administrators* ⇐535.]

The surety to an administration bond will be relieved against a decree obtained by a distributee against the administrator, if it appear, that the administrator had made payments to the distributee before the decree, which were not credited in the account settled by it, although there is no direct evidence of intentional fraud, or collusion.(*a*)

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2475; Dec. Dig. ⇐535.]

[2. *Mortgages* ⇐295.]

A purchase of the equity of redemption by the mortgagee extinguishes the mortgage debt; and the effect is the same, whether the purchase is by a direct contract with the mortgagor, or at a sale of the land by execution under a junior judgment.(*b*)

[Ed. Note.—Cited in McLure, Brawley & Co. v. Wheeler, 6 Rich. Eq. 345; Allen v. Richardson, 9 Rich. Eq. 56; Edwards v. Sanders, 6 S. C. 334; Trimmier v. Vise, 17 S. C. 500, 43 Am. Rep. 624; Trumbo v. Cumming, 20 S. C. 336; Devereux v. Taft, Id. 558; Bleckeley v. Branyan, 26 S. C. 429, 2 S. E. 319.

For other cases, see Mortgages, Cent. Dig. § 823; Dec. Dig. ⇐295.]

[3. *Work and Labor* ⇐5.]

Where a relative has been permitted to reside in a family, as a friend, without an intention manifested to charge him for his board, he cannot afterward be called upon to pay for it. What was originally a gratuity cannot be converted into a debt.(*c*)

[Ed. Note.—Cited in Sullivan v. Latimer, 38 S. C. 168, 17 S. E. 701.

For other cases, see Work and Labor, Cent. Dig. § 9; Dec. Dig. ⇐5.]

[4. *Executors and Administrators* ⇐47.]

A debt due by an administrator to his intestate's estate is assets in his hands; and if the administrator of an intestate becomes also the administrator of one of the distributees, his liability for the distributive share of the latter, in the estate of the former, attaches upon his second administration; and if he also becomes the guardian of the sole distributee of his second intestate, his liability attaches upon him in the latter character; and for a default in paying over funds in his hands, to which his ward is entitled, as distributee of the distributee of the first intestate, the sureties to the guardianship bond are alone responsible.(*d*)

[Ed. Note.—Cited in Gray v. Brown, 1 Rich. 364; Field v. Pelot, McMul. Eq. 400; Clowney v. Cathcart, 2 S. C. 403; Jacobs v. Woodside, 6 S. C. 499; Charles v. Jacobs, 9 S. C. 298; Anderson v. Earle, Id. 463; Ashley v. Holman, 15 S. C. 106; Todd v. Davenport, 22 S. C. 150; Donnan v. Watts, Id. 431; Chick v. Farr, 31 S. C. 468, 10 S. E. 176, 390.

For other cases, see Executors and Administrators, Cent. Dig. § 298; Dec. Dig. ⇐47.]

[5. *Executors and Administrators* ⇐537.]

The ordinary has no jurisdiction to ascertain and fix the liability of the surety to an administration bond, and a decree against him, for the default of his principal, is a mere nullity, and wholly inoperative.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2508; Dec. Dig. ⇐537.]

[6. *Injunction* ⇐26.]

If the defence, of a surety to an administration bond, to an action at law against him, for the recovery of the amount of a decree against his principal, in such as constitutes a complete legal bar, he is not entitled to come into equity to enjoin the proceedings at law, but will be referred to his legal remedy.(*e*)

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 35; Dec. Dig. ⇐26.]

[7. *Payment* ⇐36.]

A party making a payment has a right to direct the application, and if he fail to direct it, the party receiving may apply it to such of the debts of his debtor, as he deems proper. But the proper application of payments is a question of fact, and is often to be collected from the circumstances attending the transactions between the parties. In settling the account between a distributee and the administrator, who was insolvent, with a view to ascertain the liability of the surety to his administration bond, certain payments, and advances, of money, and goods, made by the administrator to the distributee, were ordered to be applied to the distributee's share of the estate, in the hands of the administrator; although the distributee had obtained a decree against the administrator, for the amount due him for his distributive share of the estate, in which these payments, and advances, were not credited, and the distributee

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*claimed to apply them to other debts, due to him by the administrator; it appearing, that these other debts were not only of a suspicious character, but that, from the circumstances attending the transactions between the parties, it could not have been their intention, that the payments, and advances, should be applied to these debts.(*f*)

[Ed. Note.—Cited in Bell v. Bell, 20 S. C. 46; Chick v. Farr, 31 S. C. 471, 10 S. E. 176, 390.

For other cases, see Payment, Dec. Dig. ⇐36.]

(*a*) Ordinary v. Condy, 2 Hill L., 313; Dud. L., 27; Ordinary v. Wallace, 1 Rich. L., 512; 2 Id., 460; 3 Strob. L., 496; Stewart v. McCully, 5 Rich. 84.

(*b*) 1 McC. L., 399; Nix v. Bradley, 6 Rich. E., 45; Allen v. Richardson, 9 Rich. E., 56; 2 Sp. L., 53.

(*c*) Booth v. Sineath, 2 Strob. E., 31; Westmoreland v. West, 9 Rich. E., 418; Riddle v. Riddle, 5 Id., 34.

(*d*) 2 Bail. L., 60, 199; McM. E., 496; Dud. E., 30; 2 Hill E., 284; Crenshaw v. Crenshaw, 4 Rich. E., 15; Gray v. Brown, 1 Rich. L., 351.

(*e*) Ante, 107, note c.

(*f*) Post, 380, 430; Jones v. Kilgore, 2 Rich. E., 63; Rich. E. Ca., 309.

[8. *Executors and Administrators* ⟸303.]
In making up an administrator's account with a distributee, the payments should be deducted, first from the interest due in each year, and then, if there be an excess, from the principal, of the sum in the hands of the administrator.(*g*)

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1238; Dec. Dig. ⟸303.]

[This case is also cited in McBee v. Crocker, McMul. Eq. 489; Bradford v. Buchanan, 39 S. C. 243, 17 S. E. 501, without specific application.]

This was a bill by the surety to an administration bond, to injoin proceedings at law, in an action brought against him, on his bond, for the recovery of a sum due by his principal, upon the administration of his intestate's estate.

The intestate, Jacob H. Boyer, died in 1817, leaving three children, Mrs. Schroder, the wife of the defendant, John Schroder, the defendant, Jacob F. Boyer, and a Mrs. Wirtemburgh, who were the distributees of his estate. The defendant, Schroder, took out administration of the estate and the complainant and one Harman Crone became the sureties to his administration bond. Mrs. Wirtemburgh afterwards died, leaving an only child, a daughter, who has since intermarried with the defendant, Marshburn. The defendant, Schroder, also administered on the estate of Mrs. Wirtemburgh: and was subsequently appointed the guardian of her child. The defendant, Boyer, filed a bill against Schroder, for an account of his father's estate, and obtained a decree against him for $1,144.91, with interest from 20 January, 1826: and Marshburn and wife also filed a similar bill against him, and obtained a decree for $1,144, with interest from May, 1818. They then summoned the complainant as surety to appear before the ordinary, who made a decree against him, conforming to the decrees in this court, against Schroder: and they afterwards brought an action at law against him, on the administration bond: whereupon this bill was filed. The bill charged, that the decrees against Schroder were obtained by fraud and collusion, and with intent to defraud the complainant; Schroder, and the other surety to his bond, being both of them utterly insolvent; and it was alleged, that nothing was, in fact, due by Schroder either to Jacob F. Boyer or to Marshburn and wife, upon his administration of the estate of Jacob H. Boyer.

The defendants, by their answers, denied all fraud or collusion: but the defendant, Schroder, stated that he had, at various times, advanced to Jacob F. Boyer small

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sums of money and goods to *the value, in the whole, of $966.53, with which he had not been credited in the settlement of his accounts, but which he intended to discount, if it was ever in his power to pay Boyer.

The defendant, Boyer, admitted that he had received of Schroder $137.91, which ought to have been credited as of 1 January, 1819. He also admitted that he had, from time to time, received of Schroder, goods and clothing, and small sums of money: but he was surprised to find the amount for which he was liable stated so high as $966.53, and thought there must be a mistake as to the amount: but admitting that it might, by possibility, be correct, he insisted that the amount should be credited against other demands which he had against Schroder, who, even if this sum were deducted, was indebted to him in upwards of $2,500.

The cause came on to be heard before De Saussure, Chancellor, at Charleston, in May, 1828.

To shew fraud and collusion between the defendants, Schroder and Boyer, in the settlement of the accounts, upon which the decree was founded, the complainant proved that Boyer had very slender or no means of subsistence, other than his share of his father's estate in the hands of Schroder: that he was dissipated in his habits, and never engaged in the steady pursuit of any business: and that he lived almost entirely in the family of Schroder, who clothed and fed him, for which no charge had been made, and no credit had been allowed in the account. He also gave in evidence declarations of Schroder, that he owed Boyer nothing, and that the latter had eaten and drunk out all that he was entitled to from his father's estate.

On the other hand, the defendant, Boyer, introduced evidence to shew, that he lived in the family as a friend and reliative: and that he was occasionally employed as an assistant in the store kept by Schroder: and that his board on the one side, and his services on the other, were at the time considered, and intended to be, gratuitous. To shew that Schroder was indebted to Boyer, for other demands, to which the latter was entitled to apply the money and goods which he had received from the former, two notes of Schroder's to Boyer, were produced: one for $162, dated 1 June, 1816: and the other for $400, dated in October, 1825. A bond of Schroder to Boyer, dated 11 March, 1818, for $1,036.51, was likewise given in evidence: but it appeared that this bond was secured by a mortgage of a lot of land in Charleston, and that this lot had been sold, by execution against Schroder, at the suit of another creditor, under a judgment junior to the mortgage, and had been purchased at the sale, by Boyer, for an inconsiderable sum.

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*It also appeared that the $137.91, which Boyer admitted, in his answer, that he had received from Schroder, was received in

(*g*) Huggins v. Blakely, 9 Rich. E., 408; 2 McC. E., 1, 185, 207.

goods, purchased by Boyer, at the sale of his father's estate.

The Chancellor was of opinion, that the evidence was altogether insufficient to make out the charge of fraud, and collusion, even as to Boyer; and that as to Marshburn and wife, no evidence had even been offered, which in the remotest degree affected them. That as to Boyer, it appeared that although he had received money and goods from Schroder, yet the latter was indebted to him in a much larger amount, on the bond and notes; and they certainly had a right to adjust and apply their cross demands, as they thought proper; and as the decree had been taken without crediting the advances of money and goods, against Boyer's share of his father's estate, it was too late to apply them to that demand now. And the same rule would apply to the charge for board; besides, that it was evident that no charge was ever intended to be made for board, and being originally gratuitous, it could not be afterwards made the foundation of a debt. His Honor, therefore, dismissed the bill, as to all the defendants, with costs.

The complainant appealed, and the appeal was argued, at Charleston, in February, 1829.

JOHNSON, J., delivered the opinion of the court.

Departing from the order which the counsel for the complainant have pursued, in arguing the grounds of appeal in this case, I will consider them first, in reference to the state of the account between the defendants, Boyer and Schroder; and without intending to decide whether there was, or was not, any intentional fraud and collusion between them, I think I shall be able to demonstrate, that injustice will be done to the complainant, if he is to be concluded by the decree by which the account was settled.

I will premise that the decree is predicated on an equal partition of the whole net proceeds of the personal estate of Jacob H. Boyer, amongst his three children; which gave to Jacob F. Boyer the sum of $1,144.91, the amount of the decree, in which no credit was asked or allowed. In the investigation, before the ordinary, when the complainant was a party, it was discovered that Boyer had purchased, at the sale of the estate, property to the amount of $137.91, which would leave a balance due to him of only $1,007; and Schroder states, in his answer, that, in addition to this, he had made other advances to Boyer, in money and goods, amounting in all to $828.62. Boyer, in his answer, admits that he had, from time to time, received from

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him goods, clothing and *money, in small sums, without stating the amount, although he expresses his surprise at its amounting to so much; but, so far from contesting the charge, he seems impliedly to admit it, by a proposition to apply it to the payment of other accounts between them. If this amount is to be credited to the account of the estate, then Schroder will be only indebted to him in the sum of $178.38. Boyer insists, however, that it should be applied to the payment of his other demands, which consist of the two notes, amounting together to $562; but whether the advances were made before the date of the notes, and could not, therefore, have been intended to have been applied to the payment of them, or whether there was any agreement that they should be so applied, does not appear. Admitting, however, that they must be so applied, there would still be a balance of $404.53, applicable to his demand against Schroder, on account of the administration.

In regard to Schroder's bond, I am very clear, that if, as it is stated, the lot was sold under execution, subject to the mortgage, and purchased by Boyer, the bond is extinguished. The equity of redemption was all that Schroder had in the lot, upon which an execution could operate; and that having been sold, and vested in Boyer, his right to redeem was gone. The mortgage vested the lot in Boyer, subject only to this right to redeem; and having purchased in that, the land became absolutely his, and he cannot have both that and the purchase money. Boyer had, unquestionably, the right to buy, and Schroder to sell, and release his equity of redemption; and whether he sells, or it is sold under legal authority, the legal consequences are precisely the same.

No account has been stated between these parties, but the facts above referred to, have been collected from the Chancellor's notes of the evidence taken on the hearing; and they are used only as furnishing a strong, if not irresistible presumption, that injustice would be done to the complainant, without a further investigation of them through a reference to the master. I ought to add, that I concur entirely with the Chancellor, as to the charge for board. It is clear, from all the circumstances, that it was never intended that Boyer should pay for his board in Schroder's family, into which he was received as a relative and friend; and if originally a gratuity, it cannot now be set up as a debt.

I come now to consider the case in reference to the liability of the complainant, for the amount claimed by the defendants, Marshburn and wife, as the distributive share of Mrs. Wirtemburgh, in her father's estate; to which, as her distributees, these defendants

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are *now entitled. Schroder also administered on the estate of Mrs. Wirtemburgh, and is, unquestionably, bound to account to Marshburn and wife; but all the authorities concur, that a debt due by an administrator, to his intestate's estate, is assets in his hands. Whatever, therefore, Schroder owed to Mrs. Wirtemburgh, whether on this or on any other account is immaterial, constituted so much of her estate in his hands, for which he is

bound to account, as her administrator, to all persons interested in her estate; and his liability to Marshburn and wife, must be referred to that character. The same result follows, from a consideration of the nature of the undertaking of the surety to an administration bond. The whole object, end and aim of the bond, is to secure the payment of the proceeds of the estate, to those who may be legally entitled to receive them. Now, upon the death of Mrs. Wirtemburgh, Schroder, himself, as her administrator, was alone entitled to receive her dividend of the estate of her father, Jacob H. Boyer. It was in his hands, and the condition of the bond was not only legally, but literally, fulfilled. Again, the undertaking of the surety is in reference to the law, which entitles him to be relieved, if there are well-grounded suspicions that the administrator is wasting the estate, by revoking his administration, or compelling him to find other security; and, without his own consent, neither the occurrence of any adventitious circumstances, nor the act of any one, could change the character of that liability. But if it be true, that he is liable for the funds, which the administrator is entitled to retain in his hands, it is in vain that you revoke his administration, and grant another, for that would not divest him of his right to retain the funds.

But the claims of Marshburn and wife, upon the complainant, are removed still one degree further. Schroder was appointed, and I suppose regularly, and upon sufficient security, the guardian of Mrs. Marshburn, when she was an infant; and the necessary consequence of this was, that the amount in his hands, to which she was entitled, as distributee of her mother, became so much held by him, in trust for her, as her guardian; and according to McDowell v. Caldwell, 2 McC. Eq., 55 [16 Am. Dec. 635],(*h*) the sureties to his guardianship bond are responsible for it.

The decree of the ordinary is wholly inoperative, as to the complainant. As the surety, he is under no obligation to account before the ordinary; but his undertaking was, that his principal should account, and he had accounted in the Court of Equity. The ordinary has no jurisdiction to enforce the bond, and his decree as to the surety, is a mere nullity.

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*The circumstances referred to, constitute a complete bar to the right of Marshburn, and wife, to recover at law; and there was, therefore, no necessity for the complainant's coming into this court, for relief. As to them, the bill must, therefore, stand dismissed.

The decree of the Circuit Court, so far as it dismisses the bill as to the other defendants, is reversed; and it is referred to the master, to state an account between the defendants, Schroder, the administrator of Jacob H. Boyer, and Jacob F. Boyer, the distributee in which the complainant must be allowed to shew, what sums have been paid, and advanced, by Schroder to Boyer, either in cash, or otherwise, on that account.

NOTT, J., and COLCOCK, J., concurred.

The cause again came up, before De Saussure, Chancellor, in January, 1830, upon exceptions to a report of the master, made in pursuance of the foregoing decree. So much of this report, as is material, is as follows.

"It was contended by the defendant, Boyer, that Schroder was indebted to him, for a large quantity of bacon sold to him. The claim was not only a very old one, but the evidence to sustain it was altogether insufficient; and I, therefore, rejected it.

But the principal difficulty in this case arises from two notes of Schroder's, produced on the part of Boyer, and to the extinguishment of which, he insisted that he had a right to apply the advances, received by him from Schroder.

The first note is dated in 1816, and is made payable to 'Jacob Boyer.' There was no evidence of the consideration; nor did it appear that the payee was the Jacob Boyer, who is the party to these proceedings. His father, whose name was also Jacob, was living at the date of the note; and it is much more probable, that the note was given to him, than the son. Considering the circumstances of suspicion attending this very stale claim, and in the absence of any evidence to clear up the mystery, I have rejected it.

The other note bears date in October, 1825. It appears, from Mr. Ford's testimony, that the note had been prepared by him, at the time it bears date; but it was not signed by Schroder, until March, 1826, on the evening before the day, on which a meeting was to be had before the ordinary, for the investigation of Schroder's accounts. This was after Boyer had obtained his decree against Schroder, and long after all the advances had been made by the latter. The inference that I draw from these circumstances is, that the note was a settlement in full of all the transactions between the parties, up to the time it

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bears date; and this view may derive *force from the fact, that the note was prepared before the proceedings were instituted, upon which Boyer obtained his decree against Schroder, as administrator. Boyer, indeed, alleges that the note was given as an acknowledgment for a sum of money loaned about the year 1819, for which he had not before possessed any voucher; but no evidence of this loan, or of Boyer's ever having means to make it, were produced before me.

The circumstances in which the parties stood to each other, and the time when the note was executed, seem to indicate that there was collusion between them. It appears strange that Schroder should have giv-

(*h*) Vide Joyner v. Cooper, 2 Bail., 203

en a note at this late day, if his advances, previously made, had been intended to be applied to this loan. The advances greatly exceed the loan, and if the note was the acknowledgment of an old debt, why was not a counter acknowledgment given for the advances? It seeems to me, that it was incumbent on Boyer, from the suspicion thrown upon this note, to have produced additional and full evidence of the consideration. This he has failed to do, and I think, therefore, that he ought not to be allowed to set it up now, to the prejudice of the complainant; but that he should be left to pursue his remedy against Schroder, and not fasten this suspicious debt, on the surety to his administration bond.

I, therefore, respectfully report, that the advances made by Schroder to Boyer, amount to $966.53, which must be deducted from $1,144.91, the amount of the decree against Schroder. This leaves the sum of $178.38, on which I recommend interest to be calculated, from 1 January, 1819, due to Jacob F. Boyer, from his portion of his father's estate, in the hands of Schroder, the administrator.

All which is respectfully submitted.

M. I. Keith, Master."

To this report, the defendant, Boyer, excepted, but the exceptions were overruled by the Chancellor. He then gave notice of appeal, and at the present term moved to reverse the order of his Honor.

H. A. De Saussure, for the motion.
Dunkin and Pepoon, contra.

O'NEALL, J., delivered the opinion of the court.

This court is satisfied with the conclusions of the master, on the questions of fact submitted to him. Independently of the very suspicious character of the claims set up on the part of the defendant, Boyer, it is worthy of remark, that both the note of 1816, and the claim for bacon sold, were, barred by the statute of limitations, before the note of 1825

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was given. In legal contempla*tion, they were regarded as paid; and this legal presumption is much fortified by the fact, that the parties considered it necessary that a note should be given, in 1825, only for the money alleged to have been previously loaned. We might well conclude, that this was the only unsettled transaction between them.

As to the note of 1825, I did at first feel some difficulty; but on a careful examination of the case, I am satisfied that the master's conclusion is correct. A party paying money has, at the time he pays it, the right to direct how it shall be applied: but if he does not direct the application, then the party receiving it may apply it to such debt of his debtor, as he may choose. On what account money paid, or articles delivered, were paid, or delivered, and received, is always a question of fact; and the proper answer to the inquiry, is often to be collected from the circumstances attending the transaction. In the case before us, the money paid, and the articles furnished to Boyer by Schroder, were all anterior to the note. If they had been intended as payments on account of the money loaned, the note could not have been given, for they greatly exceeded it in amount. It is more in the ordinary course of things, that the administrator should have made these advances, on account of Boyer's distributive share of his father's estate, which was in his hands; and this is fully sustained by the fact, that the parties did not, when liquidating an old debt, apply them to its payment.

The master's mode of making up the account, however, is erroneous. The payments and advances, in money or goods, to Boyer, should, in the years, when paid or delivered, be deducted, first from the interest then due on his distributive share; and if they exceed the interest, the excess should be deducted from the principal, and the interest computed on the balance. The case is, therefore, remanded to the master, to make up the accounts according to these principles.

JOHNSON, J., and HARPER., J, concurred.

Order modified.

Bailey, Eq. *343

*SARAH B. GIST, and Others v. WILLIAM CATTELL and Others, Executors of States Gist, and JOSHUA C. GIST, administrator of Independent Gist.

(Charleston, March, 1831.)

[1. *Executors and Administrators* ⟸418; *Wills* ⟸740.]

For the purpose of making partition, and division of an estate, a small portion of the property was assigned to one of three devisees and legatees, and the residue to the two others, charged with the payment of the debts of the testator. The property assigned to each was valued, and the debts enumerated and specified in a schedule; and the difference between the parties was equalized, by a payment in money. Mutual releases were executed and bonds of indemnity given; by the one, to the two others, to bear his portion of the burden of any debts, which might be established, in addition to those enumerated; and by the others, to indemnify him against the enumerated debts. A large debt due to the State, for the purchase money of lands, which were included in the property assigned to the parties, who were charged with the payment of the debts, was released by an Act of the legislature, reciting that the consideration had failed. *Held*, that the parties who were charged with the payment of the debt, were bound to account to the other for his share of the debt released; and that, although they would be entitled to an abatement, for any part of the property assigned to them, which they had failed to obtain, to the extent of the value set upon it in the partition, yet the matter of such abatement, and its extent, must be proved, and that a loss of property, of equal value with the debt,

was not to be inferred from the release of the latter.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1658; Dec. Dig. § 418; Wills, Cent. Dig. § 1893; Dec. Dig. ⇐740.]

[2. *Release* ⇐16.]

A clear mistake, in making a partition, and settlement of an estate, as to its liability for a supposed debt, is a ground for opening mutual releases executed by the parties, where it appears that the settlement was not a compromise, or speculation; and it makes no difference, that it is uncertain, whether the mistake were one of law or of fact.(a)

[Ed. Note.—Cited in Rainsford v. Rainsford, Speers, Eq. 386, 394; McDow v. Brown, 2 S. C. 110, 111; Hutchison v. Fuller, 67 S. C. 284, 45 S. E. 164.

For other cases, see Release, Cent. Dig. § 31; Dec. Dig. ⇐16.]

[3. *Release* ⇐24.]

A party brought into court as a defendant, for the purpose of adjudicating a claim set up by him, has the same right to open a release, for error in the settlement of mutual demands, upon which the release was founded, as if he were a complainant, provided the specific errors are sufficiently charged in his answer.(b)

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 41–46; Dec. Dig. ⇐24.]

[4. *Appeal and Error* ⇐1106.]

It is within the competency of the Court of Appeals, if any claim or ground of defence, has been casually omitted to be made in the Circuit Court, to afford an opportunity of trying its merits; and the court is always reluctant, whilst the cause is in its power, to exclude any apparently just claim, or defence: and where little prejudice can be occasioned by the short delay necessary for the purpose, an opportunity will be allowed for investigating it.(c)

[Ed. Note.—Cited in Fraser & Dill v. Charleston, 8 S. C. 340; Maner v. Wilson, 16 S. C. 478; Hand v. Savannah & C. R. Co., 17 S. C. 265; Hubbard v. Camperdown Mills, 26 S. C. 590, 2 S. E. 576.

For other cases, see Appeal and Error, Cent. Dig. § 4392; Dec. Dig. ⇐1106.]

[5. *Release* ⇐31.]

[A general release does not include demands which neither party had knowledge of.]

[Ed. Note.—For other cases, see Release, Cent. Dig. § 75; Dec. Dig. ⇐31.]

This was a bill for an account of the estate of States Gist, deceased; but in order to

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settle the account, it became necessary, *that a claim upon his estate, on behalf of the estate of his brother, Independent Gist, also deceased, should be adjudicated; and for this purpose, Joshua C. Gist, the administrator of Independent Gist, was made a party. This claim was as follows:

Independent Gist, and States Gist, together with their mother, Mrs. Mary Gist, were devisees, and legatees of their father, General Mordecai Gist, of Maryland, and were each of them entitled to one-third of his estate. He left property in Maryland, and a considerable estate in South Carolina, where he owed several debts, including a bond to the State, for $8,570, which, it appears, had been executed by him, to secure payment of the purchase money of three tracts of confiscated lands. In the year 1810, the devisees entered into an agreement, for the partition of the estate, and a settlement of their respective interests in it; by which agreement, the property in Maryland was to be assigned to Independent Gist, at a fixed valuation, and the estate in South Carolina, which was also valued at a fixed sum, was to be assigned to Mrs. Gist, and States Gist, who were to pay the debts in South Carolina. Mutual conveyances and releases were executed pursuant to the agreement; and a schedule of the debts, which amounted to $12,616, including the bond to the State of South Carolina, above mentioned, was annexed to the instrument executed by Independent Gist, and the conveyance and release was made subject to the payment of the debts enumerated. The property assigned to Independent Gist, fell short of one-third the net value of the whole estate, after deducting the amount of the debts: and the difference was paid to him in money, by Mrs. Gist and States Gist, so as to make their respective shares exactly equal. A bond of indemnity was executed by Independent Gist, to his mother and brother, with a condition to pay one-third of any debts, which might be established against the estate, in addition to those enumerated in the schedule; and they also executed a bond to indemnify him against the enumerated debts.

Among the estate in South Carolina, which was included in the conveyance and release of Independent Gist, to States Gist, and Mrs. Gist, was the following: "Eight hundred and fifty-four acres of land, on the south side of Santee river; also, seven hundred acres in York district; and one hundred and forty-three acres near Beaufort; which said tracts were heretofore purchased by General Gist, from the commissioners appointed for the sale of confiscated British property." The legislature of South Carolina, by an Act, passed in 1817, 6 Stat., 85, released the debt

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due to the State by General Gist. *The preamble of the Act recites as follows: "Whereas, it appears that at a sale of lands, made by the commissioners for the sale of confiscated estates, in the month of February, Anno Domini, one thousand seven hundred and eighty-six, General Mordecai Gist became the purchaser of three tracts of land, and executed a bond and mortgage, dated 15 February, one thousand seven hundred and eighty-six; but by reason of some irregularity in the transaction, the said commissioners never gave titles to General Gist, for the lands bid in by him. And whereas, it appears fur-

(a) Rainsford v. Rainsford, Sp. E., 385; post, 456, and note.

(b) Floyd v. Priester, 8 Rich. E., 248.

(c) Post, 514; ante, 98; Rich. E. C., 469; Edgerton v. Muse, 2 Hill E., 53; Id., 152; Dud. E., 24; Sp. E., 349.

ther, that two of the said tracts of land, viz: one in Ninety-six district, on Obed's creek, then late the property of Lord Montagu; and another tract, then late the property of R. English, on Savannah river, on Middle creek; have never been located; and that the only tract which has been located, to wit: a tract on Santee, formerly of Elias Ball, was sold by the direction of the comptroller general, under the mortgage, on 6 November, one thousand eight hundred and nine, when States Gist, esquire, son and representative of General Gist, to prevent its being sacrificed, bid in the same, at the sum of one thousand one hundred and ten dollars; which sum has been paid, and placed to the credit of the bond aforesaid." The Act provides, that titles to the Santee tract should be made to States Gist, on his paying into the treasury therefor, such sum, in addition to the sum already paid by him, as with the said payment, will be equal to the price bid by General Gist, with interest on the balance from 6 August, 1809, when the land was located; or if the said States Gist should prefer it, the comtroller general is required to refund the money paid by him, and to sell the land. And upon the adoption of either of these alternatives, the comptroller general is required to cancel the bond of General Gist. Vide Acts of 1817, p. 11, 12.

The claim of the administrator of Independent Gist, was founded upon the provisions of this Act; and it was insisted, that as the debt had been released, Mrs. Gist, and States Gist, were bound to refund to Independent Gist, his share of the amount left in their hands for the payment of this debt.

Col. Cattell, one of the executors of States Gist, stated: "With regard to the different lands bought by General Gist, from the commissioners of confiscated estates, I do not know of any of them obtained by Mrs. Gist, and States Gist, except the tract called Pigeon Point, near Beaufort. The tract at Santee is explained by the Act of 1817. The reason why General Gist, in his lifetime, and his widow, and son, after his death, did not

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obtain possession, *was, as I always understood, because the lands could not be located." He also stated, that States Gist never considered the partition which had been made, and the release executed by Independent Gist, as a bar to the claim of the latter, to his share of the debt released by the State; and that he had actually paid a part of it, and, but for his, Col. Cattell's advice, would have paid the residue, as he always regarded the claim as just and equitable; but that he reserved it, at the suggestion of him, Col. Cattell, in order to force Independent Gist to a settlement respecting certain military lands, which he had acquired in right of their father.

The cause had been referred to the master, who reported a balance of $2,399, due to the estate of Independence Gist, which he recommended should be paid, with interest from 27 October, 1821, out of the estates of Mary Gist, and States Gist.

The complainant excepted to the report, on the ground, that the partition and releases were a final settlement of the estate, and constituted a bar to the claim now set up for the estate of Independent Gist.

The cause was heard at Charleston, in February, 1829, by Harper, Chancellor, who made the following decree:

Harper, C. This seems to me a clear case of mistake, and I think that the representative of Independent Gist is entitled to relief. All the parties supposed that there was a debt due to the State, when in fact there was none. Mrs. Gist, and States Gist, received property equivalent to this debt, of which they assumed the payment. They received it for the purpose of paying the debt; but they have been exonerated from the payment, and ought to refund.

An account stated will be opened, and leave given to surcharge and falsify, on any errors being charged and proved; and it is said, that the party will not be confined to errors of fact, but may take advantage of errors of law. "Every release must be founded on some consideration, otherwise (as Lord Chief Baron Gilbert says, For. Rom., 57), fraud must be presumed. That consideration must be either a valuable consideration then given, or the adjustment of depending accounts. In the latter case, the fairness of the accounts is of the essence of the consideration. If they are not fair, the consideration is not fair, and the instrument founded on such consideration, is in itself void, and therefore operates nothing." Per Lord Redesdale, in Roche v. Morgell, 2 Sch. & Lef., 728. I do not think it material to inquire, whether the mistake was of law, or of fact. It did not appear, that the parties knew, under what cir-

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*cumstances the bond of General Gist was given. If all particulars were known, it would probably be impossible to say, how far it was an error of law, or of fact.

This was not a case of speculation, or compromise. The parties did not agree to take the estate in South Carolina, whatever it might be, and pay the debts, whatever they might amount to. The property conveyed was specified and valued. The debts were also specified, and a provision made, that each party should bear an equal share of the burden of any unknown debts, that might arise. It is plain, that the parties could not have contemplated the chance of such an event, as has occurred. The release is general of all claims and actions: but if they had discovered, and taken possession of a valuable estate, which had been unknown to all the parties, can it be thought, that Independent Gist might not have recovered his share of that?

In Cocking v. Pratt, 1 Ves., 400, an agreement was made by a daughter, with her mother, concerning the distribution of her father's estate: which agreement was afterwards ratified by her husband. It turned out, that what she received was considerably less than her share: and the court relieved. The master of the Rolls observed that she clearly did not intend to take less than her full share. He does not decide on the ground of fraud, but of mistake as to the value of her share. He observes, that the court would not interfere for a trifle; but the value was material. It was not a case of composition for ready money, as wanting to marry. I think the principle of that case covers this.

It was suggested in argument, that if the legislature thought proper voluntarily to release the debt, it was a gratuity to Mrs. Gist, and States Gist, in which Independent Gist had no claim to share. But the Act does not put it on that footing; it was conceded as matter of right. If the facts recited in the Act are true, and I must take them as concluded, there was a good defence against the bond.

It was also suggested, that this was not the proper form of proceeding; but that a bill should have been filed by the representative of Independent Gist, and, according to the authorities, specific errors charged and proved. But in order to settle the estate of States Gist, it was necessary, that this claim should be decided on. The representative of Independent Gist, was called upon to establish his claim. He was, in effect, called upon to interplead. The defendant was made the actor. I am of opinion, that the error was sufficiently charged, and proved.

It is ordered, and decreed, that the master's report be confirmed; and that the defendants, the executors of States Gist, pay to

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the ad*ministrator of Independent Gist, out of the estates of Mary Gist, and States Gist, the amount reported to be due to him.

From this decree the complainants appealed, and now moved that the same might be reversed.

Finley and Hunt, for the motion. The partition and settlement of 1810, were intended to be a full and final division, of the estate of General Gist. On that ground, Independent Gist refused to account for the military lands, which he acquired, subsequently to the settlement, in right of his father: and on the same ground, he might have refused to bear his portion of the loss, if Mrs. Gist, and States Gist, had been evicted from any part of the estate in South Carolina. For the same reason, he is barred of any right to a share of the debt released to them, by the State. As to Col. Cattell's statements, in relation to the views and intentions of States Gist, in the first place they are not evidence; and if they were, they prove nothing but the generosity of States Gist. There was no promise, and if there had been, it was nudum pactum. Besides, parol evidence cannot avail, to alter the terms of a deed.

It is said, however, that the arrangement of 1810, was founded in mistake. But of this there is no evidence. How does it appear, that the parties were ignorant of the circumstances connected with the debt to the State? The probability is, that they were well acquainted with them: and that the chance of a release by the State, was a motive to the undertaking of Mrs. Gist, and States Gist.

If there was any mistake, it was mutual; and when that is the case, mistake is no ground for opening a settlement. 1 Mad. C., 73. Pearce v. Crutchfield, 16 Ves., 48. No case can be found, which comes up to this. That of Cocking v. Pratt, 1 Id., 400, went upon the ground, that the compromise was obtained through parental influence. Atherley, Mar. Settl., 364. There is no pretence of influence, or unfairness, in this case.

If the release by the State were a gratuity, Independent Gist, unquestionably, had no title to share in it. But regarding the Act of 1817, as founded on the failure of the consideration, for which the bond was given, surely the release of the debt on the one side, is balanced by the loss of the lands on the other; and yet the estates of Mrs. Gist, and States Gist, are ordered to pay to the representative of Independent Gist, his share of the debt released, and no allowance is made for the loss of the lands; although some of the lands, particularly a large tract in York district, could never be located, and the only tract which could be traced, that on Santee,

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was *actually sold by the State, and bought in by States Gist. This cannot be law. Certainly it is not equity.

Grimke, contra. It is almost unnecessary to say one word in support of the decree, which is in itself conclusive. The argument for the appellants is founded upon the error, that the partition of 1810, was a compromise. It was a compromise to be sure, so far as it includes a mutual release of joint interests; but it compromises nothing more. The debts and property are all specified and the property valued, and the settlement is made on the basis of this specification and valuation.

It is urged, however, that the release of the debt is balanced by the loss of the lands. It may be conceded, that if the title to any of the lands has failed, States Gist, and his mother, are entitled to a discount pro tanto; but this discount cannot extend further than the valuation placed on these lands in the partition. The loss of any part of the property, assigned to Mrs. Gist and States Gist, can furnish no ground for depriving Independent Gist of his right to share in the debt released, except by way of discount. Now, it does not appear that any valuation whatever, was placed on the lands in question; and it is fairly to be inferred that they were

thrown in as of no value. With regard to the sum paid by States Gist, on buying in the Santee lands, it was directed by the Act of 1817, to be refunded to him from the public treasury: so that there can be no claim for any discount for that payment. The answer, then, to the argument is, that if the complainant have any claim arising out of the loss of the lands, it is to a discount, which they should have established before the master. This they have failed to do, and it is too late to do it now.

HARPER, J., delivered the opinion of the court.

This court concurs in the opinion delivered by the Chancellor; and his decree is affirmed, so far as respects the several matters settled by it. It is now, however, suggested, that of the several tracts of land conveyed, or released, by Independent Gist, to States Gist and his mother, some of them, and particularly a tract of seven hundred acres, said to be situated in York district, but which could never be located, were never obtained, or enjoyed by States Gist. This, as was urged in the argument, could not be a ground for dismissing the claim of Independent Gist, although it might have been matter for a counter demand or abatement. In strictness, this claim comes too late. It ought to have been made before the master, on the reference. This was not done; and there was neither any exception to his report on that ground, nor

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was the point made at the *hearing in the court below. Still, however, I suppose it to be within the competency of this court, if any claim, or ground of defence, has been casually omitted to be made, to afford the parties an opportunity of trying its merits; and the court is always reluctant, whilst the case is in its power, to exclude any apparently just claim or defence.

The release, or conveyance, from Independent Gist to Mrs. Gist and States Gist, is not before the court, but has been mislaid since the hearing; and, it may be, that if it were before us, it would appear that there was no ground for opening the cause. It may be, that no value was set upon the land thus released. The court perceived several other objections to the establishment of the claim. These, however, ought to be properly investigated before they are decided on; and, as little prejudice can be occasioned to any party, by the short delay necessary for the purpose, the court is disposed to grant an opportunity for such an investigation. Perhaps it may still be in the power of the parties to produce the release on a reference.

It is, therefore, ordered and decreed, that the master's report be so far opened, as to allow the complainants to prove, and establish any claim or demand, which the estates of States Gist, and Mrs. Mary Gist, may have against the estate of Independent Gist, by the failure of the land, or other property, released, or conveyed, by Independent Gist, to the said States Gist and Mary Gist, according to the views herein expressed; the decree being, in other respects, affirmed.

JOHNSON, J., and O'NEALL concurred.

Decree modified.

Bailey, Eq. *351

*MARY E. SHEARMAN and ANN M. SHEARMAN v. JUSTUS ANGEL, Executor of Isaac Waight Tucker.(a)

(Charleston. March, 1831.)

[1. *Wills* ⇐497.]

The testator devised a part of his estate to his "mother," for life, and at her death, to her children; and devised another part of his estate, to a "sister." The testator, and the "sister," were illegitimate children of the "mother," who at her death left two other legitimate children surviving her. *Held*, that describing the mother and her illegitimate daughter, by the terms "mother," and "sister," did not sufficiently manifest the intention of the testator to include the latter in the devise to the "children" of the former: and that the legitimate children were alone entitled to take.

[Ed. Note.—Cited in Bannister v. Bull, 16 S. C. 228.

For other cases, see Wills, Cent. Dig. § 1085; Dec. Dig. ⇐497.]

[2. *Wills* ⇐489.]

Illegitimate children cannot take, together with legitimate children, under a devise to "children" generally, unless the intention of the testator to include them is manifested by clear expression, or necessary implication, on the face of the will itself; parol evidence of such intention is inadmissible. Vide Wish v. Kershaw, infra, note, S. P., as to grand-children.

[Ed. Note.—Cited in Donald v. Dendy, 2 McMul. 131; Bannister v. Bull, 16 S. C. 228.

For other cases, see Wills, Cent. Dig. § 1043; Dec. Dig. ⇐489.]

[3. *Wills* ⇐610.]

A bequest of personalty to one "and her children," vests an absolute estate in the legatee.

[Ed. Note.—Cited in Johnson v. Johnson, McMul. Eq. 347; Lemacks v. Glover, 1 Rich. Eq. 144; Dougherty v. Dougherty, 2 Strob. Eq. 66; Reeder v. Spearman, 6 Rich. Eq. 95; Renwick v. Smith, 11 S. C. 306. Wallace v. Craig, 27 S. C. 524, 4 S. E. 74.

For other cases, see Wills, Cent. Dig. § 1380; Dec. Dig. ⇐610.]

Isaac Waight Tucker, by his will made in 1814, devised and bequeathed as follows. "I give, devise, and bequeath, to my beloved mother, Mrs. Elizabeth Shearman, a part of my plantation on John's Island, &c." "which part shall contain five hundred acres, and shall be run off in such manner as to include the dwelling house, &c." "which said part or parcel of land, I give to my said mother,

(a) Reported on another point, 2 Hill E., 26; see Johnson v. Johnson, McM. E., 345; Reeder v. Spearman, 6 Rich. E., 88; Dougherty v. Dougherty, 2 Strob. E., 66.

during her life, and at her decease to her children, forever. Also I give, devise, and bequeath, to my said mother, Mrs. Elizabeth Shearman, the following negro slaves, viz. Cretia, Jupiter, Mary Ann, Scipio, Juba, and her two children, Juno, and Willoughby, Jenny, and Toney, together with their issue to her, my said mother, during her life, and at her decease, to her children forever. Also, I give and bequeath, to my said mother, $1,000 of the money belonging to me, and now in the hands of the executors, of my father's estate; likewise, seven cows, and all my bedding; to her, my said mother, and her children, forever." And after directing several of his slaves to be emancipated, and bequeathing to them the sum of $1,000, the testator's will proceeds: "I give, devise, and bequeath, to my dear sister, Martha Angel, and her husband, Justus Angel, all and singular, the remainder and residue of all my estate and effects, both real and personal, wherever situated, lying, or being, to them and their

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heirs forever; but the *said property shall not be subject to the debts which have been, or may hereafter be, contracted by the said Justus Angel. Lastly, I do make, constitute, and appoint, my brother-in-law, Justus Angel, and John P. Wilhelmi, of Charleston, executors of this my last will and testament."

The testator, and Martha Angel, were the natural children of Mrs. Shearman, then Miss Tucker, and Isaac Waight, of John's Island, from whom the testator derived his estate. The complainants were the legitimate children of Mrs. Shearman by a subsequent marriage. The defendant, Justus Angel, qualified as executor of the testator's will; and Mrs. Shearman having died, this bill was filed by the complainants, for an account of the real and personal estate devised to her by the testator.

The complainants claimed the whole of the real estate, and slaves, by virtue of the express limitation to the children of Mrs. Shearman; and they also claimed the bequest of $1,000, and the cattle, &c., as subject to the same limitation, and prayed that the defendant might account for it.

The defendant in his answer, insisted that the language of the will was equivalent to a declaration plain, that the testator intended his sister, Mrs. Angel, to be regarded as one of the children of his mother, Mrs. Shearman, to whom the land and slaves were limited after her death; and the defendant contended, that he was entitled to one-third part of them, in right of his said wife. As to the bequest of $1,000, and cattle and bedding, the defendant submitted, that under the terms of the will, Mrs. Shearman took an absolute interest; and the legacy having been long since paid, and delivered to her, by the defendant, he was not bound to account for it.

The cause came on to be heard at Charleston, in February, 1829, before Harper, Chancellor, who made the following decree.

Harper, C. The principal question in this case is, whether Mrs. Angel can take under the devise, and bequest, contained in the will, as one of the children of Mrs. Shearman.

In the case of Wish v. Kershaw, (*b*) deter-

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mined by the Court of *Appeals, I understand these points to be fully settled: first, that under a devise to "children," (in that case "grandchildren,") illegitimate children

(*b*) In the Court of Appeals, at Charleston, November, 1827.

HARRIET WISH v. CHARLES KERSHAW, Executor of Elizabeth Morton.

[*Wills* ⇨497.]

[Cited in Donald v. Dendy, 2 McMul. 130; Shearman v. Angel, Bailey, Eq. 351, 352, 23 Am. Dec. 166; In re Robb's Estate, 37 S. C. 39, 16 S. E. 241, to the point that illegitimate grandchildren are not included in the term "grandchildren," and parol evidence is inadmissible to show intent to so include, except where there are no legitimate grandchildren.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1080-1086; Dec. Dig. ⇨497.]

This was a feigned issue, made up in the Court of Common Pleas, to try the right of the plaintiff to a share of the estate of the defendant's testatrix, under the following clause in her will: "My will is, and I hereby direct my executor, hereinafter named, to divide my property into as many shares as I have grand-children; and to the grand-children, who shall have attained the age of twenty-one years, or be married, at my death, my said executor shall

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give to each a *share; and the remainder he shall so dispose of as, in his opinion, will best contribute to the interest of those under age, and not married; and as soon as they shall have attained the age of twenty-one years, or be married, then he shall give to each a share."

The plaintiff was an illegitimate grand-daughter of the testatrix, who left also several legitimate grand-children, surviving her. On the part of the plaintiff, parol proof was offered to show, that the testatrix regarded the plaintiff as one of the grand-children provided for by her will. This was objected to, but was admitted subject to exception; and the proof was full and conclusive to the purpose, for which it was offered. The jury, by a special verdict, found the facts above stated, and added: "We further find, that the testatrix did intend to include the plaintiff, in the term grand-children; and if the court shall be of opinion, that parol evidence can be received, to prove such intention, then we find for the plaintiff; otherwise, if such evidence cannot be received, then we find for the defendant."

The presiding Judge gave judgment for the plaintiff, and the defendant now moved to reverse the judgment.

COLCOCK, J. The question submitted by the special verdict is, whether parol evidence was admissible, to show the intention of the testatrix. There may be a difference of opinion, as to the application of the rule on this subject; but there can only be one opinion as to the rule itself. It is very certain, that parol evidence is only admissible, in such cases, to explain a latent ambiguity. If a testator devises his estate to a person, or class of persons, by name, or description, and it turns out, that there is no one to whom the description properly applies, parol

cannot take along with such as are legitimate; and second, that parol, or extrinsic

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evidence, is not admissible to shew, *that the testator intended to include them. To be sure, a question may be made, whether, if the testator, in addition to the general devise to children, goes on to explain, and designate the persons intended, so as to shew, that he meant to include illegitimate chil-

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*dren, as well as legitimate, his disposition may not have effect. So the law Judges, to whom the case was sent for an opinion, seemed to think, in the case of Wilkinson v. Adam, 1 Ves. & Bea., 422. And such I should suppose to be law. A testator may give to illegitimate children; nor is there anything

evidence may be admissible to show, to whom the testator intended it to be applied;(c) for here is a latent ambiguity, that is, an ambiguity ascertained by extrinsic proof, and which may, therefore, be explained by proof of the same sort; and which, if not explained, would render the will inoperative. But if there are persons answering the description, and evidence is offered to show, that the testator intended to include other persons, not coming within the description contained in the will, such evidence cannot be received; for there is no ambiguity to be explained, and the evidence is, in fact, offered for the purpose of altering the terms of the will, although there is nothing doubtful, either as to its construction, or its application.

The devise in this case is to grand-children; and there are such persons. There are those who are known to the law as grand-children; and all who come within the description, are, by the terms of the will, entitled to take. Where, then, is the ambiguity to be explained? If the plaintiff comes within the description, she is entitled to a share of the estate; and if she does not, she is entitled to no part of it; but in either case, the will is clear, and intelligible, and no ground exists for extrinsic explanation of the intention of the testatrix. This is the true view of the rule, as it was laid down in the case of Lord Walpole v. The Earl of Cholmondeley, 7 T. R., 134; in which case Lord Kenyon said, "we may safely lay down as a rule, that in order

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to make such evidence admissible, *the party proposing it, must put his case into a situation to enable the court to receive it; he must show a latent ambiguity, without which the court cannot receive it." Ib., 144. In the present case, the plaintiff claims as a grand-child; and the answer is, that she is not known in law as such. Then it is, that an offer is made to show by parol proof, that the testatrix actually intended to include her under that term. This is certainly not within the rule. It is to alter the will, and not to explain it. The true question is, whether she can legally be brought within the description contained in the will; and it is clear from the authorities, that she cannot. A bastard is nullius filius; and, therefore, if an estate be limited to the eldest issue of B., a bastard son of B., although he be his eldest issue, shall not take. Co. Litt., 3 b. In the case of Godfrey v. Davis, 6 Ves., 43, an illegitimate child was held not to be entitled, under the description of a child contained in the will; although the testator knew the state of the family, and that there were several illegitimate, and no legitimate children. So also in Bell v. Phyn, 7 Ves., 458, it is laid down, that the term "children," legally construed, is confined to legitimate children. To the same effect is the case of Cartwright v. Vawdry, 5 Ves., 530. Indeed, the point is too well settled, to admit of argument. Such, then, being the fixed legal import of the terms children, and grand-children, parol evi-

dence is not admissible to show, that the testatrix meant to include an individual, who does not come within the description. Such evidence goes to alter the terms of the will, and not to explain an ambiguity as to its proper application.

This case is, however, to be distinguished from those, in which, there were no persons legally answering the general description, contained in the will; and in which it has been held, that evidence was admissible to show, whom the testator intended by the description. In such cases there is, as I have already stated, a latent ambiguity, and parol evidence is admissible to explain it. Such was the case of Lord Woodhouselee v. Dalrymple, 2 Mer., 419, in which all the authorities are collected and reviewed. The case was this: Sir James Henry Craig, by his will, dated 7 May, 1811, among other legacies to different persons, gave "to the children of the late Charles Ker, who should be living at the time of his (the testator's) decease, £2,000, to be equally divided among them." It appeared, that Charles Ker had married in 1792, but had no children after his marriage, although he had five before, of whom three were living at the testator's death; and it also appeared, that he had been lost at sea a short time after his marriage. The master disallowed the claim of the three surviving children, on the ground of its appearing that the marriage did not take place, until several years after the birth of the claimants; and the question came up before the master of the Rolls, Sir William Grant, upon an exception to the master's report. Sir William Grant said, "It struck me, on a general recollection of the authorities, that this case differed from any, in which the court had decided against the claim of illegitimate children; and upon a reference to the cases, I am confirmed in that opinion. In all of them, legitimate children were either actually in existence, or capable of coming into existence, at the time of

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making the will. In *Cartwright v. Vawdry, (supra.) the question was asked by Lord Rosslyn, how can I put upon the will the construction the plaintiff desires, when there are lawful children? It is impossible, in a court of justice, to hold, that an illegitimate child can take equally with lawful children, upon a devise to children. In Godfrey v. Davis, (supra.) Mr. Harwood was alive at the date of the will, and might have a legitimate child, as he afterward actually had. In Harris v. Stewart, (cited 1 Ves. & Bea., 434), and Swaine v. Kennerley, (1 Ves. & Bea., 469,) there were legitimate children in existence. Even in Wilkinson v. Adam, (1 Ves. & Bea., 422,) and Beachcroft v. Beachcroft, (1 Mad. R., 433,) there was a probability of future legitimate children, though under the peculiar circumstances of those cases, the illegitimate children succeeded in establishing their claim. But here the death of the parent is noticed in the will itself. It was, therefore, at the time of making the will, impossible that there should be any legitimate child in future." 2 Mer., 421, 422. In another part of his opinion, he observes, that what persons answer the description in such a case, must necessarily be matter of extrinsic evidence. If there had been any legitimate children, they would have been understood

(c) Riley E., 208; 5 Strob. L., 21; Donald v. Dendy, (Errors) 2 McM. L., 123; Lawton v. Hunt, 4 Rich. E., 233, 246; Rosborough v. Hemphill, 5 Id., 95; Clark v. Mosely, 1 Id., 396 [44 Am. Dec. 229]; Speer E., 48; 5 Rich. 405; ante, 302; post, 371; McCall v. McCall, 4 Rich. E., 447 [57 Am. Dec. 733]; 11 Rich. L., 514; 9 Rich. E., 244; 8 Rich. L., 407.

in the law to forbid his giving to legitimate and illegitimate children by the same will. If after giving to the whole, as children, he should go on to designate the particular person intended by name, or description, so as to put it out of all doubt what his meaning was; or should say expressly, illegitimate, as well as legitimate; I cannot perceive any reason, why his dispositions may not have effect.

The difficulty in most of the cases has arisen from the uncertainty of the will, and the attempt to explain the testator's intention by parol or extrinsic testimony. In the case cited, the Chancellor says: "In all the cases that I have seen having relation to this question, the illegitimate children, if they were to take, must have taken, not by any demonstration arising out of the will it-

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self, but *by the effect of evidence dehors read, or attempted to be read, with a view to establish, not out of the contents of the will, but by something extrinsic, who were intended to be the devisees; and if my judgment upon this case is supposed to rest upon any evidence out of the will, except that which establishes the fact, that there were individuals, who had gained by reputation the name and character of his children, that conclusion is drawn without sufficient attention to the grounds on which the judgment is formed." 1 Ves. & Bea., 462. It is true, the Chancellor, in that opinion, adverting to the argument, that "legitimate and illegitimate children cannot take under the same description," adds, "and it would be difficult to persuade me that they can." Id., 468. But if, in addition to the same general description, there should be a further particular description of the individuals, or of the separate classes, I do not perceive why the plainly expressed intention of the testator may not have effect. In another part of the opinion, the Chancellor says: "where an unmarried man, describing an unmarried woman as dearly beloved by him, does no more than making a provision for her and her children, he must be considered as intending legitimate children; as there is not enough upon the will itself to shew that he meant illegitimate children; and my opinion is, that such intention must appear, by necessary implication, on the will itself." Id., 465. And he goes on to explain what he means by necessary implication. As settled by the authority of our own court, and other adjudged cases, I should say, that if there be a devise "to children," the fixed and settled rule is, that this imports legitimate children; and that if the words are to be explained, or enlarged, so as to include the illegitimate, it must be done by clear expression, or necessary implication, on the face of the will itself. This is, at least, as far as any of the cases have gone.

In this case, no extrinsic evidence was offered, except that which appeared on the pleadings, and which I consider admissible, to wit: the fact, that these parties did stand in such relations; that the complainants were the legitimate, and the testator and Mrs. Angel the natural children of Mrs. Shearman. The devise, after the death of Mrs. Shearman, is to "her children;" and we are to inquire, if, independently of these words, the will furnishes any clear expression, or necessary implication, of the intention to include Mrs. Angel. I cannot discover any such. The only argument is drawn from his calling Mrs. Shearman, his mother, and Mrs. Angel, his sister. But this is entirely inconclusive. If we suppose, what perhaps I ought to presume, that he knew

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the law—that an *illegitimate is not a child—we should come to the conclusion, that he did not intend to include her. He may have known the law, and yet have used the terms of affection, "mother" and "sister," to which he had been accustomed. Independently of the rule of law, I cannot arrive at any certainty of conviction, that he did intend to include Mrs. Angel in this devise. He makes a present provision for her, by giving her the residue of his estate; any may, probably enough, have intended this devise for the benefit of his half sisters, after the death of their mother.

This does not seem to me so strong a case as that of Swaine v. Kennerly, 1 Ves. & Bea., 468. There a testator devised to "all and every the child and children of the testator's late son, Thomas Swaine, deceased, equally to be divided between, or amongst them, to hold as tenants in common, and not as joint tenants, and to the respective heirs of the body, or bodies of all and every such child, or children." The deceased son, Thomas Swaine, had left but one legitimate, and he left two illegitimate children; and yet it was held, that the legitimate son was exclusively entitled under this devise.

Another question has been made in this case, as to the bequest of $1,000, and some cattle, &c., to Mrs. Shearman, and her children; I think it very clear that, under the terms of this bequest, she took the absolute

to be the persons designated; but there being none, we are driven to the inquiry, whether there are any persons in existence who had acquired the reputation of children. Those cases, which have laid down the rule most strictly, admit, that it is possible for illegitimate children to acquire the reputation of children; but all agree, that they can never take with legitimate children, under the general description of children.

On the whole, I am of opinion, that the plaintiff, under the circumstances of this case, could not take under the terms of the will; and that the parol evidence, to show that it was the intention of the testatrix to include her, was inadmissible. The judgment must, therefore, be reversed, and the postea delivered to the defendant; and it is so ordered.

NOTT, J., and JOHNSON, J., concurred.

property in the subject of it. The gift is "to Mrs. Shearman, and her children, forever." This would have given an estate tail in real estate, and gives, therefore, an absolute estate in personalty.

It is, therefore, adjudged and declared, that the complainants are entitled to all the real and personal estate, which was devised by the will of Isaac Waight Tucker, to Elizabeth Shearman, expressly for life, and at her decease, to her children; and that the said Elizabeth Shearman, took an absolute estate under the pecuniary bequest, &c., to her, and her children. And it is ordered, and decreed, that the defendant account to the complainants according to the principles of this decision.

The complainants appealed from so much of this decree, as declared that Mrs. Shearman took an absolute estate under the bequest to her and her children; and the defendant also appealed from so much of the decree as declared the complainants to be exclusively entitled under the devise and bequest to the children of Mrs. Shearman.

Grimke, for the complainants. The several devises and bequests to Mrs. Shearman,

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must be read in connection. It is conce*ded, that under the two first, she took only an estate for life; and it is manifest, that the testator meant the same thing in the last. The bequest to Mrs. Shearman, was absolute, and the words, "and her children," were intended to restrain the gift.

If this construction is not sustained, then it is clear, that Mrs. Shearman and the complainants took as tenants in common. Oates v. Jackson, Str., 1, 127.

Petigru, contra. To control the plain import of one clause of a will, by the terms used in another, would be to say, that the testator shall dispose of his estate only in one way.(*d*) Where a testator has used different sets of words, producing different effects, in different clauses of his will, the reasonable inference is, that he intended to produce this difference in the effect. At all events, that is the legal inference, and in this case, there can be no doubt, from the subject matter of the bequest, that the testator intended it to be absolute.

Upon the effect of the words of the bequest, there can be as little doubt. They give an estate tail in land, and according to a well-settled rule, they give an absolute estate in personal property. The principle contended for by the complainant, would render every bequest of personalty a gift for life only; and convert every attempt of the testator to enlarge the estate, into a limitation over, by way of executory devise.

As to the main question, it is true, that a devise to children, means, to legitimate children; but the authorities concur, that if the testator shews by his will, that he intended to include illegitimate children, this intention will be carried into effect. And parol evidence is admissible, not indeed to prove by direct testimony, the intention of the testator, but to shew the state of things, on which the intention expressed in the will is to operate, and thus to establish what that intention must have been. Metham v. Duke of Devon, 1 P. Wms., 529; Cartwright v. Vawdry, 5 Ves., 530; Co. Litt. 3 b.; Wilkinson v. Adam, 1 Ves. & Bea., 422, 432, 468; Godfrey v. Davis, 6 Ves., 43; Harding v. Glyn, 1 Atk., 469; Hands v. Hands, 1 T. R., 437, note; 2 Bridgman's Dig. 746; tit. "Words," 76; Barwick v. Miller and Gayle, 4 De S., 134.

All this is conceded by the decree, but then, it is said, that the intention to include the illegitimate child, does not sufficiently appear. It is difficult to imagine, how the testator could more distinctly shew, that he considered Mrs. Angel to be one of "the children" of Mrs. Shearman, for whom he was making provision, than by calling her "sister," and Mrs. Shearman, "mother." This would

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be so, if he *had been himself legitimate; but the case becomes infinitely stronger, when it is remembered, that this is the case of a bastard devisor. How can we suppose him to repudiate, in regard to his sister, that relation to their common mother, which he acknowledges as the connecting link between himself and all of the family, including this very sister by name, and at the same time makes that relation the foundation of his bounty to all of them? Besides, the testator's whole estate came from the common father of himself, and his bastard sister; and to suppose, that it was his intention to exclude that sister from sharing in the property, and to give it all to his half-sisters, is to do as great violence to the feelings of our nature, as it does to the language of a testator's will.

Grimke, in reply, cited Bell v. Phyn, 7 Ves., 459. The construction of the Chancellor, is unquestionably the true legal construction; and it may be added that it is the only safe one. His reasoning is conclusive to shew, that in the present case, it is the construction which most probably effectuates the actual intention of the testator. A separate provision is made for the illegitimate sister; and therefore it is most reasonable to infer that he did not intend her to share in the provision made for the others.

HARPER, J. This court concurs in the opinion of the Chancellor for the reasons given, and his decree is therefore affirmed.

JOHNSON, J., and O'NEALL, J., concurred.

Decree affirmed.

(*d*) Vide Manigault v. Deas, ante, 298.

*ELIZABETH BOWDEN, Executrix of William Bowden v. JOHN P. SCHATZELL, JOHN and CURTIS BOLTON, and WILLIAM S. SMITH.

(Charleston. March, 1831.)

[1. *Garnishment* ⇐201.]

The funds of a copartnership consisting of four persons, all of whom were absent from the State, were attached, by writ of foreign attachment, in the Court of Common Pleas, for the separate debt of two of the copartners; and the funds having been paid into court by the garnishee, one moiety of them was, by order of the court, paid out to the plaintiffs in attachment, upon their entering into bond, with security, to refund, if it should appear that they were not legally entitled to retain it, and the other moiety remained in the custody of the clerk of the court, subject to its order. On a bill by a creditor, who had recovered judgment against the copartnership in another State, held, that the complainant, as a creditor of the copartnership, was entitled to satisfaction out of the fund attached, in preference to creditors of the individual copartner; and that as the only surviving member of the copartnership was beyond the limits of this State, so that he could not be made a party to any proceeding in the Court of Common Pleas, the Court of Equity would relieve, so far as to establish the complainant's title, as against the surviving copartner, and that the latter was amenable to the jurisdiction for that purpose, in respect of his interest in the fund attached; that the plaintiffs in attachment might also be properly made parties, although not within the limits of the State, by reason of their interest in relation to the fund; but that no decree could be made against them to refund, as they were liable by their bond to another jurisdiction; and that the clerk of the Court of Common Pleas could not be made a party in respect of his custody of the fund, as his possession was the possession of the Court, and therefore not subject to the jurisdiction of the Court of Equity.

[Ed. Note.—Cited in Wardlaw v. Gray's Adm'rs & Heirs, 2 Hill, Eq. 652; Kinloch & Phillips v. Meyer, Speers, Eq. 427, 430; Howard v. Cannon, 11 Rich. Eq. 25, 75 Am. Dec. 736.

For other cases, see Garnishment, Cent. Dig. § 394; Dec. Dig. ⇐201.]

[2. *Equity* ⇐17.]

A party having a clear legal right, in matter of property, and no remedy by means of any other jurisdiction, is entitled to be relieved in equity; provided the party against whom relief is prayed, can be properly made amenable to the jurisdiction, and effectual relief can be afforded, conformably to the ordinary method of the proceedings of the court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 38–42, 45; Dec. Dig. ⇐17.]

[3. *Partnership* ⇐182.]

The property of a copartnership is liable to the debts of the copartnership, before any part of it can be applied to the individual debts of the copartners.(*a*)

[Ed. Note.—Cited in C. J. Wilson & Co. v. Bowden, 8 Rich. 11.

For other cases, see Partnership, Cent. Dig. § 318; Dec. Dig. ⇐182.]

[4. *Garnishment* ⇐59.]

Money in the custody of the law, is not subject to process of foreign attachment; nor can the owner of funds in the custody of a court of Law, who is absent from the State, be made a party, by reason of his interest in the fund, to a proceeding in that court, by his creditor, to subject it to the payment of his demand; neither can that court relieve the creditor, unless the absent owner is a party, or the creditor's right has been established by the decision of a competent tribunal within the State.

[Ed. Note.—Cited in Godbold v. Bass, 12 Rich. 204; Wardlaw v. Gray's Adm'rs & Heirs, 2 Hill, Eq. 652; Dickison v. Palmer, 2 Rich. Eq. 408.

For other cases, see Garnishment, Cent. Dig. § 114; Dec. Dig. ⇐59.]

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[5. *Clerks of Courts* ⇐70; *Garnishment* ⇐59.]

*The clerk of the Court of Common Pleas cannot be called upon to answer for funds, which are in his custody, as the officer of that court, and subject to its order. His possession is the possession of the court, and the court of Equity can make no order to bind that court.

[Ed. Note.—Cited in McKenzie v. Noble, 13 Rich. 151.

For other cases, see Clerks of Courts, Cent. Dig. § 117; Dec. Dig. ⇐70; Garnishment, Cent. Dig. § 114; Dec. Dig. ⇐59.]

[6. *Equity* ⇐31.]

Under the 12 section of the Act of 1784, P. L. 338,(*b*) a person who is absent from the State, but has property within it, may be made a party to a suit in equity in this State, in respect of that property, although there be no other party to the suit; and he may be made a party in respect of a fund within the jurisdiction, although not in the possession of any individual, who can be made a party; and even when the court, itself, can exercise no direct control over the fund, as where it is in the custody of another court. And where the owner of a fund is properly made a party, all persons having any interest in relation to it, may, in respect of that interest, be made parties, although not personally within the jurisdiction.(*c*)

[Ed. Note.—Cited in Cruger v. Daniel, McMul. Eq. 190; Taylor v. Williamson, McMul. Eq. 349; Yarborough v. Bank of Georgia, 4 Rich. Eq. 469, note; McKinne v. City Council of Augusta, 5 Rich. Eq. 75; Hurt v. Hurt, 6 Rich. Eq. 118; Howard v. Cannon, 11 Rich. Eq. 25, 75 Am. Dec. 736.

For other cases, see Equity, Cent. Dig. § 93; Dec. Dig. ⇐31.]

[7. *Attachment* ⇐314; *Equity* ⇐17, 99.]

The Court of Equity can make no order for the disposition of a fund in the custody of the Court of Common Pleas, except by controlling the parties, who would, otherwise, be entitled to it; and where money has been paid out to an attachment creditor, by order of the Court of Common Pleas, upon his entering into bond, with security, to refund, if it should appear, that he was not entitled to it, equity will not order him to refund, although it appear that he is not entitled, as it cannot protect him by injunction against his liability on his bond. A suit may, however, be entertained, to establish the

(*a*) Wardlaw v. Gray, Dud. E., 85; Fleming v. Billings, 9 Rich. E., 149; Gadsden v. Carson, Id., 252 [70 Am. Dec. 207]; Wilson v. McConnell, Id., 500; 5 Rich. E., 155; 3 Strob. E., 161; 2 Hill E., 513.

(*b*) 7 St., 208, 210.

(*c*) Hurt v. Hurt, 6 Rich. E., 114; Kinlock v. Meyer, Sp. E., 428; McKinne v. Council, 5 Rich. E., 55; Cruger v. Daniel, McM. E., 157; 6 Rich. E., 118.

title to the fund, if there be any impediment to a proceeding at law for that purpose.(d)

[Ed. Note.—Cited in King v. Aughtry, 3 Strob. Eq. 154.

For other cases, see Attachment, Cent. Dig. § 1120; Dec. Dig. ⟸314; Equity, Cent. Dig. §§ 39, 264; Dec. Dig. ⟸17, 99.]

[8. *Equity* ⟸17.]

Equity will exercise a jurisdiction ancillary to the courts of Law, by removing impediments, or establishing rights, where impediments exist to a trial in the courts of Law; and it is no objection to the exercise of this jurisdiction, that the Court of Equity does not possess a direct control over the subject matter, so as to be able to give complete relief.

[Ed. Note.—Cited in King v. Aughtry, 3 Strob. Eq. 154.

For other cases, see Equity, Cent. Dig. § 39; Dec. Dig. ⟸17.]

John P. Schatzell, Andrew Alexander, Alexander Cranstoun, and James Woodward, trading together, at Lexington, in Kentucky, under the firm of John P. Schatzell & Company, became indebted to William Bowden, of Petersburg, Virginia, in the sum of $50,000; and after his death, his executrix, Elizabeth Bowden, the present complainant, recovered judgment against them, in Kentucky, for that amount. Two of the partners, Alexander Cranstoun, and Andrew Alexander, carried on business, on their own account, in the city of New York, under the firm of Alexander Cranstoun & Company; and becoming indebted to John & Curtis Bolton, of New York, the latter sued out a writ of foreign attachment against them, from the Court of Common Pleas in Charleston, and levied it on certain funds of John P. Schatzell & Company, in the hands of John Robinson, of Charleston, as garnishee. On the return of the writ the garnishee paid the money into

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court; and the court, on *the application of John & Curtis Bolton, the plaintiffs in attachment, ordered that a moiety of the sum be paid in, should be paid to them, on their entering into bond, with sufficient security, to refund the amount, if it should afterwards appear, that they were not legally entitled to retain it. A moiety of the fund was paid out to them accordingly, upon their giving bond, as required by the order; and the other moiety remained in the custody of the clerk of the court, subject to its order. See the proceedings reported [Schatzill v. Bolton] 2 McC., 478 [13 Am. Dec. 748], and [Chatzell v. Bolton] 3 Id., 33.

John P. Schatzell & Company proved to be wholly insolvent, and the complainant, being unable to obtain payment of her judgment in Kentucky, but learning of the proceedings by attachment in Charleston, filed this bill, in order to subject the fund attached, to the payment of her demand. John P. Schatzell, sole survivor of the firm of John P. Schatzell & Company, John & Curtis Bolton, and William S. Smith, the clerk of the Court of Common Pleas, were made the parties defendants to the bill; which charged the fund attached to be the property of the firm of John P. Schatzell & Company, and subject to the payment of their debts, before any part of it could be applied to the debts of the individual partners: and the bill prayed, that John & Curtis Bolton might refund the amount paid to them, conformably to the condition of their bond; and that the same, together with the residue of the fund attached, in the hands of the defendant, William S. Smith, might be paid over to the complainant, in satisfaction of her judgment.

The defendant, William S. Smith, demurred to the bill, on the ground, that as the money in his hands had been placed there by the order of the Court of Common Pleas, and was subject to its order, he could not be called upon to answer for it in this court.

The defendants, John P. Schatzell, and John & Curtis Bolton, were not within the limits of the State, and were made parties by publication of a rule, conformably to the Act of Assembly. (e) A demurrer was nevertheless filed on behalf of John & Curtis Bolton, on the ground, that as the defendants were beyond the limits of the State, and were possessed of no funds or property within it, they were not amenable to the jurisdiction of the courts of this State; and further, that if they were, the complainant had plain and adequate remedy at law.

Neither plea, answer, or demurrer, was filed on behalf of the defendant, John P. Schatzell, and the bill was taken pro confesso against him.

The cause was heard upon the demurrers,

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at Charleston, in February, *1829, by Harper, Chancellor, who made the following decree:

Harper, C. This is a case of new impression, and it is in vain to look for authority bearing directly upon it. The proceedings at law, out of which this suit has arisen, seem also to be of a new character. The complainant must rest her claim to relief on the general ground, that a party having a right, and no remedy by means of the ordinary jurisdictions, may properly claim the aid of this court. The general principle, I think, is sufficient, if it be taken with the proper qualifications. The party having a clear legal right in matter of property, and no remedy by means of any other jurisdiction, is entitled to the aid of this court; provided the party against whom the relief is prayed can be properly made amenable to the jurisdiction of the court, and effectual relief can be afforded,

(d) Sp. E., 430; Young v. Young, 2 Hill L., 425; Murrell v. Johnson, 3 Id., 12; 2 Sp. L., 34; Dickison v. Palmer, 2 Rich. E., 408; Carlton v. Felder, 6 Id., 58; 2 Sp. E., 391; 2 Hill L., 595; 1 Strob. L., 245; 4 Id., 292.

(e) Act of 1784, P. L., 338; 7 Stat., 210.

conformably to the ordinary methods of the proceedings of the court.

There is no question as to the legal right of the complainant, taking the allegations of the bill to be true. As a creditor of the insolvent firm of John P. Schatzell & Company, she has a right to be paid out of the assets of that firm, in preference to the creditors of the individual partners; and the bond in the hands of the clerk of the Court of Common Pleas, is substituted for the funds of the firm. The questions are, whether the complainant has any other remedy; whether the parties named in the bill are properly before the court, or can be brought before it by the process of advertisement; and whether the court can, by its decree, afford effectual relief.

The complainant seems to have exhausted the means of relief in Kentucky. She has obtained her judgment and can find nothing to satisfy it. If she should arrest the surviving partner there, and compel an assignment under any insolvent debtors' law, her remedy would not be advanced; and resort must still be had to the tribunals of this State to obtain the benefit of this fund. The remedy was suggested of an application to the Court of Common Pleas; but in making such an application, the complainant would be under the necessity of establishing her demand against the firm of John P. Schatzell & Company; and in order to do this, she would be under the necessity of making the surviving partner, Schatzell, a party before the court. The court would not act on a surmise, or an ex parte shewing, that the firm was indebted to her. The surviving partner would have a right to contest the fact of such a judgment having been rendered in Kentucky. He might

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perhaps *enter into the consideration of the judgment; and, at all events, would be entitled to an opportunity of shewing that it was satisfied, or any part of it paid. But how could he be brought before the court for that purpose? Or how could the court determine any questions that might arise in relation to the demand? I can conceive of no other method than the ordinary proceeding by a suit. The surviving partner, Schatzell, being out of the State, he could only be made a party to a suit at law, by the process of attachment; but it was admitted in the argument, that an attachment could not be levied on this fund, or on the bond, in the hands of Mr. Smith, the clerk of the court. The English cases are, that money in the custody of the law, is not subject to attachment; and I understand this rule to be recognized by the Court of Appeals in the case of Hamilton, executor of Dart, v. McKinne, decided at Columbia in the spring of 1827. I may observe here, that it seems to be to the advantage of the Boltons, that the complainant should come to establish her demand in this court, where they, being parties to the suit, may contest the demand against Schatzell & Company. Suggestions were thrown out of a remedy for the complainant by a suit in New York against Cranstoun and Alexander, either for money had and received, or by a bill in equity; but it is plain that no such suit could be sustained there. I think it clear enough, that the complainant is without remedy, unless she can be aided by this court.

The next question is, whether the parties named in the bill are properly before the court, or can be brought before it. I think that Mr. Smith is not properly made a party, and that his demurrer must be sustained. Any one who, from the bill itself, appears to have been unnecessarily made a party, may demur. The general rule is, that no one need be made a party against whom you can have no decree. De Golls v. Ward, cited 3 P. Wms., 311, n. (i.); Cookson v. Ellison, 2 Bro. C. C., 252; McNamara v. Williams, 6 Ves., 142; Fenton v. Hughes, 7 Ves., 287. In cases where an individual is in possession of funds of an absent party, he may properly be made a party to the suit, because he is compellable to perform the decree of the court in relation to those funds; but Mr. Smith is not in possession of the funds in this case as an individual. It is in the possession of the court, whose organ he is. This court can make no decree to bind the Court of Common Pleas; nor can it compel Mr. Smith to make any disposition of the fund. It is true that this court frequently disposes of funds in the hands of officers of other courts; but that is

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by controlling the parties, *who, but for the interference of this court, would be entitled to the funds.

All the other persons named in the bill, as defendants, reside without the State; and the question is, whether they can properly be made parties. I will inquire more particularly, in the first place, as to the surviving partner, Schatzell. The 12 section of the Act of our legislature, of 1784, (supra) for making absent persons parties, is as follows. "If in any suit in the said court, a defendant, against whom process shall issue, shall not cause an appearance to be entered thereupon, as it ought to have been, if such process had been duly served, and affidavit shall be made, to the satisfaction of the court, that such defendant is without the limits of this State, or that on inquiry at his or her place of abode, he or she could not be found, to be served with such process, &c." the court may make an order for his or her appearance, by publication of a rule. P. L., 338. The terms of the Act are very indefinite, but they can hardly mean, that any person, who is not domiciliated, or residing in the State, and who has no property within it, nor has made any contract to be performed here, is liable to be sued in our courts of Equity. The question is, how the generality of its terms is to be limited.

The English practice is stated, by Lord Redesdale, in the case of Smith v. The Hibernian Mine Company, 1 Sch. & Lef., 240, to be, when one party is out of the jurisdiction, and other parties within it, to charge the fact, by the bill, that such a person is out of the jurisdiction; and then the court proceeds against the other parties, and if the disposition of the property is in the power of the other parties, the court may act upon it. Lord Redesdale observes, that the subject is proper for the interference of the legislature. According to the rule thus laid down, it was necessary that some party, or parties, and the property, should be within the jurisdiction, to authorize the court to dispose of the interests of an absent party. I take this to be the true rule, notwithstanding there seems to be some diversity in the English cases. In the case of Fell v. Brown, 2 Bro. C. C., 276, for instance, where the bill was by a second mortgagee, against a first mortgagee, in possession, to redeem, and the mortgagor was out of the jurisdiction, the court refused to proceed. In Williams v. Whinyates, 2 Bro. C. C., 399, the court ordered the sale of real estate for the payment of debts, where the devisee was insane, and the heir at law was out of the jurisdiction. And see Travers v. Bulkeley, 1 Ves., 385, and Darwent v. Walton, 2 Atk., 510. I am inclin-

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ed to infer, that if the claim were to an *estate, or a fund in the hands of an agent, or trustee, within the jurisdiction, the agent or trustee, might be made a party, and the court would dispose of the estate, or the fund, notwithstanding the absence of the owner, or cestuy que trust. According to this rule, if Mr. Smith had been in possession of this fund, as the agent of Schatzell & Co., he might be made a party. But the fund is in possession of the Court of Common Pleas, which cannot be made a party, nor compelled to perform a decree.

The question is, whether, under our act, a person, without the jurisdiction, may be made a party, in respect of a fund, within the jurisdiction, the fund being in the possession of no individual who can be made a party. There exists the additional difficulty, that the court cannot, by its decree, exercise any direct control over the fund.

In the case of Telfair v. Telfair, 2 De S., 271, the court decreed the specific performance of an agreement, to convey land in this State, against a defendant, who resided without the State. It is observed in the case, that "this court would enforce its decree, by putting the complainant in possession of the land, if the defendant should prove contumacious." Ib., 275. I do not perceive that there can be any difference, in principle, if the claim were to a personal fund, within the State; if we can conceive of such a fund, derelict, in the custody of no individual, who can be made a party, but of which the complainant cannot avail himself, but by the aid of this court. The terms of the act are general, and will admit of such an interpretation. The act was made to remedy the defect of the English practice. By the English practice, the interests of the absentee might be disposed of, if the property was within the jurisdiction; provided there were other parties, by controlling whom, the court might effect a disposition of the property. But our courts do not always act in personam. It seems that they may act directly on the property, without the intervention of other parties; and the title may be changed by the mere act of the court, without any act of the party. The Act provides for making the absent person himself a party; and further authorizes the court to "issue the process necessary to enforce the execution, or compel the performance of the decree." P. L., 338, (supra.) Such a construction is convenient, and I do not see that it is likely to operate surprise, or hardship on individuals. An absent person, who has property within the State, may be fairly presumed to look after it, and to know what has become of it. The proceeding is made very notorious by advertisement. A complainant, before he can

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avail him*self of the decree, must give security to abide such order as may be made, on the defendant's appearing to the suit; and the absent defendant is allowed four years after the passing of the decree, to petition to be heard, on which all the proceedings shall be set aside, and the cause proceed de novo. I think an absent person, who has property in the State, may be made a party in respect of that property, though there be no other party in the State. The fund that was paid into court, was the property of Schatzell & Company, and if it had remained unchanged, would have belonged to the surviving partner, Schatzell. The bond of the Boltons, is substituted for it, and he has a similar interest in that. Schatzell being properly made a party, it seems to follow, that the Boltons, who have an interest in the subject of the suit, are properly made parties also.

But the further difficulty exists, that the court cannot exercise any control over this fund, being in possession of an equal jurisdiction; and the question is, what effectual relief can it give by its decree. Supposing the parties to be properly before the court, it cannot order the bond to be assigned, nor to be sued on, and the fund when received to be paid over; neither do I think that it can order the Boltons to pay the money secured by the bond, because it cannot protect them by its decree from paying it over again. If a suit should be afterwards brought on the bond, it could not enjoin the Court of Common Pleas from proceeding to enforce the recovery of the bond by suit. But this court is, in many instances, ancillary to the courts of

Law, as by compelling a discovery, or putting outstanding terms out of the way, when the title is to be tried at law. I think the court may be ancillary in the present instance. It may try and adjudicate the fact, whether the complainant is a bona fide creditor of the firm of Schatzell & Company, and entitled to payment out of its funds. It may direct an issue at law for that purpose; or, if the proper proofs are offered, it may establish the demand by its decree; and thus lay the foundation for an application to the Court of Law to order an assignment of the bond, or the transfer of the fund. These facts the Court of Law cannot try, because it has no means of bringing the parties before it.

I am not well satisfied with this decree; but the case was a new one, and I have taken the best view of it in my power.

It is ordered and adjudged, that the demurrer of William S. Smith be sustained, and the bill as to him be dismissed: and that the demurrer of John and Curtis Bolton be overruled.

The demurrer of John and Curtis Bolton having been overruled, they subsequently filed an answer, and the cause came on to be

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*heard in January, 1831, before Johnstone, Chancellor, who delivered the following decree:

Johnstone, C. The allegations of the bill are either admitted by the answer, or established by the proof. The complainant produced the exemplification of a judgment recovered by her, as executrix of her husband, against John P. Schatzell & Company, fully sustaining the allegations of the bill on that point. And the question is now, what should be the decision of this court. I shall not bestow the pains, which I should otherwise have taken, in the examination of this case, as it will go to the Court of Appeals, where it will be fully argued in connexion with the decree of Chancellor Harper. I will obey my first impressions, which are, that the Boltons, who have received the shares of the firm of Schatzell & Company, to which Cranstoun and Alexander were entitled, not as a payment by those partners of their debt to the Boltons, but as undivided shares of the funds of Schatzell & Company, upon terms stimulated, and with notice that the firm claimed, and was entitled to an account, before Cranstoun and Alexander's interests could be ascertained and set apart, must stand, in relation to the firm and its creditors, in the same situation as Cranstoun and Alexander themselves would, were they in possession; and I can see no reason, on principle, why a decree should not be pronounced against them, to the extent of the funds in their hands.

It is therefore ordered and decreed, that John and Curtis Bolton, do pay over to the complainant the amount received by them under their attachment against Alexander Cranstoun, and Andrew Alexander, as set forth in the bill, with interest thereon from the time when they received it, and the costs of this suit.

The defendants, John and Curtis Bolton, appealed from the several decrees of Harper, Chancellor, and Johnstone, Chancellor; and now moved that the same might be reversed, and the complainant's bill dismissed as to them, the said defendants, with costs.

Grimke, for the motion.
King, contra.

HARPER, J., delivered the opinion of the court.

This court concurs in opinion with both the Chancellors, and affirms their respective decrees, except so far as the last decree orders the payment, by the defendants, John and Curtis Bolton, of the money secured by their bond to the clerk of the Court of Common Pleas.

There is no doubt but that the complainant is entitled to the fund in the custody of the Court of Common Pleas, as well as to an

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as*signment of the bond; and that upon a proper shewing, that court will order them to be transferred. But the complainant's equity is founded upon this: that she cannot make her title to appear to that court. She cannot establish her demand against Schatzell, inasmuch as she cannot make him a party before the court. It is useless to say, that she might establish her demand, and shew a title to the fund, by producing to the court a properly attested copy of her judgment in Kentucky. No demand can legally be established in this State, against any person, without affording him an opportunity to contest it; and that opportunity, in contemplation of law, can only be afforded by making him party to a suit. That opportunity afforded, the judgment of every competent tribunal within the State is equally valid. That the complainant could not make Schatzell a party, was her impediment in proceeding at law; and it is the business of the Court of Equity to remove such impediments. According to the opinion, in which we concur, he might be made a party in equity.

But it was argued, that however it might be with respect to Schatzell, yet the Boltons were improperly made parties. The rule of equity is, that all persons who have an interest in the subject of the suit must be made parties; and it seems to me, that the interest of the Boltons is sufficiently palpable. Certainly they have an interest in the question, whether the bond to the clerk of the court shall be transferred to the complainant, so as to enable her to sue on it; and if the establishment of her demand against Schatzell is to lead to such transfer, they have an interest in respect to that. The

bond was made payable on a contingency, and it is probable that when it was executed, neither the parties, nor the court, looked forward to its ever being enforced. Have they no interest in the question, whether it shall be put in a course of being enforced? They have an interest in the bond, and it would be refining to say, that they have no interest in the question of the complainant's recovery against Schatzell. It is true, that if the fund, and the bond in the hands of the clerk of the court, had been subject to attachment, the complainant might have sued Schatzell alone, and recovered judgment against him; and it would have been unnecessary to make the Boltons parties. As I have observed, however, the rules of law and of equity are different with respect to the proper parties to a suit; but even then it may be questioned, whether the Court of Law would have ordered a transfer of the bond, without affording the Boltons an opportunity to shew cause against it. Is not justice more completely done by making them par-

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ties in equity, *and affording them an opportunity to contest the complainant's whole claim? It seems to me, that the Boltons complain, that an injury has not been done them. If the present suit had been against Schatzell alone, I have no doubt but that on their application, the Boltons might have been admitted as parties to defend. Admitting the complainant's claim against Schatzell & Company, they might have shewn other funds to satisfy it; in which case, the decree of the court would have laid no foundation for an application to the Court of Law for this fund. I cannot declare that they were unnecessarily or improperly made parties to this suit.

We do not think, however, that we can decree the payment of the money, for the reasons I have before assigned. The Court of Equity cannot order the Court of Law to cancel the bond, or enjoin it from enforcing or transferring it; and cannot, therefore, by its decree, protect the defendants from being compelled to pay the amount over again. We can only establish the complainant's demand against Schatzell.

It is, therefore, declared, adjudged and decreed, that the absent defendant, John P. Schatzell, as survivor of the firm of John P. Schatzell & Company, is justly indebted to the complainant to the amount of the judgment mentioned and set forth in the proceedings, and that he pay the said amount accordingly. And it is ordered, that the decree of the Chancellor be modified in conformity to this decree.

JOHNSON, J., and O'NEALL, J., concurred.

Decree modified.

Bailey, Eq. *371

*JAMES R. DOAR v. WILLIAM HASELL GIBBES and WILLIAM MATTHEWS.

(Charleston, March, 1831.)

[1. *Specific Performance* ⇐93.]

Specific performance of an agreement to sell lands, will not be enforced against the vendor, where the vendee has neglected to comply with conditions stipulated by the agreement, within the time limited by it, and the vendor has, in consequence, sold and conveyed to another purchaser.

[Ed. Note.—Cited in Davenport v. Latimer, 53 S. C. 574, 31 S. E. 630.

For other cases, see Specific Performance, Cent. Dig. § 248; Dec. Dig. ⇐93.]

[2. *Vendor and Purchaser* ⇐78.]

Time is not usually of the essence of a contract, for the sale of lands, but it may become so, if the delay is injurious; and especially where a period is fixed, within which a condition is to be performed, in order to complete the contract.(*a*)

[Ed. Note.—Cited in Sams v. Fripp, 10 Rich. Eq. 456; Columbia Water Power Co. v. Columbia, 5 S. C. 238; Lyles v. Kirkpatrick, 9 S. C. 269; Williams v. McManus, 90 S. C. 495, 73 S. E. 1038.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121–125; Dec. Dig. ⇐78.]

[3. *Specific Performance* ⇐23.]

The specific performance of agreements, for the sale of lands, is within the discretion of the court, and will not be enforced against a subsequent purchaser, for valuable consideration, without notice, who has acquired the legal title; especially in favor of a vendee, who has failed to comply with the terms of his own contract, within the time limited by it.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 52; Dec. Dig. ⇐23.]

[4. *Evidence* ⇐441.]

Parol evidence not admissible to enlarge the time within which the terms of a written agreement for the sale of land were to be complied with.(*b*)

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1778; Dec. Dig. ⇐441.]

[5. *Frauds, Statute of* ⇐131.]

[A parole agreement to extend the time for the performance of a written agreement is within the statute of frauds, and void.]

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 284; Dec. Dig. ⇐131.]

At Charleston, May, 1829.

De Saussure, C. This is a bill for the specific performance of an alleged contract, for the purchase of Snee farm. The facts important to the decision of the question submitted, are briefly as follows:

Snee farm was sold by the sheriff of Charleston district, as the property of F. G. Deliesseline; and at this sale, the land was bid off by Joseph Payne, by whom the sheriff was directed to transfer the bid to the defendant, William Hasell Gibbes, who, it appears, was a judgment creditor of Deliesseline, and entitled to receive some portion of the proceeds of the sale. Mr. Gibbes, who

(*a*) White v. Bennett, 7 Rich. E., 260; Thompson v. Dulles, 5 Id., 370; Prothro v. Smith, 6 Id., 324.

(*b*) Ante, 353, note.

was anxious to sell his bid, entered into a negotiation for that purpose with Mr. Wilkie, who, it seems, was acting as the agent of the defendant, William Matthews; but this treaty was not carried into an actual contract. After this, the complainant, James R. Doar, entered into an agreement with Mr. Gibbes, to take the land at the price bid for it at the sheriff's sale; and on 13 May, 1828, gave Mr. Gibbes a memorandum in writing, by which he agreed to pay a small portion of the price in cash, and to give security, satisfactory to Mr. Gibbes, for payment of the residue, in January, 1829; and Mr. Gibbes agreed to make titles to Doar, provided he complied with these terms in ten days from the date. Doar at that time offered his brother, and referred to Dr. Legare, as an-

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other of *his sureties. The ten days elapsed, and in the mean time, Mr. Gibbes learned from Dr. Legare, that he deemed the purchase much above Doar's means, and that he would not become his surety. The complainant alleges, that Mr. Gibbes told him, verbally, that if he came down in the third week of the May court, a term beyond the ten days, it would be in time. To this, Mr. Gibbes answers, that he has no recollection of it; but that if it be so, yet the statute of fraud applies, and this loose conversation could not vary the written contract. Mr. Gibbes, having concluded that Doar could not comply with his purchase, and conceiving himself authorised to consider the contract as abandoned, called upon the defendant, Matthews, and offered to sell the land to him, saying that he was at liberty to convey it to him. Whereupon Mr. Matthews agreed to take the bid, at the amount offered at the sheriff's sales: and actually received from Mr. Gibbes, a transfer of his bid in the sheriff's books, paid him then a portion of the purchase money, and has since satisfied him for the whole. The sheriff, on being satisfied as to the purchase money, has executed titles to the defendant, Matthews, who is now in peaceable possession of the land.

It is stated in the bill, that Mr. Gibbes gave Mr. Doar an order for the keys of some of the buildings; but Mr. Matthews, in his answer, states, that upon receiving his titles from the sheriff, he went on the premises and found them unoccupied, and took possession, which he has since retained. In his answer, Mr. Gibbes insists, that he is not bound by any contract, except the one in writing, which was not complied with by the complainant, who has never paid any part of the purchase money. Mr. Matthews positively denies any knowledge of the claims of the complainant, but avers that he contracted, bona fide, and paid his money, and received his titles.

Under these circumstances, the complainant, who has paid no money, prays the court to compel the specific performance of a contract, which he himself omitted to perform on his part. It was a conditional contract. Titles were to be made, provided adequate security were given within ten days. It is evident, that this proviso was intended to avoid any delay in seeking a new purchaser, should Mr. Gibbes be disappointed in Doar. The proviso was not complied with, and another purchaser was found: and if a decree cannot be made against him, the object of the bill fails, for this court cannot assess damages. Indeed, nothing but the loss of an opportunity to invest his funds in the land, is alleged. The complainant does not set forth any specific loss, such as the purchase of slaves, to cultivate the farm, or, funds divert-

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ed from a profitable *investment. And what decree can be made against a bona fide purchaser, for valuable consideration, without notice? He has the legal title, and his equity is at least equal; and he must be protected. It follows, that the court can make no decree for the complainant.

In relation to Mr. Gibbes, it is true, that time is not usually of the essence of a contract, so as to avoid it, in case the exact time be not complied with. But it may be, and is, of the essence, where the other party, or third persons, may be seriously injured, or even exposed to injury. It is the more so, where the contractor engages to do a certain thing, in order to complete the bargain. In this case, the bargain could not be said to be completed, until the security was given. That was to be done in ten days. It was not done. Was the contract to be kept indefinitely open, for any length of time, so as to preclude a sale to other purchasers? That would be most unjust.

Mr. Doar not having complied with the written agreement, relies on a parol extension of the time. This, I apprehend, is within the statute of frauds. But if it were not, what are the facts of the case? Do they entitle him to any peculiar favor? The bill seeks a specific performance of the contract for the sale of the land; but that is always in the discretion of the court, the discretion of equity. Would it be the exercise of an equitable discretion, to decree a specific performance in favor of one, who has not performed his contract, against the vendor, and a subsequent purchaser, for a valuable consideration, without notice, who has complied with his contract? I think not. Besides, what decree could be made against the second purchaser? None. In such a case, the only remedy of the complainant, if he is entitled to any, is in a suit at law, to recover damages from his vendor, for the non-performance of his contract. He has certainly no such equity as would induce this court to affect the land.

It is, therefore, ordered and decreed, that the complainant's bill be dismissed, with costs.

From this decree, the complainant appealed, and now moved that the same might be reversed.

Grimke for the motion.

Petigru and Hunt, contra.

JOHNSON, J. We concur with the Chancellor, in the view which he has taken of this case. The motion is therefore dismissed, and the decree affirmed.

O'NEALL, J., and HARPER, J., concurred.

Decree affirmed.

Bailey, Eq. *374

*JOHN BALL v. CHARLES T. BROWN and Others, Executors of James T. Hopkins.

(Charleston. March, 1831.)

[1. *Executors and Administrators* ⟸495.]

Executors are not entitled to commissions on the proceeds of land sold by the master, under a decree against them, for foreclosure of a mortgage executed by their testator, where the land was bid off by the mortgagee for less than his debt, and the payment was effected by his giving credit for the amount of his bid.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2099; Dec. Dig. ⟸495.]

[2. *Executors and Administrators* ⟸500.]

[Cited in Lanier v. Brunson, 21 S. C. 42; Jones v. Jones, 39 S. C. 252, 17 S. E. 587, 802, to the point that commissions are allowable on bonds or other property received or paid as money.]

[Ed. Note.—For other cases see Executors and Administrators, Cent. Dig. §§ 2131–2139; Dec. Dig. ⟸500.]

At Charleston, April, 1829.

Harper, C. I cannot perceive any ground, upon which the executors can be held entitled to commissions in this case. The Act of Assembly gives commissions on all sums received, and paid away, by the executors. P. L., 495, 5 Stat., 112. How money raised by a sale made by an officer of the court, and, if considered paid at all, paid by the officer, can be money received, or paid, by the executors, it is difficult to imagine. It is true, that in the case of Gist v. Gist, 2 McC. Eq., 473, the court allowed commissions on bonds taken by the executors, and delivered to distributees. This was a liberal, but a just construction. The parties agreed to take the bonds as money, and it was in the power of the executors to have secured their commissions, by collecting the money, and paying it over. So in Deas v. Spann, Harp. E., 176, a similar decision had been previously made. In Gist v. Gist, the court observes, that commissions are not given for the mere receiving, and paying away, but for all the risk and trouble incident to the office of an executor. Still we must have some respect to the words of the Act; and I cannot perceive how these moneys can be regarded in any shape, actually, or constructively, as having been received, or paid away, by the executors. Money raised by a sale under execution at a sheriff's sale, would stand on the same footing. The executors may have had extraordinary trouble, more than in paying away a much larger sum; but if this be so, the law has pointed out a different mode of obtaining compensation. See Act of 1745, § 12, P. L., 202.(a)

On an appeal by the defendants, this decree was affirmed by the Court of Appeals, for the reasons stated in it.

Decree affirmed.

(a) 3 Stat., 668; Ante, 183; 9 Rich. E., 71; Rich. E. Ca., 5; 2 Strob. E., 31; 3 Rich. E., 13.

Bailey, Eq. *375

*KINSEY BURDEN, Executor of Thomas Burden v. WILLIAM McELMOYLE.

(Charleston. March, 1831.)

[1. *Appeal and Error* ⟸959.]

Permitting an answer to be amended is not a very regular proceeding, and it is a practice which ought not to be too liberally indulged; but the pleadings are so much under the discretion of the Chancellor, that the Court of Appeals will not set aside an order granting leave to amend an answer, unless in a case of very palpable error.(a)

[Ed. Note.—Cited in McRae v. David, 7 Rich. Eq. 376.

For other cases, see Appeal and Error, Cent. Dig. § 3825; Dec. Dig. ⟸959.]

[2. *Account Stated* ⟸1, 7.]

A rough statement in writing, exhibiting an estimate of the condition of a copartnership, and the situation of the copartners in relation to the copartnership, and to each other, will not support the plea of a stated account by one of the copartners, in bar of a bill for an account filed by the executor of the copartner, by whom the statement was prepared; but the deceased copartner having acquiesced in the statement for ten years, and set up no claim against his copartner for an account of the copartnership, but on the contrary, at various times, acknowledged himself indebted to his copartner, the court refused to order an account. Nor is an offer by the surviving copartner to the executor of his deceased copartner, to refer the matter to arbitration, nor a declaration, that he was at all times ready to account, sufficient to deprive the former of the benefit of the statute of limitations, where there was no admission of indebtedness by him.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 2, 44; Dec. Dig. ⟸1, 7.]

[3. *Appeal and Error* ⟸1009.]

Matters of account, depending upon evidence, must be left in a great measure to the discretion of the Chancellor, with the aid of the master. The Court of Appeals will not go into a detailed examination of accounts between parties.(b)

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. ⟸1009.]

(a) Ante, 181; post, 428; McRae v. David, 7 Rich. E., 375.

(b) Wright v. Wright, 2 McC. Eq. 185; ante, 24.

[4. *Pleading* ⟸127.]

The defendant, having admitted by his answer, that he held the titles to two lots of land, to which the complainant was entitled, was ordered to execute good and sufficient titles therefor to the complainant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264–268; Dec. Dig. ⟸127.]

[5. *Equity* ⟸431.]

A party ordered to execute good and sufficient titles to land, is not bound to procure a renunciation of dower by his wife. "Good and sufficient titles" mean such as the party is competent to make.

[Ed. Note.—Cited in Polk v. Sumter's Ex'rs, 2 Strob. 85.

For other cases, see Equity, Cent. Dig. § 1050; Dec. Dig. ⟸431.]

[6. *Deeds* ⟸108.]

A conveyance executed under an order of court takes effect from the delivery, and not from the date of the order. The grantee might, perhaps, be protected against an intermediate purchaser, on the principle of lis pendens, but such a question cannot be determined until the purchaser is before the court.(c)

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 305; Dec. Dig. ⟸108.]

This was a bill by the executor of a deceased copartner against his surviving copartner, for an account of the copartnership property. After the cause was at issue, and docketed for hearing, the defendant moved, before De Saussure, Chancellor, at Charleston, in January, 1827, for leave to amend his answer, by setting forth a stated account, and praying the benefit thereof, and of the statute of limitations, in the same manner,

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as if the same had been spe*cially pleaded. The cause having been previously continued, his Honor granted the motion, as the progress of the suit would not be delayed; and the court was always reluctant to shut out any light, or to deprive a party of any just or legal defence.

The answer having been amended, the cause came on for hearing, in April, 1827, before Thompson, Chancellor, from whose decree the case will be sufficiently understood.

Thompson, C. The bill states, that Thomas Burden, the complainant's testator, and William McElmoyle, the defendant, entered into copartnership in the trade, or business, of grocers and shopkeepers, for the term of four years, from the 31 March, 1804; that by the term of the agreement, the profits were to be equally divided between the copartners; but that the defendant was to be allowed $200, per annum, for his services, which allowance was afterwards increased to $400, per annum; and that it was further agreed, that if any variance, or contention, should happen between the parties, or their executors, or administrators, by reason of the said joint business, before any suit, or trouble shall be attempted, or begun, by any of them, against the other, all such differences, and contentions, should be referred to the determination of two qualified persons, to be chosen by the parties, as arbitrators, to adjust the same within one month after such submission; and that if they could not agree, they should then choose a third person, to be approved of, whose umpirage, within one month afterwards, should be final and conclusive. The bill charges, that large profits were made by the concern, the principal part of which has been applied to the sole use of the defendant; and prays an account.

The answer of the defendant admits the existence of the copartnership, and that it expired by its own limitation in the year 1808; and states, that in 1809 the stock was sold off, and the concern closed. That about the time of closing the copartnership, the complainant's testator drew out a rough statement, exhibiting an estimate of the condition of the concern, and the relative situation of the parties, in regard to the copartnership, and to each other. That by this statement, the said testator made himself a debtor to the concern, to the amount of $696; and that this statement was regarded by both parties as a final settlement. The answer further states, that the parties had previously divided the debts, and whatever else remained, generally; and that all that remained to close the concern was to pass receipts, which was contemplated, but was omitted, in consequence of the complainant's testator re-

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moving* to the country, and being always afterwards regarded as insolvent until his death, which happened in the year 1819. The defendant pleads the said settlement in bar, and also the statute of limitations. The defendant relies on the fact, that for ten years after the dissolution aforesaid, the complainant's testator never set up any demand against the defendant; but on the contrary, repeatedly acknowledged himself to be the debtor of the defendant. That no demand was made on him until the year 1821, nearly twelve years after the dissolution of the copartnership, when defendant consented to refer the case to arbitration, as he was at all times ready to account; but that his offer was not acceded to by the complainant.

As to the plea, of a stated account, in bar, it is contended by the counsel for the complainant, that the paper produced could, in no point of view, be considered as such; and that the offer to arbitrate, which is admitted by the answer of the defendant, and the declaration, that he was at all times ready to account, which is also derived from the same source, took the case out of the statute of limitations.

As to the written statement relied on, in support of the plea in bar, it cannot, it is true, be considered as a stated account, but it has all the essential requisites, except the formality. It is in the handwriting of com-

(c) Ante, 208.

plainant's testator, and every item in it is supported by the books of the concern; and as this court is governed more by substance than form, it will consider it as such.

With regard to the offers to arbitrate, or to account, taking the case out of the statute of limitations, the court is of opinion that such offer does not extend to the length contended for; inasmuch as such mode of settlement was expressly stipulated by the articles of copartnership; and by such offer, the defendant did not intend to compromit any right of which he was legally entitled to avail himself.

From the whole of the circumstances of this case, I am of opinion, that the plea in bar must be sustained. The complainant's testator lived ten years after the dissolution of the copartnership, and never once suggested the idea that the defendant was his debtor; but on the contrary, was frequently applying to him for small favors, and actually gave him his note for nearly four hundred dollars, two years after the dissolution of the copartnership. Besides the court will not order an account to be taken when it is palpably evident, that no good can result from it, as in the present case. The bill is, therefore, ordered to be dismissed with costs.

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*From this decree the complainant appealed, and the appeal was argued at Charleston, in February, 1828.

NOTT, J. I do not think that allowing the answer to be amended in this case was a very regular proceeding; and I can readily conceive, that such a practice, if too liberally indulged, might open the door to great fraud and perjury. But the regulating of the pleadings is so much a matter of discretion with the Chancellor, that this court will not readily interfere, unless in some case of very palpable error.

With regard to the principal question, although what is relied on, as an account stated between the parties, cannot be considered as such, so as to operate as a bar to the complainant's demand, yet it furnishes some evidence, and that, perhaps, not slight, of the view of complainant's testator, with regard to the state of the accounts between them. And even though it might appear on the books, that a balance unaccounted for was still due to him; yet when we see, that he had acquiesced for ten, or twelve years, indeed during his whole life, without setting up any such demand; that the account produced was in his own handwriting; and that he had, in various indirect ways, acknowledged himself indebted to the defendant; I cannot say, that the Chancellor did wrong in considering this evidence as conclusive, that nothing was due to the complainant, and that the door of litigation ought to be closed. Matters of this sort, depending altogether upon evidence, must be left, in a great measure, to the discretion of the Chancellor, with the aid of the master. It cannot be expected that this court should be required in every case, or indeed in any case, to go into a detailed examination of a merchant's or grocer's accounts. It would not only be a perpetual clog to our progress in the business of the country, but it would be better calculated to lead to error, than to the promotion of justice. The decree of the Chancellor with regard to the accounts must, therefore, be supported.

But the defendant admits in his answer, that he holds the titles to two lots of land, which belonged to the complainant's testator, and to which the complainant is entitled as his devisee; and he must execute titles to the complainant for those lots. It is, therefore, ordered, and adjudged, that, so far as regards the accounts, the Chancellor's decree be affirmed; but that so much of the decree, as dismisses the bill, be reversed; and that the defendant do execute good and sufficient titles to the two lots in question to the complainant. Each party to pay his own costs.

COLCOCK, J., and JOHNSON, J., concurred.

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*After this decree, the defendant tendered to the complainant a conveyance of the two lots referred to, framed according to the form prescribed by the Act of 1795, 2 Faust, 5, but without a renunciation of dower by his wife. It was on that account objected to by the complainant; and subsequently the lots were sold by the sheriff under execution against the defendant, and titles were executed to the purchaser. The defendant was afterwards attached for contempt for not performing the decree; and at January term, 1830, moved, before De Saussure, Chancellor, to set aside the attachment, on the ground, that the titles tendered was a sufficient compliance with the decree, and that it was impossible for him to give a better title. His Honor ordered, that the attachment should be set aside, and that the defendant should execute a conveyance similar to that tendered, but dated as of the day on which the decree of the Court of Appeals was filed; and that on such conveyance being duly executed and tendered, the complainant should enter satisfaction on the decree.

From this order, the complainant appealed on the ground, that it amounted to a modification of the decree of the Court of Appeals, by requiring the complainant to take a title subject to a judgment against the defendant, and an actual sale under it, and without a renunciation of dower, unless the defendant's wife chose to give one; whereas the defendant must either perform the decree by giving "good and sufficient titles," or be imprisoned until he does; the court having no discre-

tion, except in a case of contempt in the proper sense of the word.

Grimke, for the motion.
Dunkin, contra.

JOHNSON, J., delivered the opinion of the court.

We are all of opinion, that there is no foundation for this appeal. The defendant has offered to perform the decree of the Court of Appeals by tendering a deed, prepared in the form prescribed by the Act of 1795, 5 Stat. 255, as "valid and effectual to convey from one person to another the fee simple of any land or real estate." The terms of the order did not require that the wife's dower should be renounced; and the right of dower would be worth but little, if the court could leave the wife no alternative but to renounce it, or submit to the perpetual imprisonment of the husband. "Good and sufficient titles," mean such as the husband was competent to make, and not such as by force, or persuasion, he could extort from his wife.

The deed, whenever it is executed, can, as

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a deed, take effect *only from the delivery. I cannot, therefore, perceive any advantage which will arise from antedating it as of the decree. The effect which the sale of the land by the sheriff may have on the rights of the complainant can only be determined when the purchaser under it is before the court; and any expression of opinion on the questions that might arise out of it would be extra-judicial. I incline to think, however, that the complainant would be protected on the principle of lis pendens. The appeal is dismissed.

O'NEALL, J., and HARPER, J., concurred.

Appeal dismissed.

Bailey, Eq. 380

WILLIAM STEWART v. THOMAS COCHRAN, and Others.(a)

(Charleston. March, 1831.)

[*Factors* ⟸47.]

A factor, to whom his principal is indebted upon several demands, may apply the proceeds of the crops of his principal, sold by him, to the payment of whichever of his demands he prefers, if the principal himself has given no direction as to their application. And where the principal was indebted to his factor by judgment, and also by mortgage, for distinct debts, *held*—That the factor was entitled to retain the proceeds of the crops in his hands, without making any application, until it could be ascertained, by a sale of the mortgaged property, whether it would be sufficient to pay the mortgage debt; and if it were not, that he might then apply the proceeds of the crops to the unpaid balance of the mortgage debt, and the residue to the judgment; and that the right of the factor to make such application was not affected by an intermediate assignment by the principal of his whole estate, for the benefit of his creditors. Vide Heilbron v. Bissell and Warner, post, 430.

[Ed. Note.—Cited in Heilbron v. Bissell, Bailey, Eq. 430; Brice v. Hamilton, 12 S. C. 37, 38; Bell v. Bell, 20 S. C. 46.

For other cases, see Factors, Cent. Dig. §§ 65–71; Dec. Dig. ⟸47.]

Before De Saussure, Chancellor, Charleston, January, 1830.

By a former decree in this cause, it was referred to the master, to examine and report upon the claims of the creditors of Thomas Cochran, with their respective liens and priorities; and the cause now came up upon exceptions to the master's report, in relation to the claim of Mazyck, Gaillard & Mazyck, who were creditors of Thomas Cochran, under the following circumstances.

The claimants were the factors of Thomas Cochran, and had advanced him several sums of money, amounting together to $3,367.77, for which he confessed judgment to them on 20 March, 1827. Shortly afterwards, they paid for him a debt of $2,000 to the Bank of the United States, and took from the bank an assignment of a mortgage of slaves, executed by Cochran to secure payment of the said

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debt. On 30 March, 1827, they *received for a part of Cochran's crop of rice, sold by them as his factors, the sum of $824.38, and on 19 May following, the further sum of $1,411.02; making an aggregate of $2,235.40. On 12 June, 1827, Thomas Cochran executed an assignment of his whole estate in trust for the payment of his debts. The mortgaged slaves were sold by Mazyck, Gaillard & Mazyck, under their mortgage, on 7 March, 1828; but the proceeds of the sale proved insufficient to pay the mortgage debt, of which a balance of $455.35 still remained due.

Mazyck, Gaillard & Mazyck, contended, that they were entitled to apply the proceeds of the crops of rice sold by them, in the first place, to the extinguishment of the mortgage debt, and the residue to the judgment; and then to come in for the balance due them, as judgment creditors. No direction was given by Cochran for the application of the proceeds of his crop of rice in the hands of his factors; but it was insisted, on behalf of the assignees, that Mazyck, Gaillard & Mazyck, were bound to make an application of the fund within a reasonable time, and not having done so previous to the assignment, they could not do it afterwards; and, at all events, it was urged, that they had made their election by selling the mortgaged slaves, under the mortgage; inasmuch, as the proceeds of the crops would have extinguished the mortgage debt, and therefore the enforcing the mortgage was an abandonment of the right to apply the proceeds of the crops to the payment of that debt.

The master was of opinion, that as Coch-

(a) Ante, 334.

ran had, himself, given no direction for the application of the proceeds of his crops, his factors had the right to apply them to whichever of their demands they deemed most advantageous for themselves; and their rights could not be affected by Cochran's assignment. He was further of opinion, that the sale of the mortgaged slaves was neither a forfeiture, nor an abandonment, by Mazyck, Gaillard & Mazyck, of their right to apply the proceeds of the crops as they thought proper; but that they had a right to retain the funds in their hands, until they could ascertain by a sale of the mortgaged property, what application would be most beneficial to them.

The master, therefore, allowed the claim of Mazyck, Gaillard & Mazyck; and exceptions to his report, on that ground, were overruled, and the report confirmed, by his Honor the Chancellor, who concurred in opinion with the master.

The assignees of Cochran appealed from

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the order of confirmation; *and now moved that the same might be reversed, and the exceptions to the master's report sustained.

Gilchrist, for the motion.

Mazyck, contra.

O'NEALL, J. This court concurs in opinion with the Chancellor, upon the questions, arising out of the exceptions to the Master's report, which have been submitted to us by the present appeal. His decretal order is therefore affirmed, and the appeal dismissed.

JOHNSON, J., and HARPER, J., concurred.

Decree affirmed.

Bailey, Eq. 382

SIMON MAGWOOD v. HENRY W. LUBBOCK, S. J. MAGSON, and A. McGREGOR.

(Charleston, March, 1831.)

[1. *Mortgages* ⟸116.]

A party holding a mortgage of a steamboat, executed by the two joint owners, to indemnify him against certain liabilities incurred by him for them, made further advances to one of the joint owners. The original liabilities having been discharged, *held*, that the mortgagee was not entitled to a lien on the steamboat for the subsequent advances, without proof of an agreement, that the mortgage should stand as a security for such advances.

[Ed. Note.—Cited in Reese v. Lyon, 20 S. C. 22.

For other cases, see Mortgages, Cent. Dig. §§ 230–232; Dec. Dig. ⟸116.]

[2. *Appeal and Error* ⟸927; *Equity* ⟸340.]

Where a discovery is sought by the bill, the answer stands for proof, unless rebutted by preponderating evidence; and although the testimony of a single witness, if corroborated by circumstances, is sufficient to disprove an answer, yet it is for the Chancellor to judge of the weight of the evidence; and his decision again t the evidence, to contradict the answer, will not be interfered with, especially where the same facts are sworn to by two defendants in their several answers.(a)

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4024; Dec. Dig. ⟸927; Equity, Cent. Dig. § 701; Dec. Dig. ⟸340.]

[3. *Vendor and Purchaser* ⟸239.]

Equity will not relieve against a purchaser for valuable consideration, without notice, who is in possession, in favor of a party claiming a lien by an equitable mortgage.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 583–600; Dec. Dig. ⟸239.]

Heard by De Saussure, Chancellor, at Charleston, January, 1830.

This was a bill to subject the steamboat Macon to the payment of a debt, due to the complainant by one of the defendants, by virtue of an alleged lien by mortgage.

The defendants, Magson and Lubbock, were joint owners of the steamboat Macon, which they mortgaged to the complainant, Magwood, to indemnify him against his indorsement of certain notes, amounting to $7,500. Before this mortgage was satisfied, the defendant, Lubbock, purchased from a

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mercantile house, with *which the complainant was connected, five hundred sacks of salt, amounting to $1,012.50, for payment of which he gave his note endorsed by the complainant. The bill charged, that the complainant endorsed this note at the request of both Magson and Lubbock, who stated that the salt was bought on account of the boat, it being difficult to obtain freight for her; and that both of the said defendants expressly agreed, that the mortgage, previously given, should stand as a security, to indemnify the complainant against this note also. Some time afterwards, the notes for $7,500, for which the mortgage was originally given, were taken up by Magson and Lubbock, who soon afterwards sold the boat to their codefendant, McGregor, for her full value. The note for $1,012.50, was not paid, and the complainant was compelled to take it up; and Lubbock being unable to pay, he applied to Magson and to McGregor, who both denied, that either they, or the boat, were liable for the debt. The bill charged, that the defendant, McGregor knew, at the time of his purchase, that the boat was pledged for the note of $1,012.50, and that it was not paid; and prayed that he and the other defendants might answer the bill, and that they might be compelled to pay the debt, or that the steamboat Macon should be sold for payment.

The defendants, Magson and Lubbock, answered separately, but both denied, that the salt was purchased on account of the boat, or that they had agreed, that the boat should be mortgaged for payment of the note. The

(a) Ante, 1, 126; post, 463.

defendant, Magson, admitted that he applied to purchase the salt, but alleged that it was for his own account; and as cash was required, which it was not convenient for him to advance, he was under the necessity of abandoning the purchase: and always supposed, that it was well understood between the complainant and Lubbock, that the purchase by the latter was on his own account, as in fact it was. The defendant, Lubbock, alleged that the salt was purchased by him for his own account, and that the complainant agreed to endorse his note to enable him to make the purchase, upon his promise to remit the proceeds from Augusta, as soon as the salt was sold there: a promise, which this defendant was disabled from fulfilling by the urgency of other creditors.

The defendant, McGregor, denied, if in fact, there was any mortgage, or lien of any sort, on the boat, for the note of $1,012.50, that he, the defendant, had the slightest notice of it. He admitted, that he knew of the mortgage for the notes for $7,500, and had insisted that those notes should be taken up

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before he purchased: *but he knew of no other lien, or he would not have purchased, until it was removed. He claimed to be protected as a purchaser for valuable consideration, without notice. At the hearing, Mr. Charles Magwood, one of the mercantile house from whom the salt was purchased, and a son of the complainant, was examined as a witness. He testified, that Magson first applied for the purchase of the salt, but as cash was required, he did not make the purchase; that Lubbock applied subsequently, on the same day, and on being refused credit, said that the salt was wanted for the boat, as freight could not be procured; and that if complainant's father would endorse a note, the mortgage which he then held might stand as a security for this note also. Witness referred him to his father, but was not present, when the agreement between them was made. The bill for the salt was made out in the name of Lubbock, who was also the maker of the note. After the return of the boat from Augusta, Magson said, in presence of the witness, that Lubbock had acted shamefully in not remitting the proceeds of the salt from Augusta, but that the boat was liable.

It was admitted, that at the time of the transaction, the defendant, McGregor, was employed by Magson and Lubbock, in business appertaining to the boat, and had the means of knowing all the business transactions done in relation to her management.

The Chancellor was of opinion, that the evidence was not sufficient to outweigh the effect of the answers: and that these, if true, destroyed the complainant's title to relief. Bill dismissed with costs.

The complainant appealed, and now moved to reverse the Chancellor's decree.

Lance, for the motion. There can be no doubt, but that where a mortgage creditor makes further advances to his debtor, they will be covered by the mortgage, upon any sort of proof that they were made upon that security; and this although the mortgage be in itself equitable merely, as upon a deposit of title deeds. Ex parte, Langston, 17 Ves., 227. But the cases go much further where there is a legal lien: and it has again and again been held, that future advances will be protected by the lien, without proof of an express agreement. Demainbray v. Metcalfe, Prec. Ch., 419. 2 Vern., 691, 698. S. C. Anonymous, Ib., 177. Ex parte, Deeze, 1 Atk., 299. Ex parte, Ockenden, Ib., 236. Hendricks v. Robinson, 2 John. C. R., 283. Chirras v. Craig, 7 Cranch, 34. The doctrine is in the highest degree reasonable. If the creditor has required, and the debtor has given, a security for the first advances,

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*much more is it to be supposed, that it would be required, and given, when additional advances are made; and, therefore, it may always be properly inferred, that, when a mortgage creditor makes such advances, he does so upon the security of the mortgage. The rule is just and equitable, and as a bona fide purchaser for valuable consideration, without notice, can never be affected, no one can be injured but those who are participators, or abettors of fraud. Equitable liens are favored by the court. At first some objection was made to them; but the objections have worn away, and the doctrine is now in favor. This may be seen by all the cases, and our own courts have gone in the same direction. Tunno v. Bethune, 2 De S., 285. Read v. Gaillard, Ib., 552. Menude v. Delaire, Ib., 564. Executor of Polony v. Keenan, 3 De S., 74. Caborne v. Godfrey, Ib., 514. Coleman v. Shelton, 2 McC. C., 126. And see the English cases collected in a note to 2 De S., 509, 518.

There could be no doubt, then, but that the complainant would have a lien on the Macon, for the note of $1,012.50, if Lubbock had been the sole owner; and there can be as little doubt, that the complainant is entitled to his lien, if either the salt was bought for the boat, or Magson assented to the mortgage. In the former case, Lubbock, as part owner, and having charge of the boat, was competent to mortgage her for what was bought on account of the owners; and in the latter case, Magson's assent would render Lubbock his agent. Now, it is true, that both of these facts are expressly denied by the answers of the defendants; but it is equally true, that both are distinctly proved by the testimony of Mr. Charles Magwood. It is said, however, that the testimony of one witness is not sufficient to outweigh the answers of the two defendants. Certainly an answer is not to be contradicted by the oath of a single witness; but the oath of a single witness is suf-

ficient, if it is corroborated by circumstances. 2 Mad. C., 443; Biddulph v. St. John, 2 Schr. & Lef., 532; and it is quite immaterial, how many defendants, one or a dozen, there are to be contradicted. The circumstances of this case are conclusive of the correctness of Mr. Magwood's testimony. Magson admits that he wished to purchase the salt, himself, and that he offered to do so; but like Lubbock, it was for his own account. The proof, however, was abundant to show, that the salt was wanted for the boat, because freight could not be procured; and neither Lubbock nor Magson wanted the salt, except for the boat. Is it credible, that one joint owner should undertake a speculation, merely to benefit the joint concern, and not even invite the other joint owner to bear his share

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of the burden? Is it *not utterly incredible, that both should intend the same thing, and set about carrying it into effect, going to the same place to make the purchase, on the same day, and not happen, even by accident, to meet, and explain their views, and unite in the enterprize? What credit, then, can be given to the answers of the defendants, under these circumstances, when directly contradicted by the testimony of Mr. Charles Magwood.

As to McGregor, it was proved that he was a sort of clerk to the boat, and must have been cognizant of the whole transaction. His answer is not entitled to the slightest credit; and, indeed, it is palpable, that his purchase was made with the view to defeat the lien of the complainant.

King, contra, was stopped by the court.

JOHNSON, J., delivered the opinion of the court.

The satisfaction of the written mortgage has divested the complainant of the legal interest, which it gave him, in the steamboat Macon; and to give him a lien on her for the amount of the salt sold to Lubbock, it was incumbent on him, to have proved an agreement to that effect. Both Lubbock and Magson have positively denied the existence of such an agreement; and whatever suspicions the evidence of Charles Magwood may raise about the truth of their answers, it is a well settled rule in equity, that when a discovery is sought, the answer must stand for proof, unless rebutted by preponderating evidence. In this case there were two oaths against one, and that was entitled to weight; but it belonged to the Chancellor to judge between them, and to weigh the circumstances which corroborated the testimony of the witness; and this court will not interfere with his decision.

But, assuming that the fact of the agreement is proved, McGregor stands on still higher ground. He positively denies notice of such an agreement, and the circumstances relied on, to show that he had, are entirely too slight, to weigh against his answer; and he is a purchaser for valuable consideration, and in possession. As a purchaser, without notice, his equity is, at least, equal to that of the complainant, supposing the existence of the agreement to have been fully proved; and being in possession he must be protected.

The motion must therefore be dismissed, and the decree of the Chancellor affirmed.

O'NEALL, J., and HARPER, J., concurred.

Decree affirmed.

Bailey, Eq. *387

*SARAH GELZER v. ROBERT GELZER and Others.(a)

(Charleston, March, 1831.)

[1. *Dower* ⟸41, 50; *Husband and Wife*, ⟸29.]

A covenant by a wife, prior to, and in consideration of the marriage, not to claim, or demand dower, or any other right, title, or interest, in the real estate of her husband, cannot operate as an estoppel against her at law; nor will it bar her of dower under the St. 27, Hen. VIII, c. 10, s. 6, without a competent jointure; but if she were of full age at the time, such an agreement will be enforced in equity, and the wife excluded both from dower, and a distributive share of her husband's real estate, where he has died intestate; although, it seems, she will still be entitled to her distributive share of the personal estate, under the Act of 1791.

[Ed. Note.—Cited in Shelton v. Shelton, 20 S. C. 565.

For other cases, see Dower, Cent. Dig. §§ 99, 114; Dec. Dig. ⟸41, 50; Husband and Wife, Cent. Dig. § 164; Dec. Dig. ⟸29.]

[2. *Dower* ⟸41.]

Nothing less than a freehold estate, to commence in possession at the death of the husband, and settled on the wife by way of jointure, will bar her of dower under the provisions of the St. 27, Hen. VIII, c. 10, s. 6, vide P. L., 51.

[Ed. Note.—Cited in Shelton v. Shelton, 20 S. C. 565.

For other cases, see Dower, Cent. Dig. § 120; Dec. Dig. ⟸41.]

The complainant was the widow of Thomas Gelzer, who died intestate; and this was a bill against his administrator, and distributees, to recover either her dower of the real estate of the intestate, or her distributive share of his real, and personal estate. The claim was resisted, on the ground, that the complainant, by a settlement made prior to, and in contemplation of her marriage, she being of full age at the time, had covenanted not to claim, or demand, dower, or any other right, title, or interest, in the real estate of her said husband. And it was contended, that she was not only excluded from dower, and a distributive share of the real estate, by the terms of her covenant, but that she

(a) Spiva v. Jeter, 9 Rich. E., 434; 4 Id., 135.

was also barred of any claim to a distributive share of the personal estate, under the Act of 1791; inasmuch as her distributive share, was given by the Act, expressly, in lieu of dower, and she had elected to take her dower, by its equivalent, the valuable consideration of marriage. 1 Faust, 27, 5 Stat., 162.

The cause came on to be heard at Charleston, in January, 1830, before De Saussure, Chancellor, who decided, that she was excluded by the settlement from both dower and any right to a distributive share, of his real estate. His Honor held, however, that she was entitled to her share of the personal estate, and ordered distribution accordingly.

The complainant appealed, and now moved to reverse so much of the Chancellor's decree, as excluded her from all participation of the real estate; and the defendants also

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appealed from so much *of the decree, as declared that the complainant was entitled to a distributive share of the personal estate.

JOHNSON, J., delivered the opinion of the court.

The agreement, out of which the question arises, was entered into before, and in contemplation of the marriage between the complainant, then Sarah Lewis, and the intestate, Thomas Gelzer; and it recites, that the said complainant had, "in her own right, an ample estate entailed and secured to her, of which the said Thomas would not take any benefit after her death;" in consideration whereof, and of the nominal payment of one dollar, she covenants, and agrees, that if the said Thomas should die, she surviving, "she will not have, claim, or demand, or pretend to have, claim, or demand, any dower, or thirds, or any other right, title, interest, claim, or demand, of, in, or to, any of the messuages, lands, tenements, and real estate, whereof the said Thomas may have been seized during the intermarriage aforesaid."

Under the statute 27, Hen. VIII, c. 10, s. 6, which is of force in this State, P. L., 51, 2 Stat. 468, this contract cannot operate as a bar to the complainant's right of dower, because, according to Lord Coke, nothing less than a freehold estate, to commence in possession at the death of the husband, settled upon the wife by way of jointure, would be allowed as a substitute, under the provisions of that statute; Co. Litt., 36 b; and here nothing is provided for the wife. Neither can such a covenant operate as an estoppel at common law. It does not profess to be a relinquishment; and moreover, she had, at the time, no interest upon which a relinquishment could operate. It can, therefore, bind, at law, only as an agreement not to claim, or demand, her dower, &c. But equity frequently regards that as done, which ought to have been done; or will, when it is necessary, compel parties, seeking the aid of the court, to do that, which in conscience they are bound to do.

The complainant was of full age, and under no legal disability to contract; the subject matter was legitimate; and the consideration of marriage is sometimes said to be the highest known to the law; and I confess, that I have not been able to discover any rule, or principle, which discharges her from the obligation, which this agreement imposes. She had an ample fortune of her own, so tied up, that she could not confer it upon her husband; and in consideration, that he would take her in marriage, she agreed not to claim her dower, or any right of inheritance in his estate. It is a contract without fraud, and apparently of perfect equality. Both Atherley and Roper, treat this question as one ad-

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mitting of no *controversy. A jointure, to operate as a bar to dower under the statute, must consist of a freehold estate; but a woman, under no legal disability, may stipulate to substitute anything she please in place of it. Atherley on Mar. Set., 511, 1 Roper, Husband and Wife, 480. There is nothing in the case of Hastings v. Dickinson, 7 Mass., 153, opposed to this view; for the Chief Justice, Parsons, puts that case distinctly on the ground, that the condition, upon which the wife covenanted to renounce her dower, was not performed, and could not be performed, in consequence of the insolvency of the husband. The case of Glover v. Bates, 1 Atk., 439, turned upon the infancy of the wife, at the time when she entered into the agreement. She was, therefore, incapable of binding herself by an agreement, and nothing but a jointure, in conformity to the statute, could bar her of dower.

The appeal in this case must therefore be dismissed, and the decree of the Circuit Court affirmed; and it is so ordered.

O'NEALL, J., and HARPER, J., concurred.

Yeadon, for complainant.
Grimke, contra.

Decree affirmed.

Bailey, Eq. 389

JOHN FRAZER v. WILLIAM B. LEGARE and Others.

(Charleston. March, 1831.)

[1. *Fraudulent Conveyances* ⟸255; *Husband and Wife* ⟸221.]

To a bill by a creditor to set aside a settlement by a husband on his wife, the latter must be made a party, unless some satisfactory reason be shewn to the contrary.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 746; Dec. Dig. ⟸255; Husband and Wife, Cent. Dig. § 802; Dec. Dig. ⟸221.]

[2. *Equity* ⇐247.]
Demurrer for want of parties being sustained, leave granted to amend so as to make the necessary parties.

[Ed. Note.—Cited in Kennerty v. Etiwan Phosphate Co., 21 S. C. 240, 53 Am. Rep. 669.

For other cases, see Equity, Cent. Dig. § 520; Dec. Dig. ⇐247.]

Before Johnstone, Chancellor, at Charleston, January, 1831.

This was a bill by a creditor of the defendant, William B. Legare, to avoid a settlement made by him upon his wife, and to subject the property settled to the payment of complainant's demand. The husband, and the trustees under the settlement, were the only parties defendants; and they demurred, on the ground that the wife ought to have been made a party. His Honor, the Chancellor, overruled the demurrer; and the defendants appealed from his decree.

Yeadon, for the appellants.
Inglesby, contra.

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*JOHNSON, J. It is, perhaps, amongst the greatest advantages of the equity jurisdiction, that, overlooking the forms of the common law, it brings together all the parties interested in the subject matter of litigation, and by the same judgment determines all their rights; thus superceding the necessity of the circuity, and multiplicity of actions, which the common law proceedings render necessary. Hence the rule, that all persons having an interest in a suit in equity ought to be made parties. This, it is said, is a rule of convenience, and not of necessity; and there is no question but that it may be dispensed with, if there be a reason for doing so; but, considered only as a matter of convenience, it ought to be enforced, unless there exists some cause, which renders it inconvenient or unimportant. See Bird v. Hardwicke, 1 Vern., 109, 110, note; Herring v. Yoe, 1 Atk., 290; Haines v. Beach, 3 John. C. R., 459.

In the present case, Mrs. Legare is the only person having any real interest opposed to that of the complainant; and his bill shews that this was known to him; and there is not the slightest suggestion of any reason why she was not, or ought not now to be, made a party. It is necessary, on the part of the defendants, as it may save them the necessity of a future account with her.

It is therefore ordered, and decreed, that the decree of the Circuit Court be reversed, and the demurrer of the defendants sustained; but that the complainant have leave to amend his bill, and make Mrs. Legare a party.

O'NEALL, J., and HARPER, J., concurred.

Decree reversed.

Bailey, Eq. 390

MARY F. POSTELL and CHARLOTTE S. POSTELL, par Prochein Amy, v. PHILIP SMITH POSTELL.

(Charleston, March, 1831.)

[*Perpetuities* ⇐4; *Wills* ⇐855.]
A testator bequeathed his personal estate to his two sons, "to them and their legal issue, and should either die without lawful issue, the said property to revert back to the surviving brother, or his lawful issue." *Held*, that the terms of the limitation over did not import that it was to take effect within lives in being, and it was, therefore, too remote and void; and that an absolute estate vested in the first takers.(*a*)

[Ed. Note.—Cited in Evans v. Durant, 1 Strob. Eq. 83; Lowry v. O'Bryan, 4 Rich. Eq. 264; 57 Am. Dec. 727; Carson v. Kennerly, 8 Rich. Eq. 268; Mendenhall v. Mower, 16 S. C. 313.

For other cases, see Perpetuities, Cent. Dig. §§ 24, 44; Dec. Dig. ⇐4; Wills, Cent. Dig. § 2171; Dec. Dig. ⇐855.]

At Charleston, May, 1830.

Harper, C. Philip S. Postell, deceased, by his will, bequeathed as follows: "I bequeath to my sons, William Dewees Postell, and Philip Smith Postell, the whole of my per-

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sonal estate, to them and *their legal issue, and should either die without lawful issue, the said property to revert back to the surviving brother, or his lawful issue." William Dewees Postell, one of the legatees, died after the testator, intestate and without issue. The complainants are the daughters of the testator, and the sisters of William Dewees Postell; and they claim that the limitation over in the foregoing bequest is too remote, as depending on an indefinite failure of issue; and, therefore, that the said personal estate, consisting principally of slaves, vested absolutely in the said William Dewees Postell; wherefore the complainants, together with his brother, the defendant, and his mother, who sues as next friend of the complainants, are entitled to the same as his next of kin, as well as to some real estate of which he died seized; and the bill prays a writ of partition to divide the said personal estate.

There is no question, but that a limitation over on a dying without issue, generally, is too remote, and void. The distinction attempted to be taken was, that the limitation over was to the surviving brother; and the case of Stevens v. Patterson, decided by the Court of Appeals in February, 1829,(*b*) was re-

(*a*) Or construed and; 1 Hill E., 265; 3 Rich. L., 289; Waller v. Ward, (Errors,) 2 Sp. L., 786; 5 Rich. E., 426; 6 Id., 240; 7 Id., 422; 1 Bail. L., 427; 2 Hill E., 195; 1 Sp. L., 258.
Still it may be doubted whether in this case sufficient effect was given to or as disjunctive or substitutional. Heyward v. Heyward, 7 Rich., E., 289; Anderson v. Smoot, Sp. E., 312; Matthis v. Hammond, 6 Rich. E., 404; 2 Hill. E., 430.

(*b*) Ante, p. 42, et vide De Treville v. Ellis, p. 40.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ferred to as an authority. No doubt, if a bequest be to two, and if either die without issue, to the survivor, such limitation over is good; and that is the determination in the case of Stevens v. Patterson. The word survivor shews, that a personal benefit was intended, and that the limitation over is to take effect within lives in being. But in this case, the limitation over is to the surviving brother, or his lawful issue. Plainly, these words do not import that the limitation over shall take effect within lives in being; but that the issue of the survivor may take at any time, when the issue of the first taker may fail. The case, I think, must be governed by that of Massey v. Hudson, 2 Mer., 129; which is referred to in Stevens v. Patterson. The difference is, that in that case the limitation over was to the survivors, his executors, administrators, and assigns. But I do not see that there is any difference in principle.

It is ordered, and decreed, that a writ of partition issue, to divide the personal estate of which the said William Dewees Postell died possessed, between the complainants, his sisters, and his mother, and his brother, the defendant, according to their respective rights and interests. The costs to be paid out of the estate of the said William Dewees Postell.

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*From this decree the defendant appealed, on the ground that the limitation over was not too remote.

Holmes, for appellant.
De Saussure, contra.

O'NEALL, J. This court concurs in opinion with the Chancellor; and his decree is therefore affirmed.

JOHNSON, J., and HARPER, J., concurred.

Decree affirmed.

Bailey, Eq. 392

SARAH MARIA DRAYTON v. THOMAS SMITH GRIMKE, Administrator, cum Testamento Annexo, of Thomas Drayton.

(Charleston. March, 1831.)

[1. *Powers* ⇐30.]

Under the Act of 1787, which provides, that when a testator directs a sale of his lands for payment of debts, or for distribution of the proceeds among legatees, but does not direct by whom the sale shall be made, it shall be made by the executors; and that if the executors die, or renounce, the administrator, with the will annexed, shall be authorized to sell: an administrator with the will annexed, possesses the power to sell and convey lands, which the testator has directed to be sold, by his executor, for payment of his debts, unless the will has expressly provided, that the sale shall be made by no other person than the executor himself. Vide P. L., 423.

[Ed. Note.—Cited in Reeves v. Tappan, 21 S. C. 10.

For other cases, see Powers, Cent. Dig. § 96; Dec. Dig. ⇐30.]

[2. *Statutes* ⇐236.]

A remedial statute is to be construed liberally.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 317, 324, 325; Dec. Dig. ⇐236.]

On appeal from the decree of Johnstone, Chancellor, at Charleston, January, 1831.

O'NEALL, J. The only question necessary to be considered in this case is, whether the administrator, cum testamento annexo, possesses the power to sell, and convey, the real estate of his testator, which the latter has, by his will, directed his executor to sell, and convey, for the payment of his debts.

In the case of Burger v. Smith, decided by the Court of Appeals, at this place, in 1828, it was held, that where a testator directed a house and lot of land to be sold, after the termination of a life estate, but did not say by whom, the executor of his executor did not possess the power to sell. That case, after a full review and examination of the decided cases is, at last put expressly on the ground of intention. It recognizes, however, both in the ground on which the decision is thus placed, and in the reasoning on the other facts of the case, that if the devise had been, that the land should be sold for the payment of debts, it

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would, both on the score of intention, *and in law, have been an interest and power transmissible from the executor to his executor.

In the case before us, the executor is directed to sell for the payment of the testator's debts. This devise made the land assets in his hands; and without the aid of the Act of 1787, P. L., 423, 5 Stat., 15, he could have sold and conveyed. That Act, however, provides, first, that when a testator directs a sale of his lands, for payment of his debts, or for distribution of the proceeds among legatees, but does not direct by whom the sale shall be made, it shall be made by the executors; and second, that if the executors die, or renounce, the administrator with the will annexed shall be authorised to sell, as directed by the will. If this Act were to receive a strict, and literal construction, it is possible, that the defendant's view might be sustained. But this is a remedial statute, and it is entitled to a liberal construction. In this State, the law in relation to the liability of the real estate of deceased persons, to be sold for the payment of their debts, is very different from

what it is in England. Here it may be sold under a judgment, upon a debt of any description, recovered against the executor, or administrator; there it is only liable, in the hands of the heir, to debts by specialty, and debts of a higher grade. With this difference in the law, lands here are, in some degree, in all cases, assets for the payment of debts. On the application of the executor, or administrator, they are frequently, on a proper case made, ordered, by the Court of Equity, to be sold for the payment of debts. Under this state of the law, ought the Act to receive such a construction, as would deprive the person, who must, by law, apply the proceeds of the land, when sold, to the payment of the debts, of the power of making the sale? If the testator had not directed his executor to sell, but had simply directed his lands to be sold, without saying by whom, then, by the very letter of the Act of 1787, the administrator would have been entitled to sell; and can it be supposed, that this power was given to him, and that the power to sell, where the executor, if alive, and acting, was authorized to sell, was intended to be denied him? I cannot think so. The uniform construction of the Act has been, that the administrator has the power to sell and convey, in all cases, where the land is ordered to be sold by the executor, or where no one has been appointed to make the sale.

The clause of the Act, by which this authority is given, is sufficiently general to admit this construction. "If the executor, or executors, should die, or renounce, according to law, then, and in that case, the administrator, or administratrix, with the will an-

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nexed,* shall be authorized, by this Act, to sell the real estate of the said deceased as directed in and by the will." These are the terms of the Act, and they seem to apply to all cases in which the executors are authorized to sell, whether by the Act, or by the will; and if the executors renounce, or die, the power vests in the administrator, with the will annexed, and he must sell, as directed by the will. If the testator has appointed some person, other than the executor, to make the sale, it is obvious, that the administrator has nothing to do with it; or if the testator has expressly provided, that the sale shall not be made by any other person than the executor himself, then it would be a personal trust, and no one but the executor could execute it. But when the will makes the sale an incident to the office of the executor, I should think, that under the Act of 1787, the administrator would be entitled, by succession, to execute the will by making the sale.

The motion to reverse the Chancellor's decree, is therefore refused, and his decree affirmed.

JOHNSON, J., and HARPER, J., concurred.

Grimke, for the motion.

King, contra.

Decree affirmed.

Bailey, Eq. *395

*Ex parte ADAM TUNNO.(a)

(Charleston, March, 1831.)

[*Trusts* ⟸169.]

When the Court of Equity assumes the management of a trust, it is for the benefit of the cestuy que trust, and not to look up the trust fund, so that he cannot have the benefit of it; and the court will even permit the trust, and the trust fund, to be transferred to another State, if it be to the advantage of the cestuy que trust to do so. And so, where a trustee appointed by the court, and to whom the trust funds had been paid by order of the court, applied by petition, stating that his cestuys que trust were free persons of color, who resided without the limits of the State, and were prohibited by law from coming within it; that they were desirous that the trust fund should be transferred to their place of residence, and placed in the hands of a trustee residing at the same place, and that it would be to their advantage to do so; wherefore the petitioner prayed, that he might be discharged of his trust, and that another trustee, who resided at the same place with the cestuys que trust might be substituted; *held*, that, if the facts stated in the petition were true, the prayer thereof ought to be granted, and therefore an inquiry should be had; but that all persons interested in the trust ought in some way to be made parties.

[Ed. Note.—Cited in Moseley v. Hankinson, 22 S. C. 323, 330, 331; Carr v. Bredenberg, 50 S. C. 485, 27 S. E. 925.

For other cases, see Trusts, Cent. Dig. § 222; Dec. Dig. ⟸169.]

Before Johnstone, Chancellor, at Charleston, January, 1831.

This was a petition by a trustee to be permitted to surrender his trust to a substitute.

The petition stated, that in November, 1823, on the petition of Martha Patience Morton, a free woman of color, the widow of Joseph Morton, deceased, and of Patience McKenzie Marshall, one of the grand-children of the said Joseph Morton, a decretal order of this court was made, whereby certain real estate was directed to be sold by the master, and the proceeds paid over to the present petitioner, Adam Tunno, who was appointed trustee for the parties entitled to the same, under the will of the said Joseph Morton; and that, in pursuance of the said order, the said real estate was sold, and the proceeds thereof, amounting to the sum of $2,200, paid over to the said trustee, who invested the same in stock of the Bank of the United States: That the trusts of the said fund were to the use of the said Martha Patience Morton, for life; and, after her death, to the use of the said Patience Mc-

(a) Ex parte, Copeland, Rice E., 69; Ex parte, Robert, 2 Strob. E., 86; Ex parte, Smith, 1 Hill E., 140; Ex parte, Heard, 2 Hill E., 54.

Kenzie Marshall, and one Joseph Morton, for life, with remainder to their children, respectively; but if either of them should die leaving no children, then to the use of the survivor, for life, with remainder to his or her children: That the petitioner, as trustee, had regularly paid the interest and dividends of the fund in his hands to the said

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Martha *Patience Morton, during her life, but that she had recently died, leaving the said Patience McKenzie Marshall, surviving her; that the other cestuy que trust for life, Joseph Morton, had gone to sea a great many years since, and had never been heard of, and was supposed to be dead; and that he had left no children, so that the said Patience McKenzie Marshall, and her children, were now entitled to the whole of the said trust fund.

The petition further stated, that the said Patience McKenzie Marshall, and her children, all of whom are minors, resided at Philadelphia, in the State of Pennsylvania; and that, being persons of color, and prohibited by law from coming into this State, they were desirous that the trust fund should be transferred to the place of their residence, and placed in the hands of a trustee residing in the same place; and the petitioner believed that it would be greatly to their advantage to do so, as the expense of transmitting the dividends, and the inconvenience, and delay, attending it, occasioned a loss, which was considerable where the fund was so small. That the said Patience McKenzie Marshall had, in consequence thereof, and with the assent of the petitioner, applied to Isaac Norris, Esquire, a gentleman of great respectability, residing in Philadelphia, to undertake the trust; and that he had consented to do so; which consent had been given by deed duly executed by both the said Isaac Norris, and Patience McKenzie Marshall.

Wherefore the petitioner prayed, that the said Isaac Norris might be appointed trustee in lieu of the petitioner; that the petitioner might be authorized to transfer the trust fund to the said Isaac Norris; and that the petitioner's account of his management of the trust might be examined, and he thereupon discharged.

The petition was read, and a motion made that the same be referred to the master, to inquire into the facts stated therein, and to report upon the propriety of granting the prayer thereof. The motion was refused by the Chancellor, on the ground, that the court could not authorize the removal of trust funds beyond its jurisdiction: and that it was useless therefore to order a reference.

The petitioner appealed, and now moved to reverse the decision of the Chancellor.

Toomer, for the motion.

O'NEALL, J., delivered the opinion of the court.

In this case we are of opinion, that if the facts stated in the petition be true, the prayer of the petition ought to be granted; and therefore, that the motion for a reference ought not to have been rejected. The petitioner was appointed a trustee by this court,

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*and not by the parties: and he was, therefore, the officer of the court, for the management of the trust, which the court had undertaken to manage. When the Court of Equity assumes the management of a trust, it is for the benefit of the cestuy que trust, and not to lock up the trust fund, so that he can never have the benefit of it. According to the statement made in the petition, the cestuys que trust are perpetually exiled from South Carolina, and can never enjoy the trust here. The inquiry would then necessarily be, whether it is most to the advantage of all concerned, that it should be transferred to their residence in Philadelphia. If it is, then the court should pursue that course. The only difficulty is in the fact, that the cestuys que trust in remainder are minors, and not parties. It would, perhaps, be well, before a final order is made, that they should, in some shape, be made parties to this proceeding. It is, therefore, ordered and decreed, that the order rejecting the petition be reversed, and that the petition be remanded to the Circuit Court for examination and trial.

JOHNSON, J., and HARPER, J., concurred.

Order reversed.

Bailey, Eq. 397

CHARLES WARLEY v. PAUL J. WARLEY and Others.

(Charleston, March, 1831.)

[1. *Executors and Administrators* ⇨272.]

The testator, after certain specific and pecuniary legacies, devised his whole estate, real and personal, "after the payment of all his debts and legacies;" but the will was not duly executed to pass the real estate, which descended to the heir-at-law; *held*, that the descended real estate was liable to debts, in exoneration of the specific legacies, but that the residuary personal estate was liable before the real estate so descended.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052–1057, 1059, 1065, 1068; Dec. Dig. ⇨272.]

[2. *Descent and Distribution* ⇨126; *Wills* ⇨832.]

Descended real estate is applicable to the payment of debts before personal estate specifically bequeathed; and even a bequest of the testator's whole personal estate, or of the residue, after specific legacies out of it, must, for this purpose, be regarded as specific in this State. But if the bequest be of the residue, merely, this must mean after payment of the debts;

and still more so, if the testator bequeath his personal estate, expressly "after payment of debts;" and in both cases, the personal estate, so bequeathed, will be liable to the payment of debts, before real estate descended.

[Ed. Note.—Cited in Brown v. James, 3 Strob. Eq. 26; Henry v. Graham, 9 Rich. Eq. 108, 109; McFadden v. Hefley, 28 S. C. 323, 5 S. E. 812, 13 Am. St. Rep. 675.

For other cases, see Descent and Distribution, Cent. Dig. § 467; Dec. Dig. ⟸126; Wills, Cent. Dig. §§ 2151, 2152; Dec. Dig. ⟸832.]

[3. *Executors and Administrators* ⟸272.]

The stat. 5, Geo. II, c. 7, 2 Stat., 570, which has rendered lands liable to the payment of debts of every description, and our own statute of distributions, by which the character of the heir-at-law, as it is understood in England, has been entirely altered, have, to a considerable

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extent, rendered the *English rules for the administration of assets inapplicable in this State. The personal estate may still be regarded as the fund primarily applicable to the payment of debts; but lands devised for, or charged with, the payment of debts, will be liable in exoneration of the personal estate; and descended real estate will be liable before personal estate which has been bequeathed in terms, that do not either expressly, or impliedly, show it to have been the intention of the testator, that it should be applicable to his debts, even in cases where the bequest would not, in England, be regarded as specific; as where the testator gives his whole personal estate, or the residue after specific legacies out of it. The following suggested, as the order in which assets are to be administered in this State. First, real, or personal estate, devised for the payment of debts, or, in any manner, directed to be so applied. Second, personal estate not specifically bequeathed; but a bequest of the testator's whole personal estate, or of the residue, after payment of specific legacies out of it, to be regarded as specific. Third, descended real estate. Fourth, personal estate specifically bequeathed. And, lastly, real estate devised.(*a*)

[Ed. Note.—Cited in Floyd v. Hodge, 10 Rich. 159; Pell v. Ball's Ex'rs, Speers, Eq. 524, 528; Laurens v. McGrath, 1 Rich. Eq. 296, 300, 301; Pinckney v. Pinckney, 2 Rich. Eq. 219, 244; Ford v. Gaithur, Id. 271; Hull v. Hull, 2 Strob. Eq. 175, 193; Hull v. Hull, 3 Rich. Eq. 92; Drayton v. Rose, 7 Rich. Eq. 337, 64 Am. Dec. 731; Farmer v. Spell, 11 Rich. Eq. 549; Laurens v. Read, 14 Rich. Eq. 267; McFadden v. Hefley, 28 S. C. 324, 5 S. E. 812, 13 Am. St. Rep. 675; Clyburn v. Reynolds, 31 S. C. 118, 9 S. E. 973.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1052–1057, 1059, 1065, 1068; Dec. Dig. ⟸272.]

[4. *Wills* ⟸473.]

If a will, devising both real and personal estate, be not duly executed to pass real estate, it must be read as if the real estate were not mentioned in it; and no condition, or equity, can be implied, against the heir, from the ineffectual devise of the real estate.(*b*)

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 995; Dec. Dig. ⟸473.]

[5. *Life Estates* ⟸16.]

The modern rule, as between the tenant for life and the remainderman, in relation to the debts of the estate, is, that the tenant for life must keep down the interest; and, if the debts are to be paid, so much of the estate must be sold, as is necessary to pay the debts; or if it be not divisible, the whole must be sold, and the surplus, after payment of the debts, be invested.

[Ed. Note.—Cited in Gillam v. Caldwell, 11 Rich. Eq. 82.

For other cases, see Life Estates, Cent. Dig. § 36; Dec. Dig. ⟸16.]

[6. *Executors and Administrators* ⟸457; *Wills* ⟸848.]

The executor is not liable to the legatee for the loss on sales, of the property bequeathed, made by the sheriff, at prices below its value, where the sale was not made by the will, or caprice of the executor, but at the instance of creditors, under executions for debts of the testator, and was fairly conducted. And if he were liable, it is a question of damages, and the remedy is at law.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1968; Dec. Dig. ⟸457; Wills, Cent. Dig. § 2145; Dec. Dig. ⟸848.]

[7. *Executors and Administrators* ⟸272.]

Where a testator, or intestate, dies after the first day of March, in any year, the crops growing on his lands are assets for the payment of debts, in case of the personal estate bequeathed, although the latter is liable to the debts before the land itself. Vide Act of 1789, § 23, P. L., 494; 5 Stat., 111.(*c*)

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1056; Dec. Dig. ⟸272.]

[8. *Wills* ⟸751.]

[Cited in Laurens v. Read, 14 Rich. Eq. 260; Kirkpatrick v. Chesnut, 5 S. C. 218, to the point that every devise is specific.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1938; Dec. Dig. ⟸751.]

[This case is also cited in Black v. Ellis, 3 Hill, 75, without specific application.]

This was a bill by a legatee to have the descended real estate of the testator applied to the payment of his debts, in exoneration of personal estate bequeathed to the

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complainant. The testator, John *M. Caldwell, of Orangeburgh, who died in June, 1824, by a will dated on 18 November, 1823, after legacies of $1,000 each, to Richard Footman, Edward Footman, and William C. Footman, and a bequest of a slave to the complainant, Charles Warley, left the whole of

(*a*) Pell v. Ball, Sp. E., 6; Godard v. Wagner, 2 Strob. E., 1; Henry v. Graham, 9 Rich. E., 108; Jenkins v. Hanahan, Chev. E., 129.

(*b*) The testator in the principal case died, as it will be seen, prior to the Act of December, 1824, which requires three witnesses to a will of personal, as well as to a will of real estate. Vide Acts of 1824, p. 24.—R.

6 Stat., 238; 1 De S. E., 500; 4 Id., 305; 2 McC. E., 269; Henry v. Graham, 9 Rich. E., 100; Lloyd v. Lloyd, 10 Id., 469; Duncan v. Tobin, Dud. E., 164; Laurens v. McGrath, 1 Rich. E., 269; Pinckney v. Pinckney, 2 Id. 219; Ford v. Gaithur, 2 Id., 270; Ib., 247; Brown v. James, 3 Strob. E., 24; Hull v. Hull, 3 Rich. E., 65; Drayton v. Rose, 7 Id., 328 [64 Am. Dec. 731]; Pell v. Ball, Sp. E., 528; McMullin v. Brown, 2 Hill E., 457; Ib., 256; Rice E., 198; 3 Strob. E., 161; 9 Rich. E., 500; 6 Id. 302; 7 Id., 281; Farmer v. Spell [11 Rich. E., 541], Columbia, May, 1860.

(*c*) Waring v. Purcell, 1 Hill E., 193; 2 McC. E., 84, 376; Freeman v. Tompkins, 1 Strob. E., 54; Clifford v. Read, 3 Rich. E., 218; Rochell v. Tompkins, 1 Strob. E., 117; Gage v. Rogers, 1 Id., 370.

his estate to his brother, Paul J. Warley, the defendant, whom he appointed executor; and by a codicil, dated 6th May, 1824, he bequeathed five other slaves to the complainant, Charles Warley; and then added this clause to his will: "In the event of my brother, Paul J. Warley's dying, I do hereby appoint the said Charles Warley my executor, and immediately then do I give, devise, and bequeath, unto the said Charles Warley, all and singular, my real and personal estate, after the payment of all my debts and legacies: to have and to hold the same unto him, the said Charles Warley, after the death of the said Paul J. Warley, and unto his heirs, executors, and administrators, forever." Neither the will, nor codicil, were attested by any witnesses, and they were, therefore, ineffectual to pass the real estate which descended to the defendant, Paul J. Warley, who was the heir-at-law of the testator; but they were, after much contest, admitted to probate, as a valid testament of the personal estate; and the defendant, Paul J. Warley, qualified as executor.

The testator left a very considerable real estate, and the personal estate was appraised at $34,923.26. He was also very largely indebted, and after his death, judgments to a large amount were recovered by his creditors against the executor. Executions were sued out upon these judgments, and thirty-four slaves were levied on and sold by the sheriff, for cash, at a very low price, and, as it was alleged, much below their value. Other slaves were also levied on, and the sheriff was proceeding to sell them, when this bill was filed to enjoin the sale, and to compel the executor to satisfy the judgments out of the real estate, and restore the personal estate sold out of the same fund.

The injunction was granted; and, afterwards, the cause came on to be heard at Charleston, in January, 1830, before De Saussure, Chancellor, from whose decree the questions made at the hearing will be fully understood.

De Saussure, C. It is conceded, that this is a case of intestacy as to the real estates, which have descended to the defendant, Paul J. Warley, the heir-at-law of the testator; but there is an effectual bequest of the whole personal estate, exclusive of a specific bequest of slaves, and some pecuniary legacies, to Paul J. Warley for life, and on his death to the complainant, Charles Warley, abso-

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lutely. *There are, however, large debts, and these must be paid. The whole estate is liable to the creditors; and they have, therefore, no interest in the question, what funds are first applicable to the payment of debts. But this is a question of great importance to the parties litigating; for one of them is entitled, as has been stated, to the real estate by descent, and the other to the personal estate by the testament of the testator.

It is the English rule, that the personal estate is first liable to the payment of debts; and, indeed, simple contract debts could not attach on the real estate at all. We have adopted the English rule to a considerable extent; but the approximation of real and personal estate, in descent and in other particulars, has shaken the rule a good deal; and even in England, where the desire to protect the real estate, as far as possible for the benefit of the heir, is very strong, it was not denied to the owner to exonerate the personal estate, and by his will to charge his real estate with his debts. When this is done clearly and distinctly, there is no doubt that the will of the testator becomes the law of the case, and binds the parties interested. In the singular combinations of circumstances, which occur in human transactions, there arise middle cases, in which great difficulties are presented. This is one of those cases, in which the following questions arise: First, whether the slaves specifically bequeathed to Charles Warley are not exonerated from contributing to pay the debts of the testator, whilst other assets remain. Second, whether the personal estate effectually bequeathed to Paul J. Warley for life, and at his death to Charles Warley, absolutely, is exonerated from the payment of debts until the real estate descended has been applied to that purpose and exhausted. Third, supposing the real estate descended not to be primarily liable, or, if so liable, actually exhausted in the payment of debts, what proportion of the debts or the unpaid residue of them, should be borne, respectively, by the tenant for life of the personalty and the remainderman. Fourth, whether losses on sales, by the sheriff of the personal estate, should be made good to the remainderman by the executor. Fifth, what is the character and liability of the crop of the year 1824, in which the testator died.

On the first question, there does not seem to be much difficulty. It is one of the oldest and best established rules of the court, as to the application of the assets of a deceased person, that the heir shall not compel a specific legatee to part with his legacy, in case of the real estate descended; and although a creditor may subject the specific legacy to his debt, yet the legatee shall, in equity,

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stand *in the place of the creditor, whether by bond or mortgage, and take as much out of the real assets as such creditor by bond or mortgage has taken from the specific legacy. Such is the language of Lord Chancellor Macclesfield, in the case of Tipping v. Tipping, 1 P. Wms., 729. It would be different, if the real estate should be specifically devised. There, a legatee of personalty, who is defeated of payment of his pecuniary legacy, by the personal assets being exhausted to pay the debts, shall not be allowed to stand in the place of bond creditors, and to

charge the land devised: for every devise of land is specific; but it would be otherwise, if the land had descended to the heir. See Clifton v. Burt, 1 P. Wms., 678. In the modern edition of P. Wms., this case and doctrine are well illustrated by the notes, in which a number of important cases are collected, explained and applied. There is a distinction made in England between bond and simple contract debts, on the ground that bond debts bind the heir and charge the land, and simple contract debts do not. In this country, lands may be subjected to the payment of debts of every description. In reality, however, in the case we are considering, the principal debts are bond debts.

The second question is next to be considered. The counsel for the defendant relied, in his argument, on the case of Harmood v. Oglander, 8 Ves., 106, in which it was decided, according to the argument of the counsel for the defendant in the present case, that the real estate, which did not pass under the will, and therefore descended, should not be first taken as a fund for the payment of debts. That case is obscurely reported on this point, which was little argued: the main question being as to a revocation. Nor does it appear, whether the question, as to the fee-farm rents being taken as a fund to pay debts, had reference to specific legacies of personal estate, or not: and I think we are justified in concluding that it had not. The Lord Chancellor, in that case, at page 124, expressly recognizes the doctrine of Lord Thurlow, which has been the law ever since, "that in the administration of assets, ordinarily, the first fund applicable is the personal estate, not specifically bequeathed; then land devised for the payment of debts; not merely charged, but devised, or ordered to be sold; then descended estates; then lands charged with the payment of debts." It is obvious from this, that personal property, specifically bequeathed, is not liable to be brought in, whilst any of the other funds remain.

It was urged in argument, that the bequest

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of the whole estate, *although effectual only as to the personal estate, was not such a specific legacy, as would subject the descended real estate to debts, prior to the application of the personal estate so bequeathed. By the English law every devise of real estate is specific; but as to personal estate, the leaning of the court is always against considering a bequest specific; and the intent of the testator to make it specific, must be clearly expressed, or distinctly implied. The bequest, in the case we are considering, is on the death of Paul J. Warley, of all the testator's real and personal estate, after payment of his debts and legacies, to Charles Warley, his heirs, executors, and administrators, forever. I have looked carefully into the decided cases, and there is a good deal of difficulty and contrariety among them. There is a case, in which real and personal estate, devised together, as in the one we are now considering, was decided to be specific. It is that of Nisbett v. Murray, 5 Ves., 149. The testator, after some specific bequests, devised and bequeathed all the rest and residue of his estate in Jamaica, which was real and personal, to trustees, with power to sell the same, and to pay over the proceeds to certain legatees; and made the trustees his executors. There was other property of the testator in England and Scotland, which did not pass by his will; and it was decided, that the devise and bequest in Jamaica was specific, and not liable to the debts of the testator, until other funds, consisting of money, and leasehold, were exhausted. The case of Sayer v. Sayer, Pr. Ch., 392, was relied on; and also that of Howse v. Chapman, 4 Ves., 543. In the last case, the testator devised, and bequeathed certain legacies. Some of them failed as being contrary to a statute. He sold, in his lifetime, a part of his real estate, for £1,000, which added that amount to the personal estate, and it went to the next of kin. The debts were directed to be paid out of that fund, in order to protect the legacies. In Edgell v. Heywood, 3 Atk., 358, Lord Hardwicke said, where goods, lands, and chattels, are given altogether as one fund, and the whole are subject to the exception of what was given before, this amounts to the same, as if he had given them subject to what was given before; and he, therefore, held a legacy, given before, to be a charge on the lands. In Herne v. Meyrick, 1 P. Wms., 201, the testator owed debts by bond, and devised his lands in tail to his heir; and he gave several legacies, and made his heir his executor. The heir paid the debts out of the personal estate, whereby there was a deficiency to pay the legacies; and it was held, that the legatees were without remedy, the lands being specifically devised; sed secus, if the land had descend-

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ed to *the heir-in-fee. So in Clifton v. Burt, 1 P. Wms., 678, and Forrester v. Lord Leigh, Ambl., 171. Mr. Bridgman, in his Analytical Digest, 2 vol., p. 162, tit. "Legacy and Legatee," 4, § 211, after stating a number of the embarrassing cases, says, "From hence it seems, that the court, where specialty creditors exhaust the personal fund, will marshal assets in favor of legatees, as against the heir in respect of assets descending, and as against a residuary legatee, but not against a specific devisee." So, where a testator, by his will, ordered his trustees to possess themselves of all his estate and substance, and to pay his debts; this was held to be a charge of the debts on the real estate; and the assets were ordered to be marshaled for the legatees, to let them in so far as the personal estate had been paid towards the debts.

Foster v. Cook, 3 Bro. C. C., 347. And see Bradford v. Foley, Ib., 351, note.

This is a complex subject, and the numerous cases are not easily reconcilable; but upon the whole, I think I am warranted in saying, that the legatee is entitled to be reimbursed, out of the real estate descended to the heir, so much as has been, or may be, paid to creditors, out of the personal estate bequeathed; and this more especially, when the real estate descended to the heir, contrary to the intention of the testator: who devised it to the person to whom he bequeathed his personal estate, and the devise failed, merely because he neglected the formality prescribed by the statute, of having three witnesses to his will. To this it may be added, that the constant solicitude to protect the real estate, for the heir-at-law, which runs through the English cases, does not exist here, but is contrary to the leading principles of our system. Upon the whole, I am of opinion, and so decide, that the debts of the testator must be paid out of the real estate descended, before resort can be had to the personal estate bequeathed, as has been done in this case.

The third question is, supposing that the real estate descended is not primarily liable, or, if it is so liable, should be exhausted by the payment of debts, what proportion of the debts, or of the unpaid residue of them, should be borne, respectively, by the tenant for life of the personalty, and the remainderman. The proportion which has been settled by the decided cases, is, that where the debts are not pressing, and do not require a sale, the tenant for life must keep down the interest; but if a sale be necessary, the tenant for life must pay one-third of the debt, and the remainderman two-thirds.

The fourth question is, whether losses on the sales, by the sheriff, of the personal property, should be made good to the remainderman by the executor. It does not appear to

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me, that the executor is *bound to make good any supposed losses which may have occurred on the sales of the personal estate, made by the sheriff. The sales were made, not by the will, or caprice, of the executor, but by creditors pressing their legal rights, and enforcing sales under their judgments and executions: and the sales appear to have been fairly conducted. The claims of creditors were paramount, and the personal estate was liable to them; and they were not bound to wait for the decision of a question of refined equity, between the legatee and heir. Besides, this is really a question of damages, and I do not perceive clearly, that this Court could give relief.

The fifth question is as to the character and liability of the crop of 1824, the year in which the testator died. It appears to me, that the statute is peremptory.(d) The crop is expressly made assets for the payment of all debts, and must be so applied at all events. No question can arise between heirs and devisees, unless the crop is more than sufficient to pay the debts. In such a case questions might arise as to the surplus; but there is no surplus alleged here.

It is therefore ordered, and decreed that the specific legacies of slaves be protected until all other funds of the estate shall have been exhausted, and that the debts of the estate be paid out of the real estate descended to the defendant, Paul J. Warley; for which purpose a sale of the lands shall be made, at such time, and on such terms, as the counsel of the parties may propose, and the Court order; and that after payment of the debts still remaining unpaid, the surplus, arising from the sale of the lands, be applied to reimburse the legatee, Charles Warley, the amount of debts, paid by sales of the personal estate bequeathed to him, and also to satisfy the pecuniary legacies under the will. Should the lands not be sufficient to pay the debts, then the tenant for life of the personal estate shall pay one-third of the residue of the debts, and the remainderman two-thirds of such residue. The crop of 1824, in which year the testator died, is to be primarily applied. The costs to be paid out of the estate.

The defendant appealed from this decree, and the appeal was argued at the present term, by King for the appellant, and Petigru, contra.

HARPER, J., delivered the opinion of the court.

The principal question involved in this case, is, whether the real estate descended to the defendant, Paul J. Warley, is liable for the payment of debts, in preference to the general personal estate, given to Paul J. Warley for life, and after his death to Charles Warley. There is no doubt, but that

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it is liable, in preference to the slaves *specifically bequeathed. Under the English law, I should incline to differ from the conclusion of the Chancellor with respect to its liability; but the case may stand on a different footing in this State. Not that I think we are at liberty to depart from an established rule of law, because we may think it inconvenient, or unsuitable to our policy. But when our legislation innovates on the English law, that legislation must be pursued to its necessary consequences. The law in our State, on the subject of the marshaling and administration of assets, is very unsettled, and I shall go into it somewhat more fully, than would be necessary for the determination of the present case.

The Acts, which appear to have effected an alteration in the English law, are, first, the

(d) Act of 1789, sec. 23, P. L., 494; 5 Stat., 111.

statute 5, Geo. II, c. 7, P. L., 250, 2 Stat., 570, by which lands are made liable to the payment of all debts, to the same extent, to which they were before liable for the payment of specialty debts: and second, our own statute of distributions,(e) by which the character of the heir-at-law, as understood in England, has been entirely altered: and which has taken away the ground of many of the English decisions, by which the apparent intention of testators has been violated in favor of the heir-at-law. The general rule in England seems to be perfectly well settled, as laid down by Lord Thurlow, in Donne v. Lewis, 2 Bro. C. C., 263, and repeated by Lord Eldon, in Harmood v. Oglander, 8 Ves., 124, "that in the administration of assets, ordinarily, the first fund applicable is the personal estate not specifically bequeathed; then land devised for the payment of debts, not merely charged, but devised, or ordered to be sold; then descended estates; then lands charged with the payment of debts." And he might have gone on: then personalty specifically bequeathed; and, lastly, land devised, so far as respects specialty debts. We are to inquire, whether it is possible to retain this order, consistently with our statutes?

Under the St. 5, Geo. II, c. 7, (supra,) it has been held, and perhaps properly, that the distinction between land and personal property, in respect to their liability for the payment of debts, has not been entirely abolished. The statute provides, that lands shall be liable to all debts, "in like manner, as real estates are, by the law of England, liable to the satisfaction of debts due by bond, or other specialty." P. L., 250. But by the law of England, the personal estate was the primary fund for the payment of specialty, as well as simple contract, debts. This seems to be somewhat in conflict with the decision in D'Urphey v. Nelson, 4 McC., 129.(f) note, that lands are liable to be taken in execution,

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in the first instance, under *a judgment against the executor. But in the case of Dunlap v. Dunlap, 4 De S., 329, it was held, that the personal estate was the primary fund for the payment of debts: and our practice has been, in cases of intestacy, to apply the personal estate in the first instance. Beyond this, we have settled nothing. It is, perhaps, beneficial to infant heirs, and legatees, that the more stable and permanent property should be reserved to the last.

The English rule is, that the personal estate, not specifically bequeathed, shall be first applied; and then, lands devised for the payment of debts. Can we adopt this consistently with our own laws? When a man devises land for the payment of his debts, his obvious meaning is, that that land, and, if it is sufficient, nothing else, shall be so applied. Why shall not his intention have effect? The English cases admit, that a testator may, if he expresses himself with sufficient clearness, exempt his personal estate, as among his legatees, and representatives, from the payment of his debts, and throw the burden on the real. The rule, laid down by Lord Thurlow in Ancaster v. Mayer, 1 Bro. C. C., 462, and recognized in many cases, is, that there must be either express words, or declaration plain, to exempt the personal estate. The mere devise of the land is not sufficient with the English courts; because, in general, land is not liable to debts, unless the testator makes it so. In favor, therefore, of the heir, who, according to their policy, is not to be disinherited but by express words, they make this somewhat strained construction: that by devising land for the payment of debts, the testator means, that his debts shall not go unpaid, but that the land shall come in aid of the personal estate. But is it possible to make such a construction here, where, without any act of the testator, the land is liable to all debts, as well as the personal estate? This would be to make his words absolutely unmeaning, and to strike out that part of his will. When a testator in this State devises land for the payment of debts, it is a declaration, as plain as words can make it, that the personal estate shall not pay those debts, if the land be sufficient. Take, for example, the case of Adams v. Meyrick, 1 Eq. Ca. Abr., 271, which has been denied in subsequent cases. A testator devised land to trustees, "in trust that they do, and shall, by mortgage, or sale, of the said premises, or any part thereof, pay off and satisfy his debts," with legacies and personal expenses. He devises all his goods, chattels, and household stuff in such a house, to another: and then goes on in these words: "all the rest and residue of my personal estate, I give and devise to my wife, whom I

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make sole executrix." What *other conceivable meaning could we attach to this, in this country, but that the land should pay the debts, and the wife take the personal estate, exempted from them? So in Samwell v. Wake, 1 Bro. C. C., 144, where the devise was, "I will, and desire, that my debts and legacies shall be paid, and for that purpose I charge all my estates with the same; and, that it may be more easily done, that Sir William Wake, and Sir John Peach Hungerford, (the defendants,) and their heirs, shall sell the estate, and apply the money to the payment of debts and legacies." But it is useless to multiply references to the English cases, as I have held them inapplicable to us.

The English rule goes on, after estates de-

(e) 5 Stat., 162.

(f) 1 Brev. Rep., 289; Jones v. Wightman, 2 Hill L., 579; Vernon v. Valk, 2 Hill Eq., 260; Bird v. Houze, Sp. E., 250; Rice E., 387, 8; Hull v. Hull, 3 Rich. E., 86, 7, 8; Rice E., 373; Sp. E., 524; 9 Rich. E., 327; 8 Rich. L., 393; 3 Rich. E., 92, and cases there in note.

vised for payment of debts, "then descended estates; then lands charged with the payment of debts." That is to say, with respect to bond debts, to which alone descended estates are liable, they shall be liable in preference to lands devised, although charged with the payment of debts. What is the meaning of the word charged? There is no doubt about its meaning in England: it is to make land liable to debts, to which they would not be liable but for the act of the testator. Is it possible to attribute that meaning to it here, where lands are liable to all debts, by law, independently of any act of the testator? But we are bound to give meaning, and effect, to every part of a will if we can. If a testator should think proper to use that word here, there would be nothing ambiguous in it. Every one would at once understand it to import, that the burden of the debts should be thrown on the real estate, in exemption of the personalty. It would be a direction to pay the debts out of that estate: and equivalent to a devise for the payment of debts. If a testator should devise land, charged with the payment of debts, the only meaning we could possibly give to it, would be, that the debts should be paid out of the land, and if anything remained, that should go to the devisee.

There are some cases, in which a devise of the testator's whole personal estate, or of the residue of his personal estate, has been considered specific; as where the intention has been clearly enough expressed, that the devise should take it exempted from the payment of debts. Such was the case of Adams v. Meyrick, 1 Eq. Ca. Abr., 271, before referred to, which has been since denied. Such also was the case of Wainwright v. Bendlowes, 2 Vern., 718, in which the testator devised land to be sold for the payment of his debts, and the residue, after payment of his debts, among three persons. He willed his household goods to go

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with his house, *and the residue of his personal estate to his sister, whom he made his executrix. Lord Hardwicke, in Inchiquin v. French, Ambl., 38, censures the reasoning of the Chancellor in this case, but I do not understand the case itself to be questioned in any of the subsequent cases. In Walker v. Jackson, 2 Atk., 624, the testator devised land to be sold for the payment of debts, legacies and funeral expenses, and appointed two executrixes: and by a codicil he devised to his executrixes all his personal estate not before devised: This was held to be specific, on the ground, that, as they would have been entitled in the character of executrixes, to the surplus of the personal estate, after payment of the debts, the only effect of the codicil must be, to give them the whole specifically. Other cases of this sort are Webb v. Jones, 2 Bro. C. C., 60; and Burton v. Knowlton, 3 Ves., 107. In Watson v. Brickwood, 9 Ves., 453, the testator gave his whole personal estate to a nephew, he paying thereout his legacies, funeral expenses, and simple contract debts. This was held not to exempt the personal estate from specialty debts. The master of the Rolls quotes the ancient rule, as laid down by Lord Nottingham, that "the law charges the debts upon the personal estate, and nothing can discharge it, but exclusive, and expressly negative words, whether in the case of hœres factus, or hœres natus.

There is no doubt, but that if in England a testator gives his whole personal estate, and charges his debts on his real estate, the personal estate must be first applied; because the technical signification of the word charge is, a direction that the land shall come in aid of the personalty. And so, doubtless, if he suffers the land to descend. Yet when a testator gives his whole personal estate, the obvious and literal import of the word is, the whole personal estate, of whatever particulars it may be made up; which the legatees cannot have, if debts are to be paid out of it. Why are these words differently construed in England? The reason has been already explained. The testator, as against creditors, cannot exempt his personal estate from the payment of debts. As said by Lord Nottingham, the law charges the debt upon the personal estate. The law exempts the real estate, in the hands of the heir, from the payment of debts; and, generally speaking, it is not considered a fund for the payment of debts at all. The testator must be supposed to be aware of this; and when, therefore, he neglects to provide for the payment of his debts out of his real estate, and to exempt his personal, though he bequeathed his whole personal estate, this must neeessarily be un-

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derstood, as subject to the payment of *debts. But can this reasoning apply in this country, where the law charges all debts alike upon real, and personal estate; and the testator bequeathing his whole personal estate, knows, that there will be lands in the hands of his heir, on which creditors may come, directly, for the satisfaction of their demands? I think not; and I conclude, therefore, that where a testator devises his whole personal estate, and suffers his lands to descend; or where after giving specific legacies, as in the cases of Wainwright v. Bendlowes, and Walker v. Jackson, (supra,) he gives the residue; this is to be considered specific, and the lands descended are first liable to debts. Of course, if a testator merely gives the residue, this must mean after the payment of debts; and still more so, if he gives his personal estate, expressly "after payment of debts."

Still I must suppose, that personal property, although specifically bequeathed, is liable to debts in preference to land devised. Every devise of land is specific. When a testator gives property specifically, of course he does not intend that it shall pay debts. If, however, he does not leave a sufficient sur-

plus for payment of debts, his intention cannot have effect, and the law attaches upon the property, as if no disposition had been made. The st. 5, Geo. II, c. 7, only makes land liable to all debts, as lands are liable in England to debts by specialty. But in England, the personal estate is still first liable to specialty debts: and, our decisions have declared it the primary fund. It follows, that if the whole real, and personal estate, are devised specifically, the debts must be paid out of the personal estate. If a specific legacy be taken by creditors, the legatee has no right to contribution from the devisee of the land; although the devisee of the land would, in like case, have a right to be reimbursed by specific legatees. There may seem to be some hardship, and irregularity in this, and perhaps it might be well that the legislature should apply a remedy; but it is not for me to alter the law. I think, however, that specific legatees would have a right to be reimbursed out of land descended.

It follows from the views that I have taken, that assets are to be administered in the following order: First, real, or personal estate devised for the payment of debts, or in any manner directed to be so applied. Second, personal estate not specifically bequeathed: and a bequest of the testator's whole personal estate, or of the residue after specific legacies out of it, to be regarded as specific. Third, descended real estate. Fourth, personal estate specifically bequeathed. And, lastly, real estate devised.

In the present case, the testator gives, by

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his codicil, the whole *of his personal estate, after the death of the defendant, Paul J. Warley, to the complainant, Charles Warley. If this were all, I should think the legacy specific: but the terms of the codicil are, "all and singular, my real, and personal estate, after the payment of all my debts and legacies." The argument is, that the devise of the land having accidentally failed, contrary to the testator's intention, the complainant ought to be in as good a situation, as if the personal estate alone had been given; and, indeed, has a stronger equity: and that the words, "after payment of all my debts and legacies," having been intended to apply to both the real, and personal estate, should, by an equitable construction, and to fulfil the intention, be referred to the real estate. If these words had been used in England, in a will duly executed to pass real estate, the effect of them would have been to create a charge upon the land. In this State, they would have had no effect, as to debts, but have left the property liable, as at law. The question is, whether I am not bound to apply these words to the bequest of the personal estate; and I think I am so bound.

From the authorities, I am not at liberty to suppose, that the testator's intention was accidentally disappointed. The settled rule is, that when a will is not duly executed, according to the requisitions of the statute of frauds, we are not at liberty to read the will as to the real estate. In Hearle v. Greenbank, 1 Ves., 298, where the will was void as to the land, on account of the infancy of the testatrix, Lord Hardwicke held, that he could not look into the will at all, to raise a case of election. There was no will of the land. In Boughton v. Boughton, 2 Ves., 12, where the will was not duly executed to pass real estate, but real estate was devised, and a legacy given to the heir, on the express condition not to dispute the will, he held, that the express condition, annexed to the legacy, made a case of election; and he distinguishes it from the case of an implied condition, attempted to be raised, when by a will, not duly executed, a legacy is merely given to the heir, and the land devised away. He says it was merely guessing at the intent of the testator, who might leave it for that very view. In Buckeridge v. Ingram, 2 Ves., Jr., 666, the master of the Rolls says, "I cannot read the will, without the word real, in it; but I can say, for the statute enables me, and I am bound, to say, that if a man, by a will unattested, gives both real, and personal estate, he never meant to give the real at all."

There are other cases to the same effect, and though Lord Alvanley in Ex parte the Earl of Ilchester, 7 Ves., 372, and Lord El-

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den, *in Sheddon v. Goodrich, 8 Ves., 497, seem to express some dissatisfaction with the rule, not the slightest doubt is expressed of its existence. Perhaps, it is not without some show of reason. One of two suppositions must be made: either that the testator, being ignorant of the law, supposed that witnesses were not necessary to a will of real estate; or, that, although he may have intended to give the land, when the will was drawn, yet he altered that determination, and concluded to give only the personal estate. The former, as Lord Hardwicke says, would be only a speculation on the testator's intention, and opposed to the maxim, that every man is presumed to know the law; and perhaps it is safer, and more legitimate, to conclude, that the testator intended what he has done. Then I am to read this will as if the words "real and" were struck out. But I cannot strike out anything else. On what principle can I strike out the additional words, "after payment of all my debts and legacies?" The testator knew what was in his will, and I must suppose him to have intended it to operate as it stood, and every word in it to have effect, except as to the giving of the real estate. The words in question, can only have the effect of rendering the personal estate subject to the payment of debts. On this point, therefore, the decree of the Chancellor must be reversed.

On another point, I differ with the Chancellor, and that is with respect to the man-

ner in which the debts are to be apportioned between the tenant for life and the remainderman. The old rule was as stated by the Chancellor; but this has been exploded by more modern decisions. The rule now is, that the tenant for life must keep down the interest; but if the debts are to be paid off, so much of the estate must be sold as is necessary to pay them; or if it be not divisible, the whole must be sold, and the surplus invested, so that the tenant for life may receive the interest during his life. White v. White, 4 Ves., 32; Lord Penrhyn v. Hughes, 5 Ves., 107.

In this case, the whole estate has been sold. The debts must be paid off out of the proceeds of the personal estate, and the surplus of that estate invested, so that the defendant may receive the interest during his life; the complainant then to receive the principal; and it is referred to the master to report on the proper mode of investment. The defendant must receive the proceeds of the real estate. In other respects, the Chancellor's decree is affirmed.

JOHNSON, J., and O'NEALL, J., concurred.

Decree modified.

Bailey, Eq. *412

*THOMAS H. S. THAYER, Administrator of Ebenezer Thayer, v. ELIZABETH DAVIDSON.

(Charleston. April. 1831.)

[1. *Limitation of Actions* ⟸45.]

A purchaser of personal property holds adversely to a prior mortgagee, at least from the time of the condition broken; and he will be protected by the statute of limitations, although he have notice of the mortgage. The rule in this respect differs in relation to real and personal property, from the difference in the effect of a mortgage of the one species of property and the other upon the legal estate of the mortgagor. Vide Thayer v. Cramer, 1 McC. Eq. 395.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 233–239; Dec. Dig. ⟸ 45.]

[2. *Limitation of Actions* ⟸45.]

Recording is notice of a mortgage of personal as well as of real property, in all cases where the mortgage is required by law to be recorded; but such notice only defeats the plea of purchase for valuable consideration without notice, and will not, in the case of personal property, deprive a purchaser of the benefit of the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 236; Dec. Dig. ⟸45.]

[3. *Limitation of Actions* ⟸45.]

The operation of the statute of limitations in the case of a purchaser with or without notice from a trustee or mortgagor as against the cestuy que trust or mortgagee, and the effect of recording as notice, in reference to real or personal property examined and discussed; and the case of Thayer v. Cramer, 1 McC. Eq. 395, questioned; by Harper, C., sed vide Smith and Cuttino v. Osborne, 1 Hill Eq. 340.(a)

[Ed. Note.—Cited in Maples v. Maples, Rice, Eq. 313.

For other cases, see Limitation of Actions, Cent. Dig. § 236; Dec. Dig. ⟸45.]

[This case is also cited in Thrower v. Cureton, 4 Strob. Eq. 159, 53 Am. Dec. 660, on the necessity of alleging that fraud was discovered within statutory period before filing bill, and in Norton v. Lewis, 3 S. C. 32; Simms v. Kearse, 42 S. C. 48, 20 S. E. 19, on the question whether mortgage involves a trust relationship.]

This was a bill to enjoin proceedings at law, and to be relieved against a replevin bond; and the defendant having answered, the cause was heard at Charleston in February, 1829, by Harper, Chancellor, from whose decree the case will be sufficiently understood.

Harper, C. On 17 January, 1818, James Lynah executed his bond to the commissioner in equity, with condition for the payment of $13,000, in three equal annual instalments, the first of them to be paid on 1 January, 1819; and to secure the payment of this bond, he at the same time mortgaged several slaves including one named Boston, who is in question in this suit. The bond is credited with $3,000, on the day of its execution, and is also credited with several payments of interest; but no more of the principal seems to have been paid. The mortgage was duly recorded in the office of the secretary of State a few days after its execution; and the bond and mortgage were assigned by the commissioner in equity to the defendant, Mrs. Davidson, for whose benefit they were taken.

On 10 December, 1818, James Lynah, sold the slave, Boston, to one John Keller, and executed a bill of sale, which does not appear to have been recorded. In March, 1820,

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Keller sold Boston *to Mrs. Mary Cassin, but no bill of sale appears to have been executed; and on 20 April, in the same year, Mrs. Cassin executed a bill of sale to Ebenezer Thayer, the complainant's intestate. Mr. Page, a witness examined at the hearing, testified, that he was the agent of Mrs. Cassin, in making sale of the slave to Mr. Thayer, that he knew nothing of the mortgage, nor did Thayer, so far as he knows. Mr. Thayer, or the complainant, as his administrator, remained in possession of Boston until 31 July, 1824, when he was seized by the sheriff, as the agent of the defendant, Mrs. Davidson, for the purpose of satisfying her mortgage. The complainant, conceiving himself to have a good title to Boston, commenced an action of replevin against the defendant, and the slave was restored to his pos-

(a) Nixon v. Bynum, 1 Bail. L., 148; Drayton v. Marshall, Rice E., 374 [33 Am. Dec. 84]; Wright v. Eaves, 5 Rich. E., 81; 10 Id., 582. See Steele v. Mansell, 6 Rich. L., 437; 10 Rich. E., 149.

session on his entering into the usual replevin bond. On the action coming on to be tried, a demurrer was sustained, on the ground, as it is alleged, that the action of replevin will not lie, except for a distress for rent in arrear. During the pendency of the action, the slave, Boston, died in the complainant's possession: by which accident, he alleges, he was prevented from restoring Boston, conformably to the condition of the replevin bond. The bill states, that the defendant is about to proceed, at law, on this bond, and prays relief against it, and that the defendant may be perpetually enjoined.

Several questions arise under the pleadings; but the principal point made in the case, and, indeed, the only one debated at the hearing, was, whether the complainant, in right of his intestate, had acquired a good title by the statute of limitations; and this depends upon the question, whether the purchaser of a slave, who is under mortgage, the mortgage being duly recorded, can acquire a title by the statute against the mortgagee. The case of Thayer v. Cramer, 1 McC. Eq. 395, was relied on by the defendant's counsel; it having been held, in that case, that the purchaser from a mortgagor, with notice, was not protected by the statute of limitations, and that recording was notice. But that was a case of real property, and does not, I think, conclude one involving personal estate. The law on this subject, however, is of much interest to the community, and I shall consider the whole subject, in relation both to real, and to personal property. And, first, as to real estate.

In general, it is enough for me, that the Court of Appeals has decided a question, whatever my own opinion may be on the point decided. Its decisions are the law of this court; and in addition to that official respect, which I am bound to pay to them, I yield the utmost personal respect to the

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discrimination, and research, *which they generally exhibit. Several circumstances, however, make me hesitate with respect to the case in question.

In the first place, the determination seems inconsistent with the views taken by the same court, a short time before, in the case of Hampton v. Levy, 1 McC. Eq. 107; and is hardly reconcilable with the principle repeatedly recognized by the court, that the rule, that the statute of limitations does not apply, as between trustee and cestuy que trust, applies only to actual, technical trusts, and not to such as are raised by construction of law. Executors of Fisher v. Executors of Tucker, 1 McC. Eq. 169. Van Rhyn v. Vincent, Ib., 310.

Registration's being notice, does not seem to have been the disputed point in the case. The argument turned on the question, of a purchaser with notice being held a trustee; and the point of recording being notice seems rather to have been conceded by the counsel, than considered by the court.

It is said in the case, generally, that the statute will not run in favor of a purchaser from a trustee, or mortgagor, with notice; but no qualification is made with respect to the particular case, where the cestuy que trust, or mortgagee, has knowledge of such conveyance, and being under no disability, takes no legal steps, for a period of time long enough for the statute to run, the purchaser in the meantime holding adversely, that is, claiming the entire property in his own right; a qualification which seems clear on authority, and principle, and important in practice.

It seems to me, that the doctrine contended for, if unqualifiedly admitted, would, in many cases, operate injurious consequences to individuals, approaching the effect of fraud, and would lead to uncertainty, and incongruity, in the law relating to possession. Under these circumstances, and in order that the subject may be again brought under the consideration of the Court of Appeals, I venture to submit my own views of the doctrine. If I assume too much in doing so, it is entirely in the power of that court to correct the error.

Apart from the authority of Thayer v. Cramer, my opinion would be: First, that in favor of a bona fide purchaser from a trustee, or mortgagor, without notice, the statute will run from the time of the conveyance; provided the cestuy que trust be under no disability, and the debt be due, or the mortgage forfeited; and provided the purchaser continues to hold adversely, from the time of the conveyance. Second, that in the case of a purchaser with notice, the statute will run from the time when the mortgagee,

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or cestuy que *trust, has knowledge of the conveyance; provided, as before, that the mortgage be forfeited, and the cestuy que trust under no disability, and the purchaser continues to hold adversely. Third, that where a sufficient time has elapsed for the statute to run, and the complainant charges a purchaser with notice, he must charge by his bill, that he came to the knowledge of the conveyance, within the statutory time, before the filing of his bill. Fourth, that although recording may be notice for some purposes, it is not so for the purpose of preventing the operation of time, or the statute of limitations.

I do not know that there has been any difference of opinion as to the case of a purchaser without notice. In general, however, such a purchaser is not put to rely on the statute. He may plead that he is a bona fide purchaser, for valuable consideration, without notice. He has acquired the legal title, and equity will not interfere against him. Of this plea, it would seem that, in this country, when he acquires the legal title by a

conveyance from the mortgagor, he may avail himself, even if he took his conveyance before the mortgage was forfeited; but there is certainly much more reason for permitting him to avail himself of the statute of limitations. That he should have purchased without notice, and retained possession, apart from our registry Act, imples no laches in the cestuy que trust, or mortgagee; but that he should have retained possession, long enough for the statute to run, without any proceeding on their part to vindicate their rights, infers gross, and unaccountable laches. To be sure, there must be no disability on their part. If the cestuy que trust be an infant, or the debt not due, or the mortgage not forfeited, time will not run. The rule is universal, that if it be not in the party's power to vindicate his rights, by proceeding at law, the law will not permit him to lose them. If there be a contract to be discharged in futuro, time will not run until the contract be forfeited. Tenant for life, or for term of years, can acquire no rights by length of possession, during the continuance of their terms, although they may extend to fifty years. And the possession must be adverse. To be adverse, the possession must be in a right, inconsistent with the right of the party, afterwards claiming. If the party in possession claims the unqualified property, in his own right, that is adverse to all the world. But if a purchaser, without notice, on being informed of the mortgage, should admit the mortgagee's right, and consent to hold subject to it, the possession would be no longer adverse. He would then stand, to all intents, in the place of the original mort-

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gagor, and hold a title, consistent *with the right of the mortgagee. He would be in the situation of one, who had purchased the mortgagor's right, or, as we inaccurately term it, the equity of redemption; which would be a case of express trust. But on this part of the subject, I am not aware, that there can be any difference of opinion.

If it is inferred from the case of Thayer v. Cramer, that in no case can the statute of limitations run in favor of a purchaser with notice, I do not see how that can be reconciled with what is said by the Court of Appeals, in the cases before referred to, that the rule, that the statute of limitations will not run, as between trustee and cestuy que trust, applies only to actual, technical trusts, and not to such as are raised by construction of law. That a purchaser with notice, is only a trustee by construction of law, I suppose will not admit of question. There is no actual, direct trust, created by his conveyance; no trust is committed to him, nor does he undertake the performance of one. He is made, constructively, a trustee, on the ground of his fraudulent intention to destroy the trust. A purchaser without notice has never been held a trustee at all, either constructively, or otherwise. He stands in the situation of any individual, gaining possession of property, under a claim of right, to which another has an equitable title. It can hardly be necessary to quote authority in support of the doctrine recognized by the Court of Appeals. It is, however, supported by ample authority; and has never been doubted, or denied, so far as I can discover. I refer more particularly to Lockey v. Lockey, Pr. Ch., 518; Townshend v. Townshend, 4 Bro., C. C., 550; Beckford v. Wade, 17 Ves., 98; and Bonney v. Ridgard, cited very fully by the master of Rolls in the last case. From these cases we infer, that, in general, time will bar in cases of constructive trust, in analogy to the statute of limitations. Why, then, does it not operate in favor of a purchaser with notice, not strictly on the ground of trust, but of fraud? Time does not operate in favor of an actual trustee, because his possession is not adverse; he holds in the right of his cestuy que trust, and subject to his title; and it was intended, in the creation of the trust, that he should hold possession. There is nothing to put the cestuy que trust upon the assertion of his right. Not so with respect to a constructive trustee, who claims in his own right. The case of Bonney v. Ridgard (supra,) was one of a sale by an executrix to a purchaser, with notice, in fraud of her children; and Lord Kenyon said, that it was a gross and flagrant fraud, a mere trick to play the estate into the hands

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of a purchaser, who had full *notice, in payment of a debt due to him by the husband of the executrix; and if the children had sued, when they came of age, they might have been relieved; but they had not done so, and were barred by time, in analogy to the statute. It may be observed, that in this case nothing is said about discovery by the cestuy que trust, but I suppose it was taken for granted, that they knew the circumstances. On this footing it is placed by Lord Redesdale in the case of Hovenden v. Lord Annesley, 2 Sch. & Lef., 633. After adverting to the position, which had been taken, "that trust and fraud are not within the statute," he adds, "if a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the cestuy que trust, and if the only circumstance is, that he does not perform his trust, his possession is according to his title; just as in the case of a lessee for years, though he does not pay his rent for fifty years, his possession is no bar to an ejectment after the expiration of this term, because his possession is according to the right of the party, against whom he seeks to set it up. But the question of fraud is of a very different description; that is a case where a person, who is in possession by virtue of that fraud, is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree of the

Court of Equity, founded on his fraud; and his possession in the mean time is adverse to the title of the person, who impeaches the transaction on the ground of fraud." In general there is no doubt about the rule, that the statute will run from the time that a fraud is discovered; and there would seem to be an incongruity, in making an exception with respect to this particular species of fraud. Such a construction seems to me contradictory to the spirit and policy of the statute. If, by any other sort of wrong, an individual obtains possession of the property of another, the statute runs from the time of his possession, even though the owner may be ignorant of the wrong thus done: the law imposes on persons the responsibility of looking after their property, and knowing what has become of it. An exception is made in the case of fraud, because fraud implies that the party is not aware of the injury done him: and in most cases, there is nothing to put him on his guard, and he has no present means of detection; but when it is actually discovered, the reason of the exception ceases.

If we suppose both parties to have notice, the purchaser, of the incumbrance, and the mortgagee, of the sale, it may be said that the purchaser suffers no hardship: he had fair warning, that he was liable to be deprived of the property at any time; and it

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was *his folly to purchase under such circumstances. But this was the very case in which the statute was intended to apply: I speak, of course, of a case where the purchaser continues to hold adversely, claiming the entire property in his own right. It supposes, that the right of individuals may be wrongfully usurped, and fixes a period, within which they shall be vindicated, by proceeding at law, under pain of losing them. If the parties are in pari delicto the statute prevails, for the peace of the country; so it is, if the parties be equally innocent, if neither have notice; only in the case of fraud, against which ordinary prudence cannot guard, and which may be practised without chance of detection, the court, by an equitable construction, fix the time of discovery as that from which the statute shall run.

Lapse of time will raise the presumption of satisfaction of a mortgage, unless the mortgagor pays interest, or does some other act, or makes some admission, recognizing its validity. The same lapse of time, I suppose, would quiet the title of a purchaser with notice. But will the acts or admissions of the mortgagor bind the purchaser, and make the property liable in his hands, at any distance of time? It would seem to follow; and yet there appears to be a legal incongruity, in permitting the admissions of one person to bind another, whose rights are certainly adverse to him.

If a case should occur of a purchaser from a trustee, with notice, and yet there should be no fraud in the transaction, (a conceivable case, as where the property was claimed under a defective title, and the trustee mistakenly, but bona fide, gave it up,) I suppose that the statute would run from the time of the conveyance, whether the cestuy que trust had discovered it or not. I infer this, because a case of fraud is the only exception, which the authorities make to the statute's running, from the time when an adverse possession is taken, if there is no disability. If, without the trustee's concurrence, one obtained possession of trust property by a trespass, there can be no doubt, but that the statute would run against the trustee, and the cestuy que trust would be bound. I can perceive no ground, in principle, to make an exception in a case, where the trustee honestly, and without collusion, or the intention to prejudice the right of his cestuy que trust, acquiesced, and transferred the possession. Actual trust it is not, for the party did not receive the property on any expressed trust: nor is it a constructive trust, for the party is made a trustee by construction, only on the score of his fraud; and besides, there is no rule that the statute will not run in cases of constructive trust. Fraud is excluded by

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the terms of the proposition: *on what ground of law then, can the operation of the statute be suspended?

Such certainly seems to have been the opinion of the Lord commissioner, Ashurst, in the case of Townshend v. Townshend, 1 Bro. C. C., 551. In that case, a term was assigned by the trustee to a purchaser for valuable consideration, who had notice. The purchaser held possession long enough for the statute to run. Against the effect of the statute, it was argued, that the transaction was a fraud, the parties having notice; and, therefore, the statute would not run. The Lord commissioner would not infer fraud, as the mother, to whom the term had been limited for life, with remainder to her children, joined in the transaction. "It is said by the plaintiff, that the defendants took the term as a trust, with notice; but it is unnatural to infer fraud in this case, for the mother must be presumed to defeat the provision for her own children. In this view, one would rather infer, that the parties knew that the settlement was voluntary, or that some compensation was made to the children of the second marriage. Then as to trusts being an exception to the statute of limitations—the rule holds only between trustees and cestuys que trust. It is true that a trustee cannot set it up against his cestuys que trust: but this is merely the case of a trustee by implication, and as such affected by an equity; but that equity must be pursued within some reasonable time. Both courts of Law and Equity preserve an analogy to the statute of limitations." 1 Bro. C. C., 554.

Stress has been sometimes laid on a dictum of Lord Hardwicke in the case of Botetter v. Allington, 3 Atk., 459, that a person who has taken conveyance from a trustee, cannot shelter himself under a plea of the statute of limitations. This is probably not accurately reported; and at all events, it must be taken with the qualification, that the person had notice; and it will admit the further qualification, that the cestuy que trust had not discovered the transaction. In the same case, however, Lord Hardwicke decides, that one who had taken a presentation to a church living, from a trustee with notice, was protected by a statute of limitation; on the ground that there was no fraud. It is true, that there are expressions in the case which might lead us to infer, that the case of a church living was a peculiar one; and that the statute was more strictly construed in favor of the peace of the church. But he manifestly decides, on general principles, applicable in all cases, that if there had been fraud, the statute would not have availed the presentee; and there being no fraud, notice was immaterial. "A man might know

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*that Marmaduke Allington was a trustee, without knowing that he was guilty of fraud, or a breach of trust, for Henry might conceive that Marmaduke had a right to present in the capacity of a trustee, and, therefore, notice is of no consequence." 3 Atk., 459.

In the case of Wamburzee v. Kennedy, 4 De S., 479, the decision was, that the purchaser's fraud raises an implied trust, and that the statute does not begin to run until the fraud is discovered.

I am not aware that any difference of opinion exists, as to the rule, in general, that in cases of fraud the statute will run from the time of discovery; and I cannot conceive, what should make the difference in a case of fraudulent breach of trust. There is as little doubt, so far as I know, with respect to the rule, that in such cases, where there has been time enough for the statute to run, the plaintiff must allege that he has discovered the fraud within the statutory period before filing his bill. South Sea Company v. Wymendsell, 3 P. Wms., 143. Though this be not, in its nature, strictly susceptible of proof, the allegation is material to put the defendant upon proof, that the fact was known. It would seem still more material, that where the party, claiming against the effect of the statute, stands in the situation of defendant, he should deny having knowledge. This has not been done in the present case. If, therefore, it were even established, that the complainant's intestate did purchase, with notice, I should doubt, whether I ought not to conclude, that the defendant had knowledge of the transaction, and that the statute would run. I should have no doubt, if such knowledge were charged by the bill, and not denied. I rest my opinion on the other ground, however, that the complainant is not affected with notice.

As to the point of recording being notice, I do not deem it necessary to decide, that, to some purposes, recording may not be notice; although on authority, independent of the case of Thayer v. Cramer, there might be some difficulty in making that out. All the English cases, I believe, are the other way. In Morecock v. Dickins, Ambl., 678, the question arose, whether, under the English statute, 7 Ann, c. 20, which requires mortgages, and every writing in nature of a mortgage, to be recorded, the due registration of an equitable mortgage was sufficient notice to give it priority over a subsequent legal mortgage; and it was decided not to be notice for that purpose. That case was decided on the authority of the case of Bedford v. Bacchus, there cited, in which Lord King decided, that where a first mortgagee, having duly registered his mortgage, advanced a further sum

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of money on it, after a second mortgage *duly registered, he was not affected with notice. To the same effect was the case of Wrightson v. Hudson, 2 Eq. C. Abr., 609. The first mortgagee, whose mortgage was duly registered, advanced more money on his mortgage; and it was contended, that the registering of Hudson's mortgage was constructive notice to Wrightson. But it was resolved, that the statutes affect prior charges not registered, but do not give subsequent conveyances any further effect against prior ones registered, than they had before; and that Hudson should have given notice; and that although Wrightson might have searched the registry, he was not bound to do so. The subject was fully considered, and the cases reviewed by Lord Redesdale in the case of Bushell v. Bushell, 1 Sch. & Lef., 90; and he comes to the conclusion, that registration is not notice. Chancellor Kent, in the case of Parkist v. Alexander, speaks of this opinion of Lord Redesdale as extrajudicial, 1 John. C. R., 400; but Lord Redesdale, himself, did not so regard it, for he says, he wishes the case to turn on that point. The case was, that husband and wife had a power of appointing, by deed, among their children. The husband, by will, devised the estate in question to his eldest son; and after the husband's death, the wife made an endorsement on his will, by which she ratified and confirmed the appointment thereby made. This will, with the wife's confirmation, was registered as an execution of the power of appointment. The son entered on the estate, and afterwards conveyed it, (by marriage settlement,) for valuable consideration. Two questions arose: first, whether this was a due execution of the power of appointment; and, second, if it was, whether the registration was sufficient notice, to disable the purchasers, under the son's marriage settlement, from pleading that they were bona fide purchasers

for valuable consideration, without notice. Lord Redesdale expresses an opinion, that it was not a due execution of the power, but examines more particularly the latter point.

In opposition to these authorities, is the opinion of Mr. Sugden, in his Treatise on Vendors, page 508. He takes exception to the case of Morecock v. Dickins, and the opinion of Lord Redesdale in Bushell v. Bushell. He approves, however, of Bedford v. Bacchus, and Wrightson v. Hudson. Mr. Cruise, in his digest of the laws of real property, concurs in the views of Mr. Sugden. 4 Cruise Dig., 544. To these are to be added the high authority of Chancellor Kent, in Parkist v. Alexander, 1 John. C. R., 394. See also Johnson v. Stagg, 2 John. C. R., 510. Now, I am not at all disposed to dispute the correctness of Chancellor Kent's conclusion;

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*but what is his decision, and how far do the opinions of Sugden and Cruise go? To this extent: that under an equitable construction of the statute, the registration of an equitable incumbrance is so far notice, that it ought to prevent a subsequent purchaser from pleading that he is a bona fide purchaser without notice. No question is suggested as to its effect in preventing the operation of the statute of limitations; nor is there, so far as I know, any authority in which such a doctrine is hinted at. It was, I suspect, on the authority of the New York cases, that the point, of recording being notice, was virtually conceded in the case of Thayer v. Cramer. If recording be notice, it was taken for granted that it must be so to every purpose; and thus the point failed to come under the consideration of the Court of Appeals.

But Chancellor Kent agrees with Mr. Sugden, and with Mr. Cruise, that registration is not notice for every purpose. They concur, that the registration of a second mortgage is not such notice to a first mortgagee, whose mortgage was duly registered, as to postpone him, if he advances more money on his mortgage. They hold that the second mortgagee is bound to give notice to the first; and yet it might be said, that it is the folly, or laches, of the first mortgagee to make further advances, without searching the registry for subsequent incumbrances.

As observed in several of the cases referred to, the statutes declare that conveyances not recorded shall be void or postponed; but they give no further effect to those which shall be recorded, than they would have had before the statutes. To authorize me to give such construction, I should require authority, on some strong ground of equity. There is a manifest distinction, however, between holding the fact of recording to be notice, as an answer to the plea of purchase, without notice, and to the plea of the statute of limitations. When the court sustains the plea of a bona fide purchase, without notice, it is on the ground, that the parties have equal equity; and, therefore, it will not interfere at all, but leave them to their remedies at law. But when the prior equitable incumbrance has been duly registered, equities are no longer equal. The equitable incumbrancer has done all in his power, and no laches can be imputed to him. Not so with respect to the subsequent purchaser. If he failed to search the registry, he was guilty of laches; if he did search, and obtain actual notice, he was guilty of fraud. The court, therefore, relieves the equitable incumbrancer, to whom nothing of this can be imputed. But the case is very different, when it comes to the plea

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of the statute of limitations. *The party seeking relief against the plea must, in general, have been guilty of gross laches. He must have slept upon his rights, for a period long enough for the statute to run, after his cause of action, or his title accrued; for until then, the statute would not begin to run. This seems to me much greater laches than a neglect to search the registry. But if equities are equal, the court ought to support the plea. Possession is favored; and the statute was made for the peace of the country. If there was negligence in the purchaser's relying on the representations of the vendor, that the property was unincumbered, it seems to me, that we must infer much greater negligence in a mortgagee, who leaves the property, on which his security depends, in the possession of his debtor, for so long a time, without taking means to ascertain what has become of it.

It is observed, in some of the cases, that a purchaser may have searched the registry, and obtained actual notice, which it will be difficult, or impossible to prove: that fraud may be thus practised without the chance of detection; and that there will be great temptation to commit perjury, in order to conceal it. But the same sort of argument may be used on the other side. The mortgagee may know that his mortgagor has sold the property: and, perhaps, it is quite as fair to presume that, he does know, what disposition has been made of property, in which he is so much interested. The possession of real property, or of slaves, must be matter of notoriety. It may be equally difficult to prove this. He may acquiesce, until his debtor has become insolvent, and then deprive the purchaser of property, for which he has honestly paid. There is as much temptation, and facility, for the trustee, and the cestuy que trust, to combine, for the purpose of defrauding a stranger, as for the trustee, and a stranger, to defraud the cestuy que trust. Suppose the case to be, that a purchaser has been guilty of the laches of failing to search the registry, and that, in fact, he has not notice; that the mortgagee, however, does know of the conveyance, but relying on the sufficiency of the mortgagor, is silent, and makes

no claim, for a period long enough for the statute to run; that the mortgagor, in the mean time, has become insolvent; and that the mortgagee then comes on the mortgaged property, when the purchaser's recourse to his vendor has become unavailable. This, it seems to me, would not fall short of actual fraud. Certainly, it would be a case of extreme hardship; and, for any thing that appears, such may be the present case. And let it be remembered, that the cestuy que trust, or mortgagee, can suffer nothing, unless the

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trustee, or mortgagor, *has become insolvent; for in favor of the actual trustee, or mortgagor, the statute will not run; unless, in the case of a mortgage, the mortgage is barred by lapse of time.

If we make it a presumption of fact, that a party purchasing has searched the registry, the presumption will often be unfounded. I believe, that in a great majority of cases it is not done. In the present case, we have satisfactory proof, that the purchaser did not have any notice. A great proportion of purchasers in this country are ignorant and even illiterate; and do not know how to direct this search. Besides, as observed by Lord Redesdale, in Bushell v. Bushell, 1 Sch. & Lef., 103, if registration of a deed be notice, it must be notice of every thing it contains. But a disposition of property may often be made in a deed, or settlement, relating to other matters, where no one would think of looking for it. It seems to me, that the consideration paid is a most material fact, in determining the question of notice. If the compensation were very inadequate, I think it would raise a fair presumption of notice. If the consideration be a full one, it goes as far to repel it. Indeed, it is not credible, that a man should pay a full consideration for a title, which he knew to be doubtful, or incumbered. In the present case, the consideration seems, so far as I can judge, to have been a full one.

So far I have considered the doctrine as applied to real property. With respect to chattels, I think there can be no doubt; and to these the case of Thayer v. Cramer does not apply. In the first place, sales of these are not required to be evidenced by writing, and frequently there is no bill of sale. If there be a bill of sale, it is not required to be, nor is it commonly, recorded. A person about to purchase a slave does not think of examining the registry offices, for the purpose of finding former transfers of the same property. The provisions of the Act of 1698, P. L., 3, 2 Stat., 137, as respects personal property, were intended to relate more particularly to mortgages. See Act of 1785, P. L., 382, 7 Stat., 234. If upon the sale of a slave, he should be left in the vendor's possession, this would be evidence of fraud: would constitute fraud of itself, as some of the cases say; and the sale would be void as against creditors or a subsequent purchaser: and I should very much doubt, whether the vendee's duly recording his bill of sale would cure the vice of the transaction; unless such possession were consistent with the contract, or under special circumstances. Some of the English cases seem to regard the leaving personal property mortgaged in the hands of the mortgagor, after the mortgage forfeited, as making a similar

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*case of fraud. But is the party, who has been guilty of this neglect, which has been thought to amount to fraud, to be so carefully protected, that not only shall he prevail against a bona fide purchaser, whose only laches has been, that he did not search for information, where he had no reason for expecting to find it, but that time, itself, shall not be permitted to mature a title against him? With respect to personal property, there is no ground for the presumption of fact, that the party has searched the registry, and obtained notice; and it can hardly be called laches, that he has failed to search. In this case, (and so it will be in many of the cases that are likely to occur,) it was not practicable, for the party to obtain notice by searching the registry. The slave had passed through several hands, after the sale by the mortgagor; and one of the intermediate transfers was not in writing, and only some of them recorded: so that there is no reason for supposing, that the complainant's intestate knew, or had the means of knowing, through what hands the slave had passed. He had, in fact, no clue, by which to direct a search.

There seemed to be an impression in the argument of the case, that even if the complainant's intestate could be construed not to have had notice, and his possession to have been adverse, the statute could not begin to run until the last instalment of the bond became due, which the slave was mortgaged to secure. I know of no rule or principle, which would authorize me to take this view of the law of the case. In all other instances of adverse possession, the statute begins to run from the time, when the title, or cause of action accrued. In this case, the first default in the payment of James Lynah's bond was made on 1 January, 1819. The defendant's cause of action arose on the bond at that time, and she might have seized the slaves. The complainant's intestate obtained possession on 20 April, 1820; and his possession continued until August, 1824. I must conclude, that his title was matured by the statute of limitations.

It is ordered, and decreed, that the defendant be perpetually enjoined from suing on the replevin bond mentioned in the proceedings.

From this decree the defendant appealed,

and now moved that the same might be reversed.

King, for the motion.
Petigru, contra.

O'NEALL, J., delivered the opinion of the court.

In this case we are of opinion, that the

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Chancellor's decree *should be affirmed. It is unnecessary, however, that an opinion should be given upon all the points which he has considered.

There is certainly a wide distinction between mortgages of real and personal property. In the former, the legal estate remains in the mortgagor; in the latter, it is in the mortgagee. This distinction is, obviously, the basis of the decisions, in Thayer v. Cramer, 1 McC. Eq., 395, and Nixon v. Bynum, 1 Bail., 148. In the last of these cases, it is said, that recording is notice; and that the purchaser cannot avail himself of the statute of limitations. This I am not disposed to question in relation to land. But I should be unwilling to say, that the mortgagor, or a purchaser from him, with constructive notice, became a trustee. The legal estate being in the mortgagor, the mortgage is a lien, not inconsistent with the legal estate, or possession of the mortgagor, or the purchaser from him; and hence there can be no adverse possession, so as to create a possessory title. On a bill to foreclose, the purchaser could not be protected by the plea of purchase for valuable consideration without notice, if the mortgage was recorded; for recording, when required by, and done according to, the provisions of the law, stands in the place of notice. It is constructive notice to all the world; but the effect of it is nothing more, than to deprive the party of the defence of being a purchaser for valuable consideration, without notice, and thus prevent the complainant's equity from being defeated.

In the case of a mortgage of personal chattels, the legal estate is in the mortgagee, if not from the execution of the mortgage, at least from the time of the condition broken. The legal estate being in the mortgagee, the mortgagor has no legal estate which he can convey. If he sells, the purchaser acquires a title hostile to that of the mortgagee, and his possession is inconsistent with the rights of the mortgagee. The mortgagee has no equitable rights; his is a plain legal estate; and his remedy is equally plain and legal, by seizure and sale of the property, or by an action of trover, or detinue. Against each of these remedies, the statute will run, whether the purchaser had notice, or not; and the question is, whether the circumstance, that the case is to be decided in the Court of Equity, can alter the law applicable to it. I apprehend that it cannot. Two inquiries would seem to be sufficient at all times to solve the question, whether the statute of limitations is a bar: first, is the case founded on a legal right, or a mere equity? Second, if on a legal right, when did the cause of action accrue? Answers to these questions will always enable us at once to say, wheth-

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er the *statute is, or is not, a good defence. If the case is founded on a legal right, such an one as can generally be enforced at law, although the party is compelled by some circumstance to come into equity for relief, then the rule is the same in equity, as at law, and the statute will run from the accrual of the cause of action. But if the case is founded on an equity merely, the statute has no application to it; and it is only in analogy to it, that lapse of time is allowed as a bar. These distinctions are, I think, just and substantial; and I am not disposed to adopt others, which would convert all legal causes of action into trusts, and thus judicially repeal the statute.

In the case before us, the defendant had a legal estate in the slave; and her cause of action, at all events, accrued to her on the failure of Lynah to pay the first instalment. This point was decided in the Court of Appeals, at Columbia, in May, 1830, in the case of Johnson v. Vernon [1 Bailey, 527]. The first instalment became due before the complainant's intestate purchased, and he and his administrator were in possession more than four years before the seizure and sale of the slave under the mortgage. This was a legal bar to the remedy.

It is, perhaps, necessary to remark, that in cases of personal property, where the law requires mortgages, or other transfers of it to be recorded, a compliance with the law is constructive notice, for all the purposes which have been already stated and noticed in cases of real property. This I regard as settled by the very able opinion of Mr. Justice Nott, in the case of Swan v. Ligan and Rudd, decided in the Court of Appeals, at Columbia, in the spring session of 1828.(*b*)

The decree of the Chancellor is affirmed.

JOHNSON, J., concurred.

Decree affirmed.

(*b*) This decision is unreported, although a case with this title is found in 1 McC. Eq., 227.

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*THOMAS W. GILES v. ROBERT F. GILES, Administrator of Matilda Giles.
GEORGE CHUR v. SAME.

(Charleston. April, 1831.)

[*Appeal and Error* ⇐959; *Equity* ⇐302.]
A party applying for leave to file a supplemental or amended answer, must show upon oath, that during all the previous stages of the cause, he was ignorant of the fact, on which the defence proposed to be set up is rested. And such an application is always, in some degree, addressed to the discretion of the Chancellor, whose decision will not be interfered with, unless in a case of manifest error and injustice.(a)

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3825; Dec. Dig. ⇐959; Equity, Cent. Dig. § 596; Dec. Dig. ⇐302.]

Before Johnstone, Chancellor, Charleston, January, 1831.

The complainant, Thomas W. Giles, was one of two children of the intestate, Matilda Giles, and assigned his interest in her estate to her administrator, the defendant, Robert F. Giles, in trust, in the first place, to pay the debts of the said Thomas W. Giles, and then to hold the residue subject to certain other trusts. The assignment was accepted by the defendant; and the bill in the first of these cases was filed to compel a performance of the trusts. The bill in the second case was by a creditor of Thomas W. Giles for the same purpose, and for an account.

The defendant, in his answers, admitted the assignment, and that Thomas W. Giles was entitled to a moiety of his intestate's estate; but alleged that the estate was not ready for distribution, there being several large outstanding demands upon it to be settled; and at the present term he moved for leave to file supplemental or amended answers, for the purpose of stating in them, that in prosecuting the claims of his intestate to certain property in England, the defendant had learned, that the said Thomas W. Giles was an illegitimate child of the intestate, not having been born until several years after the death of his supposed father; and that the defendant had, on inquiry, ascertained by indisputable evidence, that the information was true. And it was submitted, therefore, that the said Thomas W. Giles could not share in the estate of the intestate with the defendant, who was her legitimate child; and that the defendant ought to be permitted to state the facts, and set up this defence by supplemental or amended answers to the bills.

The Chancellor refused to grant leave, and the defendant now moved to reverse his decision.

Hunt, for the motion.
Wilson, contra.

(a) Ante, 181, 375. See Ril. E., 120; 2 Hill E., 548; Ril. L., 282—for further litigation between the parties.

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*O'NEALL, J., delivered the opinion of the court.

The only question submitted to our consideration is, whether the defendant had the right to file supplemental, or amended answers. An application for this purpose is always, in some degree, addressed to the discretion of the Chancellor; and we would not willingly interfere with his exercise of it. Still there might be a case of manifest error and injustice, in which this court would interfere. It is enough, however, in this case, to say, that it is not one, in which we can discover, that the Chancellor has refused the motion, where it ought to have been granted. Let it be conceded to the defendant, that he is not estopped by his answer, or by his acceptance of the assignment, from making this defence; yet before the court would permit him to set it up, he must show, that during all the previous stages of the case, he was wholly ignorant of the facts, on which this defence rested. This he did not show at the hearing before the Chancellor; nor is it yet done in any other way, than by statements, unsustained by the oath of the party making the motion, which was the only way, in which the Chancellor, or this court, could be legally informed of it.

The appeal is, therefore, dismissed, and the Chancellor's decision affirmed.

JOHNSON, J., and HARPER, J., concurred.

Appeal dismissed.

Bailey, Eq. *430

*JAMES HEILBRON v. J. H. BISSELL and JOSEPH WARNER.(a)

(Charleston. April, 1831.)

[1. *Payment* ⇐39.]
If the debtor, at the time of making a payment, does not direct to which, of several accounts, on which he is indebted, the payment shall be applied, the creditor is entitled to make the application, and is not limited as to the time within which he may do so. Vide Stewart v. Cochran, ante, 380.

[Ed. Note.—Cited in Stewart v. Cochran, Bailey, Eq. 380; Brice v. Hamilton, 12 S. C. 32, 37, 38; Clark v. Smith, 13 S. C. 598; Bell v. Bell, 20 S. C. 46; Thatcher & Co. v. Massey, Id. 548; Hopper v. Hopper, 61 S. C. 137, 39 S. E. 366; William Mulherin Sons & Co. v. Stansell, 70 S. C. 570, 50 S. E. 497.

For other cases, see Payment, Cent. Dig. §§ 104, 113; Dec. Dig. ⇐39.]

[2. *Payment* ⇐38.]
The direction, by the party paying, as to the application of the payment, must be made to the party receiving; and it is not sufficient, that the party making the payment credits it to a particular account in his own book, of which the other party has no notice.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 99–103; Dec. Dig. ⇐38.]

(a) Ante, 380, 334; post, 456, note.

[3. *Contracts* ⟸259.]

A party being indebted by judgment and execution, and also by simple contract, to the same creditor, made several payments, without directing their application; and the creditor subsequently applied them to the simple contract debt. The debtor, in the mean time, assigned his estate in trust to pay, first, the judgment, and then a bond due to another creditor. *Held*, that his being ignorant how the payments were applied, at the time of the assignment, was not such a mistake, as would furnish a ground for setting aside the assignment; even if the court could, by doing so, relieve, either against the lien of the judgment and execution, or the creditor's right to apply the payments made to the simple contract debt.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1156; Dec. Dig. ⟸259.]

This was a bill for an account, and was heard at Charleston, in May, 1830, by Harper, Chancellor, from whose decree the case will be fully understood.

Harper, C. William P. Bason, of Charleston, being considerably indebted to Benjamin Warner, deceased, of Philadelphia, after the death of the latter, to wit, on 8 November, 1822, gave to his executor, the defendant, Joseph Warner, his three notes, each in the sum of $4,470, payable in one, two, and three years; and as a collateral security, entered into a bond conditioned for the payment of $13,412.22, and on the same day confessed a judgment on the bond. This was for the debt contracted in the lifetime of Benjamin Warner. After Benjamin Warner's death, Bason had considerable dealings with the executor, who continued the business, carried on by his testator in his lifetime, for the benefit of his estate, and became indebted to him for books and stationery, the property of the estate. These transactions were the subject of a running account between them. On 23 August, 1825, Bason executed a bond to the complainant, James Heilbron, conditioned for the payment of $6,250.50; and afterwards assigned all his estate and effects to the defendants,

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Joseph Warner, and J. H. Bissell, *in trust, after paying the judgment before mentioned, to the executor of Benjamin Warner, to pay the amount of the complainant's bond. The defendant, J. H. Bissell, alone acted as assignee. In the months of April, May, and June, 1825, the defendant, Joseph Warner, drew several drafts on Bason, for the aggregate amount of $4,545, signed by him as executor of Benjamin Warner, and directing Bason to charge the amount to the estate of Benjamin Warner; and the question made in the case, related to the application of this amount—whether it should be applied towards the satisfaction of the judgment, thus leaving a greater portion of the assets of Bason applicable to complainant's demand; or to the running account, in which case, the judgment still remains to be first satisfied.

On the part of the complainant, it was contended: First, that the rule, in relation to the application of payments, is, that the party paying, has the right, where there are demands of different natures against him, to apply them to either demand he thinks proper; and that Bason in this instance did make the application of his payments to the judgment. Secondly, that if the party paying, fails to make the appropriation, although the party receiving may do so at the time of payment, yet if he neglects it, the court will make the application to the demand which it is most for the debtor's interest to extinguish; to one that has a lien, rather than to one that has not; to one that carries interest, rather than to one that does not; and therefore the application, in the present case, ought to be made to the judgment.

To show that the money was appropriated by Bason to the judgment, he himself was examined as a witness. He produced his books, in which he had opened an account with the judgment, and on which, when he paid the drafts, he entered the amount to the credit of the judgment. This testimony, of itself, would not do. The cases sufficiently show, that the direction to appropriate, by the party paying, must be made to the payee. Manning v. Westerne, 2 Vern., 606. Indeed, all the cases take this for granted, when they speak of the application of the money being expressed, at the time of payment. It cannot mean a private signification of his intention, known only to the party himself.

The subject of the application of payments, where no appropriation is made by the debtor at the time of payment, is much considered by the master of the Rolls, in Devaynes v. Noble, (Clayton's Case,) 1 Mer., 570. He adverts to the rules of the civil law on the subject, from which he supposes those of the

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common law to *have been borrowed. "The leading rule, with regard to the option given, in the first place to the debtor, and to the creditor in the second, we have taken literally from thence. But according to that law, the election was to be made at the time of payment, as well in the case of the creditor, as that of the debtor, 'in re præsenti; hoc est statim atque solutum est:—cæterum, postea non permittitur.' If neither applied the payment, the law made the appropriation, according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And as it was the actual intention of the debtor that would, in the first instance, have governed; so it was his presumable intention that was first resorted to, as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor. The payment was consequently

applied to the most burthensome debt.—to one that carried interest, rather than to that which carried none; to one secured by a penalty, rather than to that which rested on a simple stipulation; and if the debts were equal, then to that which had been first contracted." 1 Mer., 605.

He goes on to observe, "But it is contended, that in this respect, our courts have entirely reversed the principle of decision, and that, in the absence of express appropriation by either party, it is the presumed intention of the creditor that is to govern; or at least that the creditor may, at any time, elect how the payments made to him shall retrospectively receive their application. There is certainly a great deal of authority for this doctrine. With some shades of distinction, it is sanctioned by the case of Goddard v. Cox, 2 Str., 1.194, by Wilkinson v. Sterne, 9 Mod., 427, by the ruling of the Lord Chief Baron in Newmarch v. Clay, 14 East., 239, and by Peters v. Anderson, in the Common Pleas, 5 Taunt., 596. From these cases I should collect, that a proposition which, in one sense of it, is indisputably true, namely, that, if the debtor does not apply the payment, the creditor may make the application to what debt he pleases,—has been extended much beyond its original meaning, so as, in general, to authorize the creditor to make his election when he thinks fit, instead of confining it to the period of payment, and allowing the rules of law to operate, where no express declaration is then made." 1 Mer., 606, 7.

The master of the Rolls proceeds, "There are other cases, however, which are irreconcilable with this indefinite right of election in the creditor, and which seem, on the contrary, to imply a recognition of the civil law principle of decision. Such, in particular,

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*are the cases of Meggot v. Mills, 1 Ld. Raym., 286, and Dawe v. Holdsworth, Peake's N. P. C., 64. The creditor, in each of these cases, elected, ex post facto, to apply the payment to the last debt. It was, in each case, held incompetent for him to do so. There are but two grounds, on which these decisions could proceed; either that the application was to be made to the oldest debt, or that it was to be made, to the debt which it was most for the interest of the debtor to discharge. Either way, the decision would agree with the rule of the civil law, which is, that if the debts are equal, the payment is to be applied to the first in point of time;—if one be more burthensome, or more penal, than another, it is to that the payment should be first imputed. A debt, on which a man could be made a bankrupt, would undoubtedly fall within this rule." 1 Mer., 607.

The extracts I have made state, very precisely, the question presented in this case, as well as that which may be made on the construction of the various cases referred to. I have already said that the debtor, Bason, made no appropriation of the payments at the time when he made them. Nor in a legal point of view, did the creditor, Joseph Warner, at the time when he received them; that is to say, when he drew his drafts, or was advised that they were accepted and paid. It is true, he files an account with his answer, to shew that he did appropriate these amounts to the credit of the running account between himself and Bason. But this is not evidence; even if such an appropriation, of which Bason was not advised, were sufficient. He claims by his answer, however, to appropriate the payments to the running account; and the question is, whether he can thus make the application: whether the creditor can apply payments, at any time, when the debtor has failed to make the application at the time of payment.

The master of the Rolls, in the opinion I have quoted, comes to no conclusion of his own; but it seems to me, that his leaning is in favor of adherence to the rule of the civil law. With the respect due to so great an authority, I have examined the cases referred to, and some others on the same subject; and my conclusion is, on the preponderance of authority, that the creditor has that unlimited right to appropriate, when the debtor has made no appropriation at the time of payment.

One of the earliest cases, that of Heyward v. Lomax, 1 Vern., 24, seems to be in conformity to the civil law rule. Where the party was indebted by a security carrying interest, and by simple contract, the payment was

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applied to the demand bearing interest, *as being most for the advantage of the debtor. But in Perris v. Roberts, 1 Vern., 34, where there was a debt on mortgage, and one by simple contract, the payment was decreed to be apportioned.

In Manning v. Westerne, 2 Vern., 606, a party indebted, both by specialty and simple contract, made payments and entered them in his book, as made on account of the specialty debt. This was held not a sufficient appropriation, and that the creditor might apply the payments. The creditor's right does not appear to have been restricted to the time of payment, but to have been regarded as indefinite.

In Goddard v. Cox, 2 Str., 1.194, a widow, executrix of her deceased husband, was indebted, as executrix, and on her own account. She married again, and her second husband became indebted to the same person. He made payments, but directed no appropriation of them at the time. It was held that the husband might have appropriated at the time of payment; but neglecting to do so, the creditor might appropriate, either to the debt due by the wife, personally, before marriage, or to the husband's debt. Nothing is said of the creditor's right being limited to the time of payment.

In Peters v. Anderson, 5 Taunt., 596, a party had served three years, as a surgeon, under indentures, and then about three years under a simple contract. The question was respecting payments made during the last three years; and it was held, that although the party making payments may appropriate them as he pleases, or the appropriation may be inferred from circumstances, yet if he fails to do so, the creditor may appropriate afterwards. The same doctrine is recognized in Newmarch v. Clay, 14 East., 239; and in Kirby v. The Duke of Marlborough, 2 Maule & Selw., 18. It is observed with respect to these cases, in Devaynes v. Noble, (supra,) correctly, so far as I can perceive, that in none of them does the appropriation appear to have been made by the creditor, until after the matter came into question.

In addition to these is the case of Plomer v. Long, 1 Starke, 122, where the question was made by a surety to a bond. His principal has been indebted, both by the bond and by simple contract, and having made payments, it was held that these could not, in favor of the surety, be presumed to have been appropriated to the bond, but that the creditor might appropriate.

The doctrine is also laid down, expressly, by Chief Justice Marshall, in the case of the Mayor of Alexandria v. Patten, 4 Cranch, 317, that although the debtor may apply his

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payments at the time *when they are made, yet if he neglect to do so, the creditor may, at any time afterwards, apply them.

Against these authorities, the cases of Meggot v. Mills, 1 Ld. Raym., 286, and Dawe v. Holdsworth, Peake's N. P. C., 64, are supposed to be opposed. These cases are almost exactly similar in circumstances. In the former, A, while a trader, was indebted to B, £100; after he ceased to be a trader, he became indebted £100, more; and paid £100, generally on account. Lord Holt held, that the payment should be applied to the debt of £100, contracted while he was a trader; for "it would be too rigorous, to permit B to sue a commission of bankrupt, for the old debt of £100. But to this point he said he would not give an absolute opinion." 1 Ld. Raym., 287. The case of Dawe v. Holdsworth, was a similar case of bankruptcy; though the reasoning of Lord Kenyon seems to be founded on the rule, of applying payments as may be most beneficial to the debtor. But in Peters v. Anderson, (supra,) Lord C. J. Gibbes, referring to these cases, says, that they go on the ground of the grievous disability to which the party would be subject, by remaining liable to be made a bankrupt. "It is an exception, and founded on the circumstance of bankruptcy." 5 Taunt., 602.

Apart from these cases, and that of Heyward v. Lomax, (supra,) I have found no authority for the court's applying payments, on a presumed intention, as may be most beneficial to the debtor; nor any dictum recognizing the civil law rule. Heyward v. Lomax, has been often overruled, and the other cases are regarded as exceptions; and I must therefore conclude in favor of the defendant, Joseph Warner's right to appropriate the payments in question.

There is another class of cases, in which the appropriation of payments has been determined by circumstances, indicating, or presuming to indicate, the intention of the parties; which, so far as I perceive, have no application in the present case. Such is the case of Newmarch v. Clay, 14 East., 239, where the creditor having various demands, and among the rest, certain bills of exchange, upon receiving a payment to about an equal amount, gave up the bills; and this was held to be a special application of the payments. So in Hammersly v. Knowlys, 2 Esp. N. P. Rep., 666, where a party having deposited with his bankers, an accommodation note, known to the bankers to be such, as a security for money advanced, and afterwards received further advances, and made payments; the payments, in favor of the maker of the note, were applied to the debt, for which the note was security.

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*Another point was made in this case, which, however, did not seem to be insisted on in argument. It was, that the assignment of Bason was made under a mistake, and that the mistake should be relieved against. He himself stated, in his testimony, that he made the assignment under the impression, that the amount of the drafts in question had been applied to the judgment; and that, but for that impression, he would not have made it. If the mistake were admitted, it is plain, that no relief could be given. If the assignment were set aside, the judgment would still be entitled to priority; execution on it having been lodged. Or, if the assignment had given a priority to complainant's demand, it would have been so far inoperative. The assignment has provided for these debts, in the same order of precedence, that the law would have done without it.

But I cannot regard this as a mistake, in the legal sense of the word. Bason accepted, and paid the drafts, without directing how they should be applied, or being informed by Warner how they were to be applied. He had no ground to conclude, or believe, anything about the application; although he might conjecture, or surmise. He was ignorant how the payments were applied; but this was not mistake. It was argued, that the form of the drafts was calculated to mislead Bason. They direct him to charge the amount to the estate of Benjamin Warner; and it was contended, that the debt for articles purchased of the executor, Joseph Warner, was Joseph Warner's personal debt, although the articles were part of his testator's estate. But, in strictness, the notes, and the bond, taken by

Joseph Warner, were also his personal debt, though for a debt due to the testator in his lifetime. We know that, popularly, dealings with an executor, in relation to the estate, are termed dealings with the estate. It is probable, that Bason regarded the running account as much a debt to the estate, as the judgment; nor did he say to the contrary in his testimony, or that he was misled by the terms of the drafts.

It is therefore ordered and decreed, that the defendant, J. H. Bissell, as assignee of William P. Bason, account before the master, or commissioner; and that he pay over the funds in his hands to the creditors of the said William P. Bason, in the order of priority specified in the assignment; and that the amount of the several drafts before mentioned, be credited to the running account between the defendant, Joseph Warner, and the said William P. Bason. The costs of suit to be paid by complainant.

From this decree the complainant appealed; *sed per curiam,*

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*HARPER, J. The decree of the Chancellor is affirmed, for the reasons given, and the motion to reverse is dismissed.

JOHNSON, J., and O'NEALL, J., concurred.

Axson, for the motion.

Petigru, contra.

Decree affirmed.

Bailey, Eq. 437

PETER MILLER v. MARTHA and ELIZA MITCHELL, Infants Defending by Their Guardian, John C. You, and JACOB LAZARUS, Executor of E. N. Frisk, Deceased.

(Charleston, April, 1831.)

[1. *Executors and Administrators* ⟸233.]

Where an executor has duly advertised for the creditors of his testator, if a creditor neglect to render in his demands within the time prescribed by law, and the executor pays over legacies, but funds of the estate nevertheless remain in his hands sufficient to pay the creditor, the latter cannot afterwards compel the legatees to refund, although the funds retained by the executor have become unavailable by reason of his insolvency. Aliter, if the assets were originally deficient.

[Ed. Note.—Cited in Lanier v. Griffin, 11 S. C. 583.

For other cases, see Executors and Administrators, Cent. Dig. § 831; Dec. Dig. ⟸233.]

[2. *Wills* ⟸807.]

The testator bequeathed two small pecuniary legacies, to be paid as soon after his decease as could be conveniently done. He then directed his estate to be sold at such a credit, and on such terms and conditions, as his executor might think advantageous; and directed his executor, as soon as his estate should be sold, to purchase and emancipate a certain slave, to whom he bequeathed the residue of his estate.(a) *Held*—That the pecuniary legatees were entitled to be paid in preference to the bequest for the purchase of the slave to be emancipated; and that their legacies were not applicable to the payment of creditors, until the rest of the estate had been exhausted.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2103; Dec. Dig. ⟸807.]

[3. *Equity* ⟸87.]

A suit by a creditor, against pecuniary legatees of his debtor, to refund their legacies for payment of his demand, on the ground of the insolvency of the executor, will be barred by lapse of time, in analogy to the statute of limitations, in four years after the insolvency of the executor has been ascertained by the return of nulla bona to a fi. fa. against him. Vide [Fripp v. Talbird] 1 Hill Ch., 145(b)

[Ed. Note.—Cited in Fripp v. Talbird, 1 Hill, Eq. 145.

For other cases, see Equity, Cent. Dig. §§ 242–244, 395; Dec. Dig. ⟸87.]

[4. *Equity* ⟸87.]

Courts of Equity will not only apply the statute of limitations in cases of mere legal titles and demands, but in cases of purely equitable cognizance will also give effect to lapse of time as a bar, in analogy to the statute of limitations; and a mere personal demand for money, although purely equitable, will, by analogy to an action at law for the recovery of money paid by mistake, be held stale in four years from the time when the right to sue in equity accrued.

[Ed. Note.—Cited in Buchan v. James, Speers, Eq. 375, 382; Joyce v. Gunnels, 2 Rich. Eq. 267; Long v. Cason, 4 Rich. Eq. 65, 67; Brewster & Dickson v. Gillison, 10 Rich. Eq. 438; Mobley v. Cureton, 2 S. C. 146; Cleveland v. Mills, 9 S. C. 438; Brock v. Kirkpatrick, 60 S. C. 346, 38 S. E. 779, 85 Am. St. Rep. 847; Id., 69 S. C. 235, 237, 48 S. E. 72; Brantley v. Bittle, 72 S. C. 189, 51 S. E. 561.

For other cases, see Equity, Cent. Dig. § 242; Dec. Dig. ⟸87.]

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*This was a suit by petition,(c) brought by a creditor against the legatees of his debtor, to compel them to refund their legacies, which had been paid to them by the executor, and to have the amount applied to the satisfaction of the petitioner's demand; the executor, who was a party defendant to the suit, being insolvent. The cause had been referred to the master; and came on to be heard, upon his report, at Charleston, in February, 1829, before Harper, Chancellor, from whose decree the case made will be fully understood.

Harper, C. The facts and circumstances on which this suit is founded are as follows. The testator, E. N. Frisk, who died in 1812, by his will, gave legacies of $100 each to the infant defendants, Martha and Eliza Mitchell; and directed his executor to purchase and emancipate a negro woman, named

(a) The testator died before the Act of 1820, prohibiting the emancipation of slaves, and this bequest to purchase and emancipate a slave seems, therefore, to have been lawful. Vide Lenoir v. Sylvester, 1 Bail., 632.

(b) Buchan v. James, Sp. E., 382; Joyce v. Gunnels, 2 Rich. E., 267.

(c) Vide Act of 1791, 1 Faust, 32; 7 Stat., 259.

Amy, to whom he bequeathed the residue of his estate. The executor, Jacob Lazarus, paid the legacies of $100 each to the guardian of the infant defendants, in 1812, soon after the death of the testator. The petitioner, Peter Miller, who was a creditor of the deceased, brought an action at law, on his demand, against the executor, in 1817; and in 1820 recovered a judgment for about $1,500, on which a fi. fa. was immediately issued, and a return of nulla bona subsequently made thereon. It appears, that the executor, Lazarus, is insolvent; and it is alleged by the petitioner, that the assets of the testator were originally insufficient to authorize the payment of the legacies; and he prays, therefore, that the legatees may be ordered to refund. The defendants rely upon the lapse of time and the statute of limitations.

I think the demand a stale one, and that the petition must be dismissed. There is no doubt, that in the event of a deficiency of assets, creditors may call upon a legatee to refund. According to the English cases, if an executor pays one legatee in preference to others, not retaining sufficient assets to satisfy the rest, and becomes insolvent, the unsatisfied legatees may compel the first to refund; although if he retains sufficient assets, and afterwards wastes them, there is no such recourse on the part of the unpaid legatees. Anonymous, 1 P. Wms., 495; Edwards v. Freeman, 2 Id., 446. But a similar distinction does not appear to obtain with respect to creditors. They are preferred to all legatees; and if there be a deficiency of assets, whether original or from the waste of the executor, they shall compel legatees to refund. In consequence of our executor's law, creditors are on somewhat a different footing with us from that on which they

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stand in England. In England, no *time but that prescribed by the various statutes of limitations is limited for creditors to render their demands to the executor. Our law directs the executor to advertise for creditors to render their demands within twelve months. It is their duty to render them accordingly, and they are guilty of laches if they omit it;(d) and I apprehend, that if creditors fail to give notice of their demands within the time limited, and the executor pays over the estate to legatees, he may, if afterwards sued, protect himself by the plea of plene administravit. But on general principles a party's laches shall not be permitted to work an injury to an innocent third person. If due notice, by advertisement, be given by the executor, and the creditor fails to render in his demand, and the executor pays over a legacy, and there are funds in the hands of the executor, over and above the legacy, applicable to the payment of debts, and sufficient for that purpose, which the executor afterwards wastes, or which perish, or in any manner become unavailable to the creditors, the legatee ought not to be compelled to refund. If he is compelled, he is deprived of his legacy by the laches of the creditor, who might have obtained payment, if he had given notice, and prosecuted his demand in due time. There was enough both for the legatee and the creditor. The case might be different, if sufficient funds to pay debts were not left in hands of the executor after payment of the legacy.

In the present case, the executor states, that he gave due notice to creditors. Perhaps I ought to presume in favor of the regularity of his proceedings. There is no allegation or proof to the contrary. He states, also, that he had no notice of the petitioner's demand, until his action at law was commenced in the year 1817. I think, too, it sufficiently appears that after payment of these legacies of $100, there were in the hands of the executor sufficient funds to pay the petitioner's demand, and that they were applicable to that purpose prior to these legacies. It was admitted in the cause, that, in pursuance of the will, $1,000, were paid by the executor for the negro woman, Amy, who was emancipated; and it appears from the master's report, that there was left in the hands of the executor a further balance of $430. The petitioner's demand, with interest accumulated, was, in 1820, about $1,500. I think the $1,000, paid for Amy, was applicable to the payment of debts rather than the defendant's legacies. The will itself gives them a preference. The testator directs them "to be paid as soon after" his "decease as can be conveniently done." He then directs his estate to be sold

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"at such a credit, and on such terms *and conditions," as his "executor may think advantageous." As soon as his estate should be sold, (and we must infer, the money, for which it should be sold, collected,) he directs the negro woman, Amy, to be purchased, and emancipated. It seems to me, from the terms of the will, to have been the intention of the testator, that if either of these bequests should fail, it must be that for the purchase of Amy. It does not appear what has become of Amy; and with respect to her a singular question might, perhaps, arise.

I wish, however, to express the opinion, distinctly, that the petitioner is barred by his delay after the recovery of his judgment in 1820, and the defendants protected by lapse of time, in analogy to the statute of limitations. The defendants have been in possession of their legacies since 1812, claiming adversely: that is, claiming them as their absolute, unqualified property. Whatever equity, or cause of action, the petitioner has against them now, arose, at

(d) Act of 1789, § 27, P. L., 494; 5 Stat. 111.

all events, on the return of nulla bona to his execution issued on the judgment of 1820. At that time the executor, Lazarus, had become insolvent, although the precise date of his assignment for the benefit of his creditors does not appear. The master's report states, that judgments obtained against him as early as 1818, remained unsatisfied; and I conclude he was insolvent when the judgment of 1820 was obtained. But the return of nulla bona must have been made within the year after the judgment rendered; and the present petition was not filed until 10 March, 1826; and by any computation, the petitioner's equity must have arisen more than four years before his present suit was commenced.

It was argued, that this is a merely equitable demand, to which the statute of limitations does not apply. It is true, that the terms of the statute apply only to actions at law: but, as observed by the master of the Rolls, in Beckford v. Wade, 17 Ves., 96, "courts of Equity, by their own rules, independently of any statutes of limitations, give great effect to length of time; and they refer frequently to the statutes of limitations, for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity of any particular demand." Mere legal titles, or demands, are sometimes to be adjudicated in courts of Equity, on which actions at law might have been sustained: the court either having concurrent jurisdiction, or the matter being incidentally drawn within its jurisdiction: and with respect to these, there is no question, that the court is bound to yield obedience to the statute. But in other cases, where from the nature of the demand there never could have been any pro-

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ceeding at law, the *court has given effect in time in analogy to the statute. In the case of Bonney v. Ridgard, cited in Beckford v. Wade, 17 Ves., 97, an executrix has sold leasehold property, to a purchaser with notice, in fraud of her children. The children suing after they came of age, were held to be barred by lapse of time in analogy to the statute.(e) What time had elapsed, between the children's coming of age, and the filing of the bill, does not appear; but we learn, that less than twenty years had elapsed between the time when the youngest came of age, and the decree. This was a case of purely equitable cognizance.

It has been sometimes said, that twenty years will bar in equity: and that this is the bar applicable to purely equitable demands; as to a bill for foreclosure, or to redeem, or a bill of review. But it is to be recollected, that this bar has been adopted in equity, in analogy to the English statute of limitations respecting actions for real estate; or in conformity to the rule of law, which raises the presumption of satisfaction of a specialty, or of a judgment, and many other presumptions, in twenty years. Where there has been an adverse possession, and no trust, or fraud, it seems, that time will always bar, in analogy to the statute. As was said by Lord Redesdale, in Hovenden v. Lord Annesley, "I think it impossible not to see, that courts of Equity have constantly guided themselves by this principle, that whenever the legislature has limited a period for law proceedings, equity will, in analogous cases, consider the equitable rights as bound by the same limitations." 2 Sch. & Lef., 632.

But what is the analogy in the present instance; and what provision of the statute shall we apply to the petitioner's demand? It is a mere personal demand for money, and I think the same provision will apply, that would bar such a demand at law.(f) If an executor, not having notice of a debt, should pay over the estate to legatees, and then be compelled to pay the debt, and should file his bill against the legatees to refund, the analogy would, perhaps, be more perfect. It would be an action to recover money paid by mistake. The petitioner's demand seems to me to be of the same character. If the executor were solvent, the creditor would be compelled to resort to him in the first instance; and the executor's recourse would be against the legatees. It is the executor's insolvency which gives him the equity to come directly, and in the first instance, against the parties who would be ultimately liable.

Upon the whole case, there can be no doubt, that the petitioner has been guilty of great neglect and delay; and in all prob-

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ability, *if he had used due diligence, he might have secured his debt, without depriving the defendants of these inconsiderable legacies.

It is ordered and decreed, that the petition be dismissed with costs.

From this decree the petitioner appealed, and now moved that the same might be reversed.

T. O. Elliott, for the motion. The direction for the purchase and emancipation of Amy was in the nature of a specific legacy, and was therefore to be performed before payment of the legacies to the defendants, which are pecuniary, and general. 1 Rop. on Leg., 150. Admitting it, however, to be only a general pecuniary legacy, it stood upon the same footing with the legacies to the defendants, and all were bound to abate equally: nor would it have made any difference, if the testator had, in express terms, directed the legacies to the defendants to be paid in the first place. Blower v. Morret, 2 Ves., 420; Brown v. Allen, 1 Vern., 31, and see the cases collected by the editor, in the note

(e) Vide 1 Cox Ca., 145.

(f) Vide Act of 1712, P. L., 102; 2 Stat., 585.

to that case. It is manifest, therefore, that when the executor paid the legacies of the defendants, he did not retain sufficient funds to pay the petitioner's demand; and so the argument in the first part of the decree entirely fails.

With regard to the statute of limitations, it is conceded, on all hands, that the bar of the statute applies only to legal titles and demands, and that the petitioner's claim is purely equitable; but it is said, that courts of Equity give effect to lapse of time as a bar, by analogy to the statute, even in cases of mere equitable cognizance. There is no doubt of this, and this principle has led to the well established general rule, that twenty years will bar an equity. It is wholly immaterial by what precise analogy this period was agreed upon: it is sufficient that it is fixed: and it is unquestionable, that, as a general rule, the lapse of twenty years is requisite to bar an equity. There may be an exception, where there are circumstances to aid the presumption of satisfaction arising from the lapse of a somewhat shorter period; by analogy to the rule at law in relation to the payment of bonds, and satisfaction of judgments; and the case cited, of Bonney v. Ridgard, 1 Cox Ca., 145, seems to be founded on such an exception. But it is nowhere laid down, that mere lapse of time will bar a purely equitable demand, within less than twenty years. To discriminate between equitable demands, with a view to apply the bar arising from lapse of time, at different periods, to different classes of demands, according to supposed analogies to legal demands,

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is not *only, in effect, to apply the various statutes of limitations, in all their strictness, to equitable demands, at the same time that it is declared, that they are not applicable to such demands at all: but it is to apply them without any certain rule to guide the applications: for all such analogies must be more or less fanciful, and perhaps no two Chancellors would agree on the precise time applicable to any one case. Vide Anonymous, 1 Salk., 154; Blakeway v. Earl of Strafford, 1 Dick., 48; Fergus v. Gore, 1 Sch. & Lef., 107.

PER CURIAM. We concur in the Chancellor's decree for the reasons therein stated. It is, therefore, affirmed, and the motion to reverse it is dismissed.

Decree affirmed.

Bailey, Eq. 443

JOHN WALKER v. THE CITY COUNCIL OF CHARLESTON.

(Charleston. April, 1831.)

[1. *Eminent Domain* ⇐208.]

Commissioners mutually appointed by the owner, and the city council of Charleston, under the Act of 1817, to value a lot of land taken to widen a street, are governed by the rules which apply to arbitrators; and where the owner consented to the appointment of an umpire, on the condition, that all of the commissioners on his part should be present at the examination of the umpire, which was agreed to by the commissioners on the part of the city council; and the umpire decided, after hearing only one of the commissioners on the part of the owner, and in the absence of the two others; *held*, that the award was not binding on the owner.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 547; Dec. Dig. ⇐208.]

[2. *Eminent Domain* ⇐270.]

The Court of Equity possesses jurisdiction to give relief, where the owner has conveyed his property to a corporation, for public purposes, in the confidence of receiving a compensation, which the corporation has failed to make.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 706–716, 741; Dec. Dig. ⇐270.]

[3. *Constitutional Law* ⇐43; *Municipal Corporations* ⇐402.]

[Where a person whose land had been taken, under the act of 1817, for widening a street, assented to the mode of assessing damages pointed out thereby, by appointing commissioners for that purpose, it was *held* that he could not object, to their award, that such mode of assessment was unconstitutional.]

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. ⇐43; Municipal Corporations, Cent. Dig. § 979; Dec. Dig. ⇐402.]

[4. *Eminent Domain* ⇐237.]

[The court has jurisdiction to set aside an award made by commissioners for assessing damages under the act of 1817 for irregularity in the proceedings.]

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 606; Dec. Dig. ⇐237.]

[5. *Eminent Domain* ⇐237.]

[Land was taken for a street, under the statute, and the damages were assessed by commissioners appointed by the parties. The owner of the land objected to the award as irregular, but conveyed the land, and received the damages assessed, upon being assured, by the intendant of the city in which the street was located, that such a step would not impair his right to redress for the error in the assessment. *Held*, that such conveyance and receipt of damages were no bar to the claim to set aside the award, though the intendant had no power to bind the city authorities.]

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 605; Dec. Dig. ⇐237.]

Heard by De Saussure, Chancellor, at Charleston, May, 1829.

This was a bill to obtain compensation for a lot of land, and the buildings thereon, of which the complainant was the proprietor, which had been taken by the city council of Charleston, for the purpose of widening Berresford's Alley in the city of Charleston, in pursuance, and by virtue, of the powers vested in them by the Act of 1817.(*a*) Three commissioners were nominated by the city council, and three others were nominated by the complainant, to value the lot, pursuant to the provisions of the Act. The commissioners on the part of the city valued it at $2,000,

(*a*) Vide Acts of 1817, p. 38; 7 Stat., 136.

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only, *whilst those on the part of the complainant assessed the value at $4,000, and being unable to agree, an umpire was appointed; but the bill charged, that this appointment was assented to by the complainant, on the express stipulation, that all of his commissioners should be examined by the umpire, previous to his making a decision. The umpire confirmed the valuation of the commissioners on the part of the city; but only one of the complainant's commissioners was examined by the umpire. This commissioner, however, stated, at the time of the examination, that he represented the others: and they were, therefore, not even notified to attend before the umpire. The complainant being called upon to execute a conveyance of his lot to the city, on being tendered the valuation fixed by the umpire, refused to do so, on the ground, that he was not bound by that valuation, and that he would appeal to the courts for redress; but he eventually consented, on being informed by the intendant of the city, that it would not impair his right to legal redress, if he had any, and he accordingly executed a conveyance upon receiving the sum tendered. He immediately afterwards filed this bill, praying compensation, and that an issue at law might be ordered to assess the damages, which he had sustained.

The answer of the city council stated, that their proceedings in relation to the widening of Berresford's Alley, and the compensation to the complainant for his lot, had been in strict conformity to the provisions of the Act of 1817; and they submitted that the valuation, which had been confirmed by the umpire, was conclusive under the Act, and that neither this, nor any other court, possessed jurisdiction to extend, or diminish it. They denied the right of the complainant to annex any stipulation, or condition, to the appointment of the umpire; and alleged that, in point of fact, there was no such stipulation, as was charged in the bill, but a mere declaration of the complainant's intention, to insist upon all his commissioners being examined by the umpire—which was cheerfully conceded at the time, and would have been fully executed when the examination occurred, if the complainant's own commissioner had not dispensed with it. They insisted, further, that the complainant had, in reality, sustained no injury from the absence of two of his commissioners, as their views were fully explained by the commissioner who was in attendance; and that, moreover, these views could not have had any just weight with the umpire, as they related to compensation which these commissioners supposed that the complainant was entitled to, for a diminution of the rents of his buildings, for several years, during which it was rumored,

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*that the city council intended to widen Berresford's Alley, before they actually resolved to do so; in consequence of which, the complainant, it was said, was unable to procure permanent tenants, or to obtain the previous rents—whereas it was insisted, that the complainant was lawfully entitled to no other compensation, than the actual value of the land and buildings, at the time when they were taken for the use of the city. The defendants further insisted, that the complainant was estopped by his conveyance to the city from now questioning the valuation made by the umpire, of which the conveyance was a recognition, and the execution of his award; and they submitted, that no expression of opinion by the intendant, or other city officer, could avoid the legal effect of this recognition, or bind the city council.

The cause being at issue, Thompson, Chancellor, in May, 1827, on motion of the complainant, ordered an issue at law, to ascertain damages sustained by him, as preliminary to a hearing. An issue was accordingly made up, on which the jury rendered a verdict for the complainant, for $2,112. And the cause now came on for hearing, upon a motion to enter a decree for the complainant, for the amount of the verdict.

De Saussure, C. It would, perhaps, have been more regular, to have argued the question of jurisdiction, and to have tried, and decided the right of the complainant, to relief in this court, before ordering an issue at law to ascertain the amount of his damages. In the course which has been pursued, the equities of all the parties must be regarded as having been reserved; and indeed the whole merits have been gone into, at the present hearing; all the evidence in relation to every part of the case has been adduced; and the cause has been very ably argued on both sides. I shall, therefore, consider the questions involved in it, as altogether unembarrassed by any conclusions from the order directing the issue at law.

It is contended in the first place, that the court will not take cognizance of such a cause: in other words, that the court has no jurisdiction. But I cannot doubt the competency of the court to give relief in a case of injustice; although, as in this case, it has been unintentionally committed, under misapprehension, by respectable gentlemen. It would be strange, if this court could not give relief, when as it appears from the evidence, these gentlemen regret the injury they have done; and especially too, when it is to open an award, or a report of commissioners similar to an award, on the ground, not merely that injustice has been done, but that

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*the terms, upon which the umpire was called in, were not complied with.

Dr. Joseph Johnson, one of the commissioners on the part of the city council, and one of the most respectable citizens of Charleston, expressly states, that it was the agree-

ment of the commissioners on the part of the city council, of whom he was the chairman, that all Mr. Walker's commissioners should be present at the examination by the umpire, Mr. Dawson; and that this was required by Mr. Walker, as the condition of his assent to the appointment of the umpire. But only one of Mr. Walker's three commissioners did attend on the umpire; the other two not being even notified, as they testify. It is, indeed, stated by Dr. Johnson, that Col. Magwood, who did attend, on the part of Mr. Walker, said he represented all the commissioners; but, in my judgment, he was not at liberty to dispense with the express requisitions of Mr. Walker, that all his commissioners should be present to represent his case, and explain the grounds of their valuation to the umpire.

On this ground, I think Mr. Walker is entitled, in equity, to open the return of the commissioners, and I am glad that he is so entitled, because it does appear to me, to be clearly established by the evidence, that injustice was done him by too low a valuation of his lot: although this was altogether unintentional on the part both of the commissioners, and the umpire, who acted with the purest good faith, but were unquestionably mistaken. That they were mistaken, is proved by the testimony of Mr. Roche, Mr. Peronneau, Mr. Rouse, and Mr. Geddes, as also by that of Mr. Payne, and Col. Magwood. Dr. Johnson, one of the city commissioners, who made the low valuation of $2,000, afterwards regretted it, and signed a petition to council for the relief of Mr. Walker. The four first named witnesses testify to the injury sustained by Mr. Walker, in the deterioration of the value, and income of his property, from the dilatory proceedings of the city council; and although this is not a distinct ground for relief in the present suit, but rather the ground for a claim in another shape, yet it should have constituted a strong motive for allowing a liberal compensation for the property thus deteriorated. I hold it to be a sound principle, that whenever the property of the citizen is taken from him compulsorily, for public purposes, there ought to be not merely a reasonable, but an ample and a liberal compensation. Now, that the valuation of Mr. Walker's land was not even a just compensation, appears from the testimony of the far greater part of the witnesses, as well as from the other facts in evi-

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dence. Mr. Walker *purchased the property in 1806, for $6,000; and he received a regular rent of $400, per annum, until the measures of the city council deteriorated the property. In 1819, or 1820, it was proved, that he was offered $4,500, for the house and lot. And in addition to all, we have the verdict of the jury establishing the correctness of the opinion of the witnesses. I repeat, therefore, that I am well satisfied, that there is not any ground, on which this application to the justice of the court can be refused, notwithstanding the return, or award, of the umpire.

I do not know that it is necessary that I should examine fully the argument of the counsel of Mr. Walker, that the State cannot delegate to any corporation, the right of taking away private property for public purposes, without compensation, and that a full compensation, such as a jury would give. This objection is founded on the constitutional maxim, that private property should not be taken away but by the verdict of a jury, or by the law of the land; which does not mean any ordinary act of legislation, but the lex terræ, as it is technically understood by the courts. If I were to enter upon this question, I should be disposed to agree, that the creation of a board of commissioners to value the land of the citizen, taken for public purposes, without the intervention of a jury does not come within the lex terræ: and that the citizen is not bound by it, unless he voluntarily submits to it.(*b*) There may be an exception under the general road-making power, founded on the usage of the country from its first settlement. I do not, however, enter into the discussion of this question, because it does appear to me, that as Mr. Walker made no objection to the mode of valuation directed by the Act of 1817, (supra,) he voluntarily submitted his rights to the commissioners under that Act. In making this submission, however, he had a right to stipulate, and did stipulate, that on calling in an umpire, all his commissioners should be present; and this was not done, but two of them were not notified. It is true, that this was after the commissioners had disagreed; but he might have withdrawn his submission, even then, if his stipulation had not been agreed to. I think, therefore, that if the Chancellor had heard the case upon its merits, he would have done right to order the issue. It does not appear indeed, that any objection was made to it by the defendants. It was acquiesced in without opposition or condition; and it might well be argued, that the city council is as much bound to abide by that acquiescence, as Mr. Walker was to abide by his submission to the mode of valuing his land, although it did not follow the rule of the constitution.

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The issue *has been tried, and not one word of argument has been urged against the justice of the verdict, which was in conformity to the weight of evidence, as well as to the opinion even of some members of the city council.

One other objection remains to be examined. It was insisted that Mr. Walker is precluded from relief by his having signed the conveyance to the city council, and received

(*b*) Vide L. C. & C. R. R. Company v. Chappell, Rice Rep., 383.

the sum of $2,000, assessed by the umpire. It is true that he did this, but it is in proof that he at first refused it, stating that he meant to seek legal redress; and it is also in proof, that he did not depart from this resolution until he was assured by the intendant, that his performing these acts should not injure his claim to redress. It was urged, however, on the part of the defendants, that the intendant could not thus do any act binding on the city council. This objection has weight, but I am sorry it has been made. It has been said that corporations have no souls, and consequently no consciences, and this seems to be an instance of it: for certainly the honorable gentlemen who constitute the city council, would not, in their individual character, be guilty of anything inconsistent with fair dealing; and yet, in this instance, they have, in their corporate capacity, taken a ground, which I cannot think reconcilable with it. Undoubtedly, they regard it as their duty, and in this instance a painful one, to protect the public property, of which they are guardians, by every legal defence. But the rules of fair dealing are legally applicable to corporations, and they are as much bound to regulate their acts, and govern all their transactions by these rules, as natural persons. Strictly speaking, neither the intendant, nor any of the wardens, can bind the city council, of which they are component parts, without formal Acts of council; and regularly not without the seal of the corporation; but, in practice, nine-tenths of the transactions of the city are performed without the seal, and by their officers acting individually. The court, at least, can say, that the city council shall not have the benefit of the acts done by Mr. Walker, unless it accedes to the terms which were proposed by him as the condition of his acts, and which were accepted by the officers of the city. Acts and engagements to be binding must be mutual; and if the city council has a right to disavow the acts of their principal officer, they ought not to be permitted to take advantage of the acts of the other party done, expressly, on the faith of the acts and assurances of that officer. Mr. Walker has the right to be placed in the same situation in which he was before

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he was *misled; and this would remove the objection to his relief, which we are now considering.

Upon the whole, I am satisfied, that justice has been done by the verdict rendered on the issue at law, and that it ought to stand; and it is therefore ordered, and decreed, that the complainant have leave to enter judgment for the amount of the verdict, and to enforce the same. The costs to be paid by the city council.

From this decree, the defendants appealed, and at the present sitting of the Court of Appeals, moved that the same might be reversed.

Axson, city attorney, for the motion. It is a mistake to say, that there was any stipulation for the examination of the complainant's commissioners by the umpire. The complainant insisted that they should be examined, and this was readily acceded to by the city commissioners. They had in fact no right to object to it. But it was the duty of the complainant to bring his commissioners before the umpire, and this he failed to do, as to two of them; and not only so, but the one who did attend, stated that he represented the others, and, as appears by the umpire's report, did explain their views most fully. The complainant had no right to make any stipulation, as the condition of his assent to the appointment of an umpire. Under the Act of 1817, he was bound to assent; and if he had refused to join in the appointment, it would have been made without his consent, and he would have been concluded by the decision of the umpire so appointed.

But it is contended, that the Act of 1817 was not binding upon the complainant, except so far as he has submitted to it: for that the Act is unconstitutional, in so far as it authorizes private property to be taken for public purposes, without a compensation to be assessed by a jury. The only provision of the constitution relied on, however, for the support of this position, is that part of the 2 section, 9 article, borrowed from Magna Charta, which declares that no freeman shall be disseized, &c., "but by the judgment of his peers, or by the law of the land." But the exception to this restriction is two-fold, and to render the clause available to the purposes of the argument, it is necessary to strike out one of the alternates, and obliterate the important exception expressed by the phrase, "or by the law of the land." This cannot be done; and then the question arises, what is the law of the land? For the answer, we must look to the constitution; (c) the 1 section, of the 1 article, of which, declares, that "The legislative authority of this State shall be vested in a general as-

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sembly, which shall *consist of a senate and house of representatives." Here, then, is the authority to make and declare the law; and although the exercise of this authority is subject to the restrictions, imposed by the paramount authority of the constitutions of this State, and of the United States, yet an Act of the legislature, which does not conflict with either, is most unquestionably "the law of the land." The idea of a lex terræ of a different origin, and paramount authority, is unknown to the constitution, and is in itself somewhat unintelligible.

This construction of the constitution has

(c) 1 Stat., 184.

been recognized in practice ever since its adoption, and that in regard to this very matter of taking private property for public purposes. Lindsay v. Commissioners, 2 Bay, 38; Patrick and Manigualt v. Commissioners, 4 McC., 541. In the latter case it was held, that the State may take private property for public purposes, without compensation; and a fortiori, if compensation is allowed, the State may adopt any mode of assessing it.

If the Act of 1817 is constitutional, then the decision of the umpire, which has been made in conformity to the provisions of the Act, is conclusive; and this court does not possess a jurisdiction to renew it. The Act gives no such right of appeal, and there is no principle, upon which the question can be withdrawn from the jurisdiction, in which the legislature has vested it. Admitting that fraud would afford a ground for interfering, yet fraud is not pretended; and to say that there has been injustice done, without charging fraud, is, in fact, to impute mere error of judgment, and that in a matter, to wit, the value of land, about which commissioners are the best, as the legislature have said they shall be, the final, and exclusive judges.

But the idea of injustice in this case is founded altogether on misapprehension. It is not pretended, that the commissioners, or umpire, have assessed the land below its value; but Mr. Walker claims, and the jury have allowed, compensation for deterioration of his property, and loss of rent, while council were deliberating as to the propriety of widening Berresford's Alley. Now, to this he has not even the shadow of a right. He is in truth entitled simply to what the Act of 1817 allows; and that is only "the true and real value of his lot." Anything beyond that is a gift and it is a gift which the city council has no right to make, at the expense of the tax paying citizens.

If, however, Mr. Walker ever had a right to set aside the valuation of the umpire, he concluded that right when he conveyed his

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*land in fee to the city council. The opinion expressed by the intendant, or any one else, cannot change the legal effect of the instrument. It is said that this defence ought not to have been set up; but it would be grossly oppressive upon the citizens of Charleston, if they were compelled to make good all losses sustained by relying on hasty, or mistaken opinions, expressed by their officers, to persons who have no authority to ask for such opinions. If there is a mistake, there was mistake on both sides; and it is very certain that the majority of council would never have voted Mr. Walker his money, if they had supposed that the payment was to be followed by a law suit. It is submitted, that Mr. Walker is estopped by his deed from denying that he has received full compensation for his land.

Henry A. De Saussure, contra. It is unquestionable, that Mr. Walker has been injured; and if his rights have been invaded, he is entitled to a remedy, and that remedy will be furnished by this court, if there is none at law.

Admitting the Act of 1817 to be constitutional and binding, yet if Mr. Walker has been injured by mistake, or accident, in the execution of it, this court will grant relief. Much more will he be relieved against his own deed on that ground. Pickett v. Loggon, 14 Ves., 215.

But the Act of 1817 is not constitutional; for even if the State possesses the power to take private property without compensation, it could not delegate that power to a corporation; and the utmost limit to which the grant of authority, contained in the Act of 1817, could be extended, consistently with the constitution, would be to divest the title of the citizen, upon payment of a compensation to be assessed by a jury. Walker, therefore, was bound by the Act only so far as he submitted to it; and the city council were bound by the terms of his submission. Those terms were not complied with, and the valuation therefore was not binding on Mr. Walker.

The case is precisely analogous to that of a submission to arbitration; and it is a well settled rule, that the terms of the submission must be strictly pursued, or the award is not binding. Smith v. Spencer, 1 McC. C., 93; Pratt v. Hackett, 6 John. C. R., 14; Champion v. Wenham, Ambl., 245. Where arbitrators promised to hear witnesses, but made the award before, the award was set aside. Earl v. Stocker, 2 Vern., 251. Where the submission was to five arbitrators, and the award was made by four, it was held void. Green v. Miller, 6 John. C. R., 39. Arbitrators cannot delegate their authority, and therefore Col. Magwood could not be in-

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vested *with the authority of the other commissioners. See Lingood v. Eade, 2 Atk., 505.

Walker, then, is neither concluded by the award, nor by his own deed; and if this be so, he is entitled to relief in this suit. An issue at law to assess his damages was, obviously, the most appropriate mode of fixing his compensation; and no objection was seriously urged against the verdict itself. His Honor the Chancellor, therefore, very properly confirmed the verdict, and for the same reason the appeal from his decree must be dismissed.

Petigru, same side. Could the city council have taken Walker's land without compensation? The public, to be sure, have a right to use the property of individuals for public purposes; but an adequate compensation must be made. 1 Bl. Com., 139. Since the case of Patrick and Manigault v. The Commissioners of Cross Roads, (supra), the

doctrine of Blackstone must, it seems, be taken with some limitation in this State; but, even in that case, it was not decided, that the State can delegate its authority to take private property without compensation.

The king cannot delegate the exercise of his prerogative. Chit. on Pre., 9, 384. And certainly, the power of delegation is not more inconsistent with the analogies of royalty, than with republican principles.

Public functionaries are trustees, and have but delegatam, potestatem, quæ non potest delegari. 2 Inst., 597. The rule extends to all agencies; and an executor with power to sell cannot sell by attorney. But in no case ought this principle to be enforced more rigidly, than in the exercise of the right of the State to take private property for the use of the public. The legislature holds but a delegated authority to do so, and that authority cannot be again delegated.

Walker had then a right to compensation, and he had a right to come into the courts to obtain it. This right is secured to him by Magna Charta, and the constitution; and the legislature could not deprive him of it by referring him to a tribunal unknown to the constitution. The legem terræ, is not whatever the legislature may think proper to declare it. Zylstra v. Corporation of Charleston, 1 Bay, 382.

The road-making power was anciently a part of the royal prerogative, but before it could be exercised, it was necessary that a writ of ad quod damnum should issue. Registrum Brevium, 252, 255. In New York, a similar process issues from the court of Chancery, whenever private property is tak-

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en for public purposes. *2 N. Y. Rev. St., 588. This is, however, but a reenactment of the common law. The writ of ad quod damnum is a common law writ, and secures to the citizen the right of a trial by jury, whenever his property is to be taken from him. And this is the lex terræ, which is referred to in the constitution.

Walker's obligation under the Act of 1817 rests therefore entirely upon his assent, which must be taken with all its qualifications; and it cannot be questioned, that the umpirage was not in conformity to the assent.

Is he concluded by his deed? He executed it under a mistaken impression of his rights, and this forms a ground of relief, according to the recent decision of this court, in the case of Lawrence v. Beaubien.(*d*) Moreover, this mistaken impression was caused by the misrepresentation of the agent of the defendants; and this added to the inadequacy of the consideration, and other circumstances, furnishes a distinct ground for being relieved from his deed; Astley v. Reynolds, 2 Str., 915; Fox v. Mackreth, 2 Cox Ca., 320; Phillips v. Thompson, 1 John. C. R., 131; McCants v. Bee, 1 McC. C., 390.

Axson, in reply, cited Dunn v. City Council, Harp., 189, and Cruickshanks v. City Council, 1 McC., 360. The right of the State to take private property for public purposes is beyond all question; and the proposition, that the authority of the legislature is restricted by the constitution will not bear argument. There can be but one law of the land, and that is what the legislature think proper to make it, unless they infringe the provisions of the constitution; but it is no violation of the constitution to alter the law of the land, in any particular which is not prohibited by the provisions of the constitution.

It is said, however, that this power cannot be delegated. The answer is, that the State cannot exercise its powers except by agents; and it is difficult to discover any good reason why a public corporation, consisting of persons elected directly by the people, upon whose rights they are to exercise the authority of the State may not as properly be selected as agents, as any other person whatever. To say otherwise, would be to deny the right of the State to create a municipal corporation, or indeed to establish any office whatever.

HARPER, J., delivered the opinion of the court.

The very full and satisfactory decree of Chancellor De Saussure in this case, leaves very little to be added. Some of the points that were chiefly argued, do not appear to

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be really involved *in it. These respect the power of the legislature, under the constitution, to take the property of an individual for public purposes, without compensation; or if the legislature possess such power, its authority to delegate it to the city council; and the authority of the legislature to appoint any other tribunal than a jury of the country to determine on the compensation. The legislature may certainly propose to any citizen, whose property it takes for public purposes, to join in the appointment of commissioners, or arbitrators, to assess his compensation: and if he accepts such terms, and join in the appointment, unquestionably he will be as much bound, as if he had submitted to arbitration a matter of litigation with an individual. The Act of the legislature of 1817, 7 Stat. 136, under which the case arises, provides for this mutual submission, if the party shall be willing to make it. It is only in the event of his refusal, that it makes provision for taking the property without any agency on his part. But the present complainant did accept the proposal of the legislature, and appoint commissioners on his part; and he must therefore be bound by their determination, unless there was some irregularity in their proceedings, which will

(*d*) Vide 2 Bail. L., 623.

invalidate it. We do not perceive that the powers of the commissioners in this case differed at all from that of the arbitrators in contest between individuals, and we think their proceedings are to be governed by the same rules.

Thus regarding them, we think with the Chancellor, that there was an irregularity which vitiated the award. This was the circumstance, that when it was proposed to appoint an umpire on the terms of the act, the complainant made it a condition of his assent to the appointment, that all the commissioners on his part should be present before the umpire, which was agreed to by the commissioners on behalf of the city council: but the umpire afterwards went on to hear and determine the matter, in the presence of only one of the complainant's commissioners. We agree with the Chancellor, that the commissioner who attended, could not take upon himself to represent those who were absent. The umpire, of course, knew the terms upon which he was appointed; and in a legal point of view, it was misconduct on his part to disregard those terms, and proceed without the presence of the other commissioners. This is said, of course, without intending any personal reflection on the individual in question, who appears to have been a fair and highly respectable man; but we think he misconceived his duty.

In Earl v. Stocker, 2 Vern., 251, it is said,

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that "in Pitt v. Daw*kra, the arbitrators promised to hear witnesses, but making the award before they had done so, the award was set aside. In the case of Smith and Croyton, the arbitrator promised not to make his award until Smith, who was not well, should come abroad. Lord Nottingham, for that reason, inclined to set it aside: but the matter ended by compromise."

In Walker v. Frobisher, 6 Ves., 70, the arbitrator, after examining witnesses, advised the parties to produce no more witnesses. He stated, on oath, that after he had fully made up his mind, several persons, unattended by the solicitors on either side, mentioned to him circumstances relative to the matter in dispute, of which he took minutes, but told them that he had before satisfied himself; and he stated that nothing that passed had the least weight with him. Lord Eldon said, that although he was a most respectable man, on general principles, the award could not stand. "A judge must not take upon himself to say what effect testimony improperly admitted had produced on his mind.

When a course of proceedings is prescribed to an arbitrator by the consent of the parties, or he engages to pursue a particular course, which the parties think material to their interests, and which may be material, he is not afterwards at liberty to depart from it. The umpire, in this case, was appointed on condition of hearing and determining in the presence of all the complainant's commissioners; and this was the prescribed rule of his conduct, to which he was bound to conform. In Spettigue v. Carpenter, 3 P. Wms., 361, the bill was to set aside an award. There were several stated accounts between the parties, but the arbitrator, without regarding them, went on to make out an account in his own way. A few days before the time appointed for making the award, one of the parties sent to the arbitrator, desiring to be heard; but he went on to make his award. The award was set aside, "for as much as there seemed just reason for the plaintiff to desire to be heard, and it was difficult to assign a reason for rejecting so many stated accounts." Here, the arbitrator's refusal to conform to the reasonable wishes of one of the parties in the course of his investigation, seems to have been the principal ground for impeaching the award.

In Chicot v. Lequesne, 2 Ves., 315, it is a principal ingredient of the decision, that two of the arbitrators decided without the presence of the third. Reference is made in the argument to the case of Corbett Kynaston v. Mayor of Shrewsbury, "where fifteen aldermen concurring, as found in the verdict, the whole court held it a void act, the sixteenth

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not having been summoned, whose *reason might have convinced the rest." This was the case of a corporate act, done, not on a corporation day, when it is said, all must be present. So here, we cannot say that the reason of the other commissioners might not have convinced the umpire. We cannot say that Col. Magwood presented to the mind of the umpire all the circumstances that were necessary to his decision. Different minds see things in a different light, and present them differently. The concurrence of several gives some authority to an opinion, and it is more difficult to resist their arguments. The decision of the umpire seems to have been so palpably erroneous, that perhaps it is fair to presume he might have been convinced by the reason of several. An umpire, I suppose, may either re-examine the whole matter, and hear testimony for himself, or act on the concurrent statements and opinion of the arbitrators. In the latter case, it would seem a rule of propriety, at least, that all the arbitrators on both sides should be before him.

It was argued, that the complainant had no right to impose conditions: that he had no power to do anything but name his commissioners, and that to them belonged, in conjunction with the commissioners on the part of the council, the appointment of the umpire. Admitting this to be so, yet as his conditions were assented to by the commissioners, who had the power of appointment, it became the rule for the umpire's conduct, to which he was bound to conform. Besides, we would presume that his commissioners,

who were in some sort his agents, joined in the stipulation. It was, we think, a reasonable condition, and may have been a material one. Being assented to on both sides, it was binding on the umpire.

On the question of jurisdiction, I think it hardly necessary to say, that the setting aside of awards, for misconduct or irregularity, is a familiar subject of equity jurisdiction.

It was further urged, that the complainant had precluded himself from relief and confirmed the award, by executing a conveyance of the premises. It is plain that he did this under a misapprehension of his legal rights; and we have decided, during the present session, that such misapprehension may be relieved against.(e) It was not acting in ignorance of the law; but he was assured by the intendant, himself a lawyer, that the execution of the deed would not impair his claim to further compensation. We may justly conclude that he was deceived and mislead by this assurance. But, in truth, this is a mistaken view of the subject. He does not come to be relieved against the deed, or to

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set it aside. *He comes to claim a compensation for his property, to which he is certainly entitled. The award does not stand in his way, for we have declared it irregular. If before he had received any compensation, he had executed a conveyance and delivered possession, in the confidence that the council would go on to ascertain and pay his compensation in pursuance of the directions of the act, I think he might sustain his suit in equity.

The authority of Chancellor Kent, in Philips v. Thompson, 1 John. C. R., 147, seems directly in point. In that case, commissioners were appointed under an Act of the legislature, for the purpose of reclaiming drowned lands, and a mode was fixed of making compensation to persons whose property might be injured. Under some understanding with the commissioners, the plaintiff had lowered his mill dam, and they had cut a canal on his land. The bill was for compensation. The Chancellor says he has no doubt of the jurisdiction. It is certain that the plaintiff has sustained injury, and is entitled to compensation. The defendants admit that they entered upon the land, and dug the canal, under his express, or implied assent, and with a mutual understanding that compensation should be made. How is he to proceed? He cannot sustain trespass at law, for the lowering of the mill dam was his own act, and the commissioners entered to cut the canal by his assent. The Chancellor cites many cases, in which the Court has sent issues to law, for the purpose of assessing damages; and says he is apprehensive the plaintiff will be remediless without the aid of the court. In the present case the complainant cannot sustain trespass at law. He first delivered possession of the premises by his own act, and afterwards executed a conveyance. It is difficult to conceive of any action in form ex contractu, which he could sustain at law. Yet he is certainly entitled to full compensation for his property. He has not received it, and the award is not in his way; and we are apprehensive, that the complainant will be remediless without the aid of this Court.

The decree is therefore affirmed, and the appeal dismissed.

JOHNSON, J., and O'NEALL, J., concurred.

Decree affirmed.

(e) Vide Lawrence v. Beaubien, 2 Bail. L., 623 [23 Am. Dec. 155]; ante, 436, 343; post, 507, 494; Lowndes v. Chisolm, 2 McC. Eq., 455 [16 Am. Dec. 667]; Hopkins v. Mazyck, 1 Hill. Eq., 242; Maner v. Washington, 3 Strob. E., 179, 178; Brockington v. Camlin, 4 Strob. E., 198; Boulware v. Harrison, 4 Rich. E., 317, 319, 349, 354; Sp. E., 419, 315, 394; 1 Strob. E., 159, 164; 2 Hill L., 666.

Bailey, Eq. *458

*JOHN WHITE, and Others, v. ADELE POUSSIN.(a)

(Charleston. April, 1831.)

[1. *Limitation of Actions* ⇐⇒67.]

A voluntary conveyance will not be protected by the statute of limitations against creditors of the donor, if the fact, that such conveyance had been made, was unknown to the creditors until within the statutory period before the bill was filed to set it aside, and the donor remained all the time, ostensibly, in possession.

[Ed. Note.—Cited in Thrower v. Cureton, 4 Strob. Eq. 159, 53 Am. Dec. 660.

For other cases, see Limitation of Actions, Cent. Dig. § 376; Dec. Dig. ⇐⇒67.]

[2. *Limitation of Actions* ⇐⇒177.]

Although a bill praying relief against fraud must, in order to avoid the effect of the statute of limitations, allege that the fraud was not discovered until within the statutory period before suit brought, yet it will be sufficient if the allegation is substantially, although not clearly, or formally made: and even if it is not made at all, yet if it appear at the hearing, that the discovery was not made until within the statutory period, it seems that leave will be given to amend for the purpose of making it.

[Ed. Note.—Cited in Thrower v. Cureton, 4 Strob. Eq. 159, 53 Am. Dec. 660.

For other cases, see Limitation of Actions, Cent. Dig. § 665; Dec. Dig. ⇐⇒177.]

[This case is also cited in DuPont v. DuBos, 52 S. C. Append. 605, regarding the right of creditor to pursue property in hands of voluntary donee.]

Heard by Harper, Chancellor, Charleston, May, 1830.

This was a bill by the assignees of Thomas W. Price, an insolvent debtor, to set aside three bills of sale, executed by him in the years 1812, 1816, and 1820, by which he had conveyed several slaves to the defendant. The bill charged that the bills of sale were,

(a) Ante, 244, 228.

in fact, without consideration, and fraudulent as to creditors; and prayed that the slaves might be delivered up to be sold for the benefit of the creditors. The defendant pleaded the statute of limitations; and under this plea evidence was adduced to shew, that she had held adverse possession of the slaves for more than four years: that the tax returns had been made in her name; and that she had also brought an action for one, and sold others of them, in her own name; that she was a single woman, and lived in her own house; and that Price cohabited with her.

It was insisted at the hearing, that this was, at the utmost, a case of constructive fraud merely, which was no bar to the operation of the statute; and that if it were, the statute would run from the discovery of the fraud: but, that to avoid the effect of the statute, the complainants should have alleged, that the fraud had not been discovered until within four years before the filing of the bill; and this had not been done.

Harper, C. This is a very clear case. Independently of the evidence furnished by the bills of sale, that the slaves were originally the property of Price, the proof is that they remained in his possession until his death in 1827. These bills of sale were relied on for the purpose of shewing, that although

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Price had an *apparent possession, it was exercised in defendant's right, and enured to her benefit; in short, that the possession was exclusively hers. Whether the statute of limitations could have matured her title against him it is unnecessary to consider. She had a good title against him independently of the statute. But the complainants are not volunteers, standing, to all intents, in the place of Price. They stand in the situation of creditors; and one of them is a creditor to a very large amount, and may impeach what Price himself could not. It is apparent that the deeds were fraudulent. They are so charged to have been; and as the plea does not deny, it must be taken to admit the charge. Then the rule is notorious, that time will not run to protect a fraud, until the fraud has been discovered.

It is true, that the party seeking relief, in such a case, must allege that the fraud was discovered within the statutory period before the filing of the bill. The allegation is not strictly susceptible of proof; but it is material, to put the defendant upon the proof of discovery. I think that the allegation, though not clearly or formally, is yet substantially made by the present bill. The allegation is, that the complainants, under a decree of the Court of Appeals, made in 1828, directing the slaves belonging to the estate of Price to be delivered up for sale, were proceeding to seize the slaves in question as part of that estate, when the defendant produced her bills of sale for them. They do not say directly, that they had no knowledge of these conveyances before: but I think they do so impliedly; and this was enough to put the defendant upon proof of their knowledge.

But if the allegation were not made, yet as I am satisfied that the fact was so, and the justice of the case requires it, I should give leave to amend in order to make it. The allegation is supported by the circumstances, that the conveyances were never recorded, and that Price remained ostensibly in possession until his death. There is no way in which the discovery could probably have been made. Indeed, I believe that the charge, that the deed was kept secret, must be taken as admitted to be true. On the part of the defendant, no proof is produced of any previous knowledge of the fact by complainants. If it were established, that the defendant exercised acts of ownership by selling one or two of the slaves, there was but the merest chance, that complainants should be informed of that. So of the returning the slaves to the tax collector in the name of the defendant after 1824. I

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must take it *that the fraud was discovered in 1828; and since that there has not been time enough for the statute to run.

It is therefore ordered and decreed, that the plea be overruled.

On appeal, JOHNSON, J., delivered the opinion of the court.

We concur in the decree of the Chancellor for the reasons on which it is founded, and the appeal is therefore dismissed.

O'NEALL, J., and HARPER, J., concurred.

Legare, Attorney General, for the motion.

Decree affirmed.

Bailey, Eq. 460

CHARLES BROWN, Administrator of Charles Butler, v. JOHN VINYARD.(a)

(Charleston. April, 1831.)

[1. *Executors and Administrators* ⇐104.]

To excuse an executor from the payment of interest on the annual balances in his hands, it must appear, not only that there were debts due by the estate, but that he retained the funds in his hands to meet them. If he used the money as his own, he is liable for interest. The rule, which allows an executor to retain funds for the purpose of meeting debts, does not mean a hypothetical retaining.

[Ed. Note.—Cited in Lafont v. Ricard, Bailey, Eq. 487; McAlister's Heirs v. Brice, McMul. Eq. 278; Burnside v. Robertson, 28 S. C. 587, 6 S. E. 843.

For other cases, see Executors and Administrators, Cent. Dig. § 432; Dec. Dig. ⇐104.]

(a) Ante, 23; 98, note; post, 487.

[2. *Executors and Administrators* ⟸104.]
Where an executor has not returned an account of the crops of the estate, but is charged with a specific sum for the rent of the lands, and the hire of the slaves, he is not entitled to six months to invest the fund, but is liable for interest from the end of the year.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 432; Dec. Dig. ⟸104.]

[3. *Executors and Administrators* ⟸104.]
The accruing interest on the annual balance in the hands of an executor is to be set off against his disbursements in each year; and if the disbursements equal, or exceed the annual interest, the balance remaining, after deducting the aggregate of principal and interest, is principal, on which he is chargeable with interest for the succeeding year.

[Ed. Note.—Cited in Livingston v. Wells, 8 S. C. 363.

For other cases, see Executors and Administrators, Cent. Dig. §§ 423–432; Dec. Dig. ⟸ 104.]

[4. *Executors and Administrators* ⟸111.]
An executor, who has been in possession of the estate, under a will, the probate of which was subsequently set aside, is not entitled, on a bill against him by the administrator of the deceased for an account of the estate, to an allowance for fees paid to counsel for defending the will, nor even to the usual fee to his solicitor in the suit for an account.(*b*)

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 451; Dec. Dig. ⟸111.]

[This case is also cited in Ketchin v. Rion, 72 S. C. 153, 51 S. E. 557, and distinguished therefrom.]

Before Harper, Chancellor, Charleston, May, 1830.

Charles Butler, the complainant's intestate, died in 1820, and administration of his estate was granted to the present complainant and defendant, jointly. Shortly afterwards, a paper purporting to be the will of the deceased was found, and admitted to probate; whereupon the previous grant of administra-

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tion was revoked, and *the defendant, Vinyard, qualified as executor of the will. Some years subsequently, proceedings were instituted to set aside the will, and after much litigation, the paper purporting to be a will was declared to be a forgery, and the probate was cancelled; but without any evidence implicating Mr. Vinyard. Administration of the estate of Charles Butler was then committed to the present complainant, who in 1826, filed this bill for an account of the estate whilst in the hands of the defendant, as executor of the supposed will.

The matters of account were referred to the commissioner; from whose report it appeared, that the defendant had not kept any separate account of the crops made on the lands, or by the slaves, of the intestate, but that believing the will to be genuine, and his own children being the parties chiefly interested under it, he had used the land and slaves of the intestate indiscriminately with his own. The account was, therefore made up, by charging him with a specific sum annually, for the rent of the land, and the hire of the slaves. The cause now came up upon exceptions to the commissioner's report, which will be sufficiently understood from the decree.

Harper, C. I shall consider the several exceptions in their order. The first is, that the commissioner has allowed interest on moneys retained by the defendant to pay debts and current expenses of the estate. The general rule is, certainly, that an executor shall pay interest on the annual balances in his hands. He may be excused, however, if it appear that he retained the money idle in his hands to meet debts and expenses. There was but one considerable debt against the estate, which the defendant litigated for four years, when a judgment was finally recovered against him. Did the defendant retain the funds with a view to meet that demand? He mixed the slaves of the estate with his own, and made crops, of which he returned no account. It must be supposed that he used the proceeds of the crops as his own. It is on this ground that he is charged with interest. Having the use of the funds, it is as if he were shewn to have made interest. There is not, in fact, any ground to conjecture, that he did keep funds in his hands unemployed, with a view to meet that debt. The rule, which allows an executor to retain funds, for the purpose of meeting debts, does not mean a hypothetical retaining of funds. The exception must, therefore, be overruled.

The second exception is, that the commissioner allowed interest from the end of each year, without allowing a term of six months

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*to make investments. I think the reasoning of the complainant's counsel on this point correct. If the defendant had returned an account of the crops, he would have been entitled to a reasonable time after the proceeds were received, to make investments. But he is charged as the hirer of the slaves, and the land; and that was a debt from the end of the year. Besides, as the defendant received the land and slaves early enough in the first year to make a crop, he might have been properly charged with hire at the end of the year, or on 1 January of the following year; but the commissioner has made up his accounts to 21 of May, annually. This effects a saving of interest to the defendant. If the hire be considered to have been in

(*b*) Wham v. Love, Rice E., 51; Atcheson v. Robertson, 4 Rich. E., 39; Butler v. Jennings, 8 Id., 87; McClellen v. Hetherington, 10 Id., 202 [73 Am. Dec. 89]; Villard v. Robert, 1 Strob. E., 409; 2 Hill E., 113.

his hands on 1 January, it may be said that he has been allowed nearly five months to make investments. This exception is also overruled.

The third exception, which is, that the commissioner has allowed annual rests in the account, thereby compounding the interest, is misconceived. According to the rule adopted by the Court of Appeals in Black v. Blakely, 2 McC. Eq. 1, the accruing interest is to be set off against the expenses of the year; if those expenses exceed the interest, as in this case they did, in the year 1822, then deducting them from the aggregate of principal and interest, nothing is left but principal, on which the interest is calculated for the ensuing year. In those years in which the expenses fell short of the interest, it will be perceived, that the commissioner has allowed interest only on the principal, and not on the balance of the accruing interest. The exception is overruled.

The fourth and fifth exceptions are, that the commissioner has disallowed the fees paid to counsel for defending the will, and has also disallowed the usual fee to the defendant's solicitor in this suit. I think the reasoning of the commissioner conclusive as to these exceptions. If the defendant has any equity to be reimbursed the expenses of litigating the will, it is against the legatees for whose benefit he was litigating, and not against the present complainant. And as to the expenses of the present suit, I perceive no claim, that any other defendant, who has unsuccessfully litigated a hostile suit, would not have. These exceptions must, therefore, be also overruled.

It is ordered, and decreed, that the commissioner's report be confirmed.

The defendant appealed, and now moved that the decree might be reformed, and the account referred back to the commissioner to be restated conformably to the exceptions.

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*H. A. De Saussure, for the motion. As to the allowance of interest, and the time from which it should be computed, cited Taveau v. Ball, 1 McC. C., 459, 431; Pace v. Burton, Ib., 250; and Wright v. Wright, 2 Id., 185. And on the charge for counsel fees, cited Warden v. Burts, Ib., 76; Wright v. Wright, Ib., 191; and Allen v. Dundas, 3 T. R., 125.

Memminger, contra.

JOHNSON, J. This court concurs with the Chancellor in the views he has taken of all the questions that have been raised on this motion. The decree is therefore affirmed.

O'NEALL, J., and HARPER, J., concurred.

Decree affirmed.

Bailey, Eq. 463

JOSEPH JOHNSON, and Others, Executors of Sarah Johnson, v. Executors of NATHANIEL SLAWSON and WILLIAM HARTH.

Executors of NATHANIEL SLAWSON v. JOSEPH JOHNSON, and Others, Creditors of Nathaniel Slawson.

(Charleston. April, 1831.)

[1. *Executors and Administrators* ⟸263; *Vendor and Purchaser* ⟸254.]

An agreement in writing, but not under seal, to give bond, secured by mortgage, for the purchase money of land, will not entitle the vendor to be paid as a bond creditor, where the purchaser has died insolvent, before giving bond pursuant to the agreement; although the vendor is entitled to a specific lien on the land itself.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 987; Dec. Dig. ⟸263; Vendor and Purchaser, Cent. Dig. § 648; Dec. Dig. ⟸254.]

[2. *Equity* ⟸6.]

Equity relieves when, through mistake, an instrument is not what it was intended to be; but will not aid a security, by giving to it an effect not intended by the parties, when it was entered into; and although there are cases, in which an agreement for a specific lien will be enforced, there is no case where, in the administration of assets, the court has carried into effect an agreement to confess a judgment, or to give a bond, or other general security, to the prejudice of other creditors.

[Ed. Note.—Cited in D. C. Roddy & Co. v. Elam, 12 Rich. Eq. 345.

For other cases, see Equity, Cent. Dig. § 14; Dec. Dig. ⟸6.]

[3. *Equity* ⟸345.]

Where the allegations of the bill are denied by the answer, a single witness is not sufficient to establish them, unless strongly supported by circumstances.(a)

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 722; Dec. Dig. ⟸345.]

These causes were heard together at Charleston, in May, 1830, before Harper, Chancellor, from whose decree the questions made will be sufficiently understood.

Harper, C. The bill in the first of the cases stated, charges that complainants entered into a written agreement with Nathaniel Slawson, deceased, for the sale of a tract of

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land, which they had *purchased at the commissioner's sales, and for which he was to receive titles from the commissioner; that it was a part of the agreement that the purchase money, $4,000, should be secured by two notes of hand for the amount of $1,000, endorsed by the defendant, William Harth, and by bonds for the residue, payable in one and two years, with the said Harth as surety, together with a mortgage of the land; and that, in pursuance of the agreement, the notes were given, endorsed by Harth, and Slawson went into possession, and continued in possession until his death, but, from causes alleged in the bill, delayed to execute the bonds and mortgage. It appears, that since

(a) Ante, 1, 382, 126, 223.

the death of Slawson, the land has been sold, with the assent of the defendants, his executors, and that complainants have received the proceeds, which, however, were not sufficient to satisfy their demands under the agreement. The objects of the bill are to set up the residue of the demand, as a bond debt, against the estate of Slawson, and to charge the defendant, Harth, as surety, who, it is stated, was present when the agreement was executed, and assented to it. The answer of the executors of Slawson admits, generally, the facts charged, but states that the estate of Slawson is insolvent, and submits that the complainants' demand cannot be set up as a bond debt, to the prejudice of simple contract creditors. The answer of the defendant, Harth, admits that he endorsed the notes, as he had often done for Slawson, without knowing for what purpose they were to be used; and positively denies, that he ever agreed to become Slawson's surety on the bonds, or that he even knew of the existence, or contents, of the agreement exhibited by complainants. The bill of the executors against the creditors of Slawson is for the administration of the assets of his estate.

The first question is, whether the demand in question can be set up as a bond debt, to the prejudice of the other creditors of Slawson. Our statute of 1789, P. L., 494, 5 Stat., 111, prescribes, that the executors and administrators shall pay bonds, and then simple contract debts, as they existed at the death of the testator, or intestate. At the death of the defendants' testator, the complainants' demand was a simple contract debt merely. It rested on the agreement, which was not under seal. Upon what ground am I to take it out of the words of the statute? Equity inclines to regard all creditors as equally meritorious; and upon what principle of equity shall the court interfere to postpone those who, with equal equity, have obtained legal equality? The cases chiefly relied on for the complainants are those in which a bond made joint, when

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it was intended to be joint, *and several, has been set up as a joint and several bond, against the representatives of a deceased obligor. The case in which this subject has been most fully considered, is that of Burn v. Burn, 3 Ves., 573. This is the first case in which it was decided expressly, and in terms, that such a demand may be set up to the prejudice of creditors, although there was no doubt it might be done as against the representatives of the obligor himself. The heir-at-law might be charged with at as a bond debt, yet the Chancellor seems to have doubted as to the principle, and upon what equity the party could be entitled to preference over simple contract creditors. Id., 575. And he subsequently decides upon the authority of the previous cases, in which creditors must have been affected, although not expressly named.

There seems to be something anomalous in the doctrine, and I should not be disposed to follow the cases further than they necessarily lead, especially against the plain provisions of a statute. Yet there is an obvious distinction between that class of cases and the present. Those were cases of mistake—the parties intended to make an instrument which should have the effect of a joint and several bond, and supposed that they had done so. As explained by the Chancellor, in Gray v. Chiswell, 9 Ves., 124, "the cases of mistake, &c., differ in respect of the intention of the transaction; the intention originally to constitute a legal demand against the deceased man, as well as the survivor. The decree goes upon the intention." See also Underhill v. Harwood, 10 Ves., 227. In those cases it might be argued, that the simple contract creditors were put in no worse situation than they would have been, if the parties had done what they intended, and supposed they had done. In the present case there was no mistake; but the parties did what they intended. There was no intention "originally to constitute a legal demand." This, I think, constitutes a sufficient distinction between the cases relied on and the present.

Another class of cases relied on are those, in which agreements to mortgage have been executed to the postponement of other creditors. The distinction between a mortgage, or specific lien, and a judgment, or general security, is pointed out in Finch v. Winchelsea, 1 P. Wms., 278. If a person having articled to sell land should afterwards confess a judgment to a creditor, who had no notice, this would not affect the land in equity; but if he should sell, or mortgage, the purchaser for valuable consideration, without notice, would be protected. The like distinction prevails, if a trustee should confess a judgment,

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or give a mortgage. There is no case, *so far as I know, where, in the administration of assets, the court has carried into effect an agreement to confess a judgment, or give a bond, or other general security, to the prejudice of other creditors. Some of the cases seem also to indicate another distinction with respect to agreements to mortgage, or give a specific lien, which appears conformable to principle, and reason, between the instances, in which a party advances his money on the faith of the agreement, and where it is made to secure a previously existing debt. This, however, it is not necessary to consider at present. In Williams v. Lucas, 2 Cox Ca., 160, where a party having borrowed money, gave his note promising to give security by a mortgage of land generally, it was held that this debt was not a charge on the land. The case of Rutledge v. Smith, of which the sequel is reported in

1 McC. Eq. 119, and which was cited in the argument of this case, goes very far in establishing a lien. Without, however, questioning the authority of that case, although the present Court of Appeals speak doubtfully of it in Smith and Ravenel v. Smith, 1 McC. Eq. 148, there is the obvious distinction between that and the present case, that the court did not profess to carry into effect an agreement for a future security, but decided on the construction and effect of the security, such as the parties had made it. It is expressly put on that footing by Chancellor De Saussure, in Smith and Ravenel v. Smith, 1 McC. Eq. 144. The opinion of the Court of Appeals says that the former court held it to be a specific lien. This is conformable to the distinction taken in Falkner v. O'Brien, 2 B. and B., 223, between a covenant that all the estates of the covenantor are charged with a sum of money, and a covenant that he will charge his estate: the former is a charge upon all the covenantor's land, the latter is not. The complainants have already had the benefit of a specific lien on the land sold by them, and I think they are not entitled, as against other creditors, to the general security of a bond.

As to the case against the defendant, Harth, it is not made out by evidence. He positively denies that he knew of, or assented to, the agreement made by Slawson; and his answer is contradicted but by a single witness. One witness will not do, however respectable, unless strongly supported by circumstances; and I perceive none such. The testimony of the witness, Carew, goes strongly to support the answer; and indeed the testimony of Major O'Hara, the witness against the answer, is rather matter of conviction, and inference, than positive fact; of very strong conviction, to be sure, but still subject to uncertainty and mistake.

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*It is therefore ordered, and decreed, that the bill of the executors of Sarah Johnson be dismissed, with costs; and that in administering the assets of Nathaniel Slawson, the demand of said executors be ranked as a simple contract debt.

From this decree the complainants in the bill of the executors of Sarah Johnson appealed, and now moved, that the same might be reversed, or reformed, on the following grounds.

1. That the agreement of the defendant's testator, to give bonds, entitled the complainants, under the circumstances of this case, to have their demand ranked as a bond debt, in the administration of the assets of the estate.

2. That his Honor, the Chancellor, was mistaken in supposing that the land was sold by the complainants, or that they have received the proceeds; the fact being, that the land was sold, under an order of court in this cause, by the late master, and that he, or his successor, still holds the bonds taken for the purchase money, subject to the order of the court; wherefore it is submitted, that, in any event, these bonds should be ordered to be assigned and delivered to the complainants.

3. That in no view of the case ought the bill to have been dismissed with costs; inasmuch as it is conceded by the decree, that the complainants are entitled to a specific lien on the land, for the satisfaction of their demand, and this lien could not be enforced but by coming into equity.

McCrady, for the motion, cited, and commented on, the following authorities. Pegge v. Skyner and Richardson, 1 Cox, 23; Staines v. Morris, 1 Ves. & Bea., 9; Wilkins v. Fry, 1 Mer., 244; Pember v. Mathers, 1 Bro. C. C., 52; Wood v. Griffith, 1 Swans., 43; Griffith v. Sheffield, 1 Eden, 73; Taylor v. Wheeler, 2 Vern., 565; Williams v. Lucas, 2 Cox, 160; Freemoult v. Dedier, 1 P. Wms., 429; Falkner v. O'Brien, 2 B. & B., 223; Read v. Administrator of Simons, 2 De S., 552; Polony v. Keenan, 3 Id., 74, and Ex Parte, Brightwen, 1 Swans., 3.

JOHNSON, J., delivered the opinion of the court.

We concur in opinion with the Chancellor, that in the administration of the assets of the defendants' testator, the complainants are only entitled to rank with simple contract creditors, as to the balance due them, after deducting the nett proceeds of the sale of the land. Upon the principles of the decree the complainants had a specific lien on the land, and are entitled to the bonds given for the purchase money. The order dismissing the bill was founded on the mistaken supposition, that they were

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already in their posses*sion. This circumstance rendered it necessary that the complainants should come into this court, and supplies a very adequate reason for the concession, made by counsel, that the costs should be paid out of the fund.

It is therefore ordered, and decreed, that the master, or other officer, having the custody of the bonds, do forthwith assign, and deliver them to the complainants; and that the costs be paid out of the proceeds of the sale of the land. In other respects the decree is affirmed.

O'NEALL, J., and HARPER, J., concurred.

Order modified.

Bailey, Eq. 468

MARY E. SPENCER, an Infant, by Her Next Friend, v. MARY V. GODFREY, Administratrix of Joseph V. Spencer, Deceased, THE BANK OF THE STATE OF SOUTH CAROLINA, and JOSEPH V. SPENCER, Jr.

(Charleston. April, 1831.)

[1. *Executors and Administrators* ⟸329, 407.]
The court upon the petition of an administratrix, and after reference to the master, ordered that the administratrix have leave to mortgage a lot of land, to which she, and her infant children, were entitled by inheritance from her husband and intestate, for the purpose of raising money for the payment of debts; and the money was borrowed of the bank, and a mortgage executed by the master, accordingly. Bill filled several years after, by one of the children, to be relieved from the mortgage on the ground, that the children were not parties to the proceedings, and that the master's mortgage conveyed nothing, and alleging that the money was misapplied, dismissed as to the bank.

[Ed. Note.—Cited in Shumate v. Harbin, 35 S. C. 529, 15 S. E. 270.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1342, 1613; Dec. Dig. ⟸ 329, 407.]

[2. *Infants* ⟸37.]
The jurisdiction of the Court of Equity to dispose of the real estate of infants, and other persons under disability, has been too long exercised, to be now questioned; and a conveyance, or mortgage, executed by the master, in pursuance of an order of the court, which was intended to operate on the title of infants, is binding on them, if they are parties, to, or represented in, the proceeding, in which the order was made.

[Ed. Note.—Cited in McNish v. Guerard, 4 Strob. Eq. 79; Clarke v. Jenkins, 3 Rich. Eq. 339; Moore v. Hood, 9 Rich. Eq. 326, 327, 70 Am. Dec. 210; Barnes v. Cunningham, 9 Rich. Eq. 479; Cathcart v. Sugenheimer, 18 S. C. 128.

For other cases, see Infants, Cent. Dig. §§ 82, 83, 97; Dec. Dig. ⟸37.]

[3. *Executors and Administrators* ⟸324, 329.]
The real estate of an intestate may be ordered to be sold, or mortgaged, for payment of debts, on the application, by petition, of the administratrix, without making the infant heirs formally parties. The interests of the infants are under the protection of the court, and its order is sufficient evidence, against them, that a necessity existed for disposing of the estate; nor can the title of the purchaser, or mortgagee, be affected by subsequent proof, that there was no necessity.(a)

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1342; Dec. Dig. ⟸324, 329.]

[4. *Judicial Sales* ⟸50.]
A purchaser, or mortgagee, under an order of the court, is not bound to see that the money is applied to the purpose, for which the sale, or mortgage, was ordered.

[Ed. Note.—Cited in Mayer v. Mordecai, 1 S. C. 398; Hyatt v. McBurney, 18 S. C. 220; Webb v. Chisolm, 24 S. C. 491.

For other cases, see Judicial Sales, Cent. Dig. §§ 90–94, 96; Dec. Dig. ⟸50.]

(a) Moore v. Hood, 9 Rich. E., 311 [70 Am. Dec. 210] impugns this point; and see Sollee v. Croft, 9 Id. 474; Rich. E. Ca., 301; 5 Id., 187.

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*Heard at Charleston, January, 1830, before De Saussure, Chancellor, who made the following decree.

De Saussure, C. The defendant, Mrs. Mary Godfrey, formerly Spencer, administered on the estate of her deceased husband, Captain Joseph Vesey Spencer, who died intestate, leaving his said widow, and their children, the present complainant, and the defendant, Joseph Vesey Spencer, and another who has since died, all of them at that time infants, his heirs-at-law. In 1818, she applied to the Court of Equity, by petition, for leave to borrow money from one of the banks, upon a mortgage of a lot of land, which belonged to the estate of her said husband, in order to raise money for the payment of debts due by his estate, and also for payment of certain debts contracted by her for the support of the children. The petition was referred to the then master, who reported in February, 1818, recommending that the prayer of the petition be granted, and that the petitioner be allowed to borrow the sum of two thousand dollars from some bank, and to mortgage the lot mentioned in the petition, for securing the payment; and he further recommended, that the sum borrowed, should be appropriated, under the direction of the master, to the discharge of the debts due by the estate, and to the payment of the debts contracted by the administratrix for the support of the children; and that she account to the master for the due application thereof. No opposition was made to this report, and it was confirmed by a decretal order of the court, on the motion of the petitioner's solicitor, General Hayne, who was then at the bar. Under this order, the sum of sixteen hundred and sixty-six dollars was borrowed from the Bank of the State of South Carolina, by the master, to whom the money was paid, and who executed a bond for the amount, and also a mortgage of the lot of land mentioned in the petition, to secure repayment of the loan.

The object of the present bill is to open these proceedings; and that the mortgage of the land to the bank may be declared void, or the proper application of the money borrowed accounted for.

On behalf of the complainant, it was urged, that a sale, or mortgage was unnecessary, as there was no debts in fact due by the estate; and that the money borrowed was applied by the administratrix chiefly to her own use; and it was contended, that the order of 1818, made upon the ex parte application of the administratrix, could not affect the title to the land, as the administratrix possessed no power over, and in fact had nothing to do with, the real estate; and

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*that it could not bind the complainant, who

was not a party to the proceeding, nor represented in it.

On this statement, it is to be remarked, that there was no proof, that there was no debts of the estate. The petition presented in 1818, was referred to the master in the usual way; and he reported that there was a necessity for mortgaging the lot in question, in order to raise money to pay debts due by the estate, and other debts due for the support of the heirs. And the court, confiding in the report of the officer, whose duty it was to make the necessary investigation, confirmed the report, and authorized the loan; which was obtained, and the mortgage given to the Bank.

I am bound, then, to suppose that there were debts of the estate; and the question arises, as to the ground, on which the court exercises the power of ordering sales, or mortgages of real estates.

The authority has been exercised by the court ever since its formation. It was so, at least, immediately after the revolution, and it is presumed to be founded on the principles of the statute of George the Second,(*b*) applied to the circumstances of the country. The present judges of the court found that it had been constantly exercised by their predecessors, and that very beneficially for the citizen: for the court was able to prescribe terms, and give such credit, as would enhance prices, and prevent sacrifices of property by cash sales under the execution of creditors. The exercise of the power of authorizing the borrowing money to pay debts of the estate, and securing the lender by mortgage, is but a modification of the power of selling, being inferior in degree, and frequently saving estates altogether, by giving time to work out the debts.

It is true, that, strictly speaking, the administrator has no power over the real estate: that doctrine being borrowed from the English law. The circumstances of the two countries are, however, materially different. In England, the real estate is not liable to debts, as it is in this country, where it is subjected to the payment of debts by proceedings at law against the administrator. Hence the administrator frequently comes into this court to anticipate a compulsory and ruinous cash sale, by obtaining an order for a sale on credit. Such has been the practice, and generally it has proved a beneficial one. Besides, in this case, the petitioner was the mother, and natural guardian of the children, and she was entitled, as one of the heirs of the intestate, to a third part of the real estate in fee simple; and on the death

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of one of the other heirs, she became *entitled to one-third of the share of that heir, unless otherwise disposed of.

(*b*) 5 Geo. II, c. 7, P. L., 250; 2 Stat., 570.

The bank loaned the money in question on the authority of the decretal order of the court. To overturn this mortgage would be a rescission of the decretal order of the court, in which the bank confided. If such a mortgage or sale should be set aside, it would unsettle the titles of a great many purchases under sales made by the master. The mischief would be too extensive and intolerable. I do not, therefore, feel at liberty to declare these transactions void, and to interpose the authority of the court to prevent the enforcement of a mortgage made by its authority. Certainly the court will not be active to produce such effects.

But it is alleged, that the mother of the complainant did not employ the money borrowed from the bank in the payment of the debts of the estate, or even of those contracted for the support of the heirs, but to her own uses and purposes, and that the master did not control her in the application of the money to those purposes, as he was bound to do. The complainant has certainly a right to make inquiry into this; so that the blame, if any, and the responsibility, should fall on those who have not pursued the course recommended by the master, and ordered by the court; but the bank was not bound to see to the application of the money, and cannot be affected by the result of the inquiry.

It is, therefore, ordered and decreed, that the bill be dismissed as to the bank; and that with respect to the other defendants, Mrs. Godfrey and J. V. Spencer, the case be referred to the master or commissioner, as the parties may select, to examine and report as to the application of the money borrowed from the bank.

The complainant appealed from so much of this decree as dismissed the bill against the bank, and now moved that the same might be reversed.

Pepoon, for the motion. The Court of Equity possesses no lawful power or authority to sell, and much less to mortgage, the property of the citizen; and the title of the master, in fact, conveys nothing. Where a sale is ordered in equity, the proper mode of giving title is by acting on the parties, and compelling them to convey; nor are the rights of even infants divested, otherwise than by ordering them to join in a conveyance on coming of age. Sug. Vend., 248, 9; 1 Harr. C. Pr., 444, 435; Roll v. Roll, 2 Vern., 99; Ratcliff v. Roper, 1 P. Wms., 420; and see 2 Bridgman's Dig., tit., "Infant," 6. This is the practice of the English chancery, which was prescribed as the rule for the government

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of our *court on its first organization; and that rule has been continued by every statute relating to the subject which has been enacted since. See Act of 1721, P. L., 111; Act of 1784, P. L., 337; and Act of 1791, 1 Faust, 29, 7 Stat., 165, 208, 258. To order the

master, therefore, or any third person, to convey the property of the suitor, is neither more nor less than a plain and palpable usurpation.

But admitting the power of the court to convey, yet it was never before pretended, that the conveyance of the master affected the rights of any but the parties to the cause; and here the present complainant was not a party to the proceedings, which was a mere petition, and altogether ex parte; and she, therefore, cannot be bound either by the order, or the mortgage made in virtue of it. It is no answer to say, that the bank confided in the order of the court; for it is the business of the purchaser to see that all parties, whose interests are involved, are properly represented. 1 Mad. C., 443; Bennett v. Hamill, 2 Sch. & Lef., 577. This was not done in the case now under consideration. Indeed, the whole proceeding was loose and irregular from beginning to end; and the bank not only lent its money under an order, to which the heirs were not parties, but were content to take the mortgage of the master, when the order directed it to be executed by the administratrix herself.

Besides, the complainant was, and still is an infant; and an infant is not finally bound by a decree made during his infancy, but is entitled to shew cause against it, on attaining full age. Fountain v. Caine and Jeffs, 1 P. Wms., 504; Napier v. Effingham, 2 Id., 401; Bennet v. Lee, 2 Atk., 531. And he is not obliged to wait until he comes of age before he does so. Richmond v. Tayleur, 1 P. Wms., 737.

The complainant, in the present case, is clearly entitled to avoid the mortgage, unless it be shewn that the money borrowed was applied to purposes for which the land mortgaged was legally liable; and his Honor erred in founding his decree upon the supposition of there being no proof that there were no debts due by the estate. It was for the bank, in the first place, to shew the proper application of the money, in order to give validity to the mortgage; and in the second place, the application itself was a matter of account and reference, and not of evidence to be adduced at the hearing. But, in fact, it was conceded by the counsel for the defendant, that the money had been applied to the private use of the administratrix; and a reference was waived, expressly on that ground.

Legare, Attorney General, contra. It is

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too late to question the *power of the court to order a sale or mortgage of the real estate of minors and other persons under legal disability. It may be admitted, that the English chancery never pretended to any general power of this sort. Taylor v. Philips, 2 Ves., 23. But there are reasons for this, which do not apply to the state of things in this country: first, the feudal origin and character of the law of land property; second, the great value and permanency of that sort of property, and its settled price, so very different from the condition of the same kind of property here; third, the gradual manner in which the chancery jurisdiction sprang up; fourth, the effect of a special Act of parliament in giving validity to conveyances, otherwise void or voidable; a power withheld from our legislatures by all our constitutions, but which must exist somewhere.

And yet even the English courts do sometimes exercise an analogous jurisdiction; as, for instance, to compel trustees to join in destroying contingent remainders; as was said in Moody v. Walters, 16 Ves., 288. So a wife may be compelled to join the husband in levying a fine to bar her inheritance. Luttrel v. Olmius, cited 11 Ves., 638. This is a strong case; and see other cases collected in 1 Thomas' Co. Litt. 181, note p. See also Co. Litt., 171, a, b, as to infants and married women being bound by partition.

But if the English cases gave no color whatsoever to the established practice of this court, no discreet lawyer would think of drawing it into controversy at this time of day. It has been established among us as long as there is any trace of a judicial record. It has prevailed to an indefinite extent. Public opinion has conformed to it: contracts without number depend upon it; and to overrule it now, would be to shake half the titles in the lower country.

One of the very first of our reported cases, that of Dinckle v. Timrod, 1 DeS., 109, decided in 1784, is an instance of the exercise of this jurisdiction to direct a sale of the lands of an infant. The cases of De Brahm v. Fenwick, Ib., 111, and Clifford v. Clifford, Ib., 115, are other instances of the same sort. In Carmichael v. Abrahams, Ib., 114, a lien was created by a decree. In Ernst v. Tharon and Muller, Ib., 115, money was ordered to be paid into the hands of the master, to be by him put out to interest, on security, subject to the further order of the court. In Ex parte Gibbes, Ib., 126, on a mere petition, defendant was ordered to account for sixty-four negros. The case of Ex parte Fenwick, on the same page, is an instance of a petition

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to be allowed to sell, or *mortgage lands; which was accordingly ordered. In another case, at page 136, of the same book, the lands of a lunatic were ordered to be sold, and that upon a mere petition. So much for the objection to the petition in this case.

The unpublished records of the court would furnish innumerable other cases; for scarcely a term has elapsed without a decretal order disposing of real estate; and such orders are among the most "common assurances" of the people. It is not material to ascertain the foundation upon which this jurisdiction

was assumed. Its origin might perhaps be traced to the circumstances of early colonial times, when the functions of a court of Chancery were exercised by the governor and council, who possessed legislative, as well as judicial powers. But it is sufficient, that the jurisdiction has been exercised from time immemorial in this State; and independently of the necessity of such a jurisdiction being lodged somewhere, it has been too long established in the Court of Equity to be now denied.

Communis error facit jus. And this is most especially so, where titles are concerned. See the strong language of Lord Macclesfield, in Wagstaff v. Wagstaff, 2 P. Wms., 258. Compare 1 Sand., Uses and Tr., 95, Sug. Pow., 84, and Goodill v. Brigham, cited in Cox v. Chamberlain, 4 Ves., 637.

In Burgess v. Wheate, 1 Eden, 224, Lord Mansfield, speaking of there being no dower of a trust, says: "the case of dower is the only exception, and not on law or reason, but because wrong determinations had misled in too many instances to be now set right." See also what is said at page 230.

Calder v. Bull, 3 Dall., 386, is a strong case to the same effect. And the courts of this State have said the same thing over and over again. Assignees of Topham v. Chapman, 1 Mill, 286. Galt v. Lewis, 1 Treadw., 160. Lester v. Graham, 1 Mill, 182. Adams ads. Wylie, 1 N. & M., 80.

Add to these cases, what is said by Lord Ellenborough, in Isherwood v. Oldknow, 3 Maule & Selw., 397; and by Lord Eldon, in Maundrell v. Maundrell, 10 Ves., 246.

And if this principle be acted on in England, so uniformly, and sacredly; where the terrible effects of a decision contrary to the opinion of the profession, and established practice, and usage, may be prevented by an Act of parliament, acting, like the decision, retrospectively; what shall we say here, where there is no remedy for one of the greatest evils that can befall a country? For

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*such decisions have all the effect of ex post facto legislation, and are acts of confiscation by wholesale.

Nor is there anything new in a court's gaining a jurisdiction, which, in strict theory, does not belong to it, by long acquiescence. Many heads of chancery jurisdiction sprang up in the same way, as the jurisdiction now complained of: e. g. Specific performance, per Lord Erskine, in Halsey v. Grant, 13 Ves., 76. Alley v. Deschamps, Ib., 228. Account, Id., Middleton v. Dodswell, Ib., 268. Guardianship, Co. Litt., 88, b, Hargrave's n., 16. (70.) Partition, Co. Litt., 169, a, Har. n., 2. (23.) 1 Thomas' Co. Litt., 712.

So, and this is very much in point, the Irish Chancellor orders the sale of lands for satisfaction of creditors. O'Fallon v. Dillon, 2 Sch. & Lef., 19. And from the case of Bennett v. Hamill, Ib. 567, it appears, that the conveyance is made by the master in conformity to our practice.(c) In the latter case it is to be remarked, that a purchaser was held not to be affected, although the decree, under which the land was sold, had been obtained by fraud, and collusion between an alleged creditor and the guardian of the infant.

Even courts of Law have enlarged their jurisdiction in the same way: as in the case of cosureties for contribution, Craythorne v. Swinburne, 14 Ves., 164, lost bonds, &c.; and set-off, without action. Hood v. Huff, 2 Mill, 163.

Add to these the recent decision, that by the established practice, courts of Ordinary may appoint guardians of the persons and property of minors. Howard v. Faber, 2 McC. C., 446.

So much for the law, and settled practice. The policy of the country is decidedly in favor of the jurisdiction, which is a necessary, and, when properly exercised, a paternal and salutary one. Infants may sometimes be ruined by being compelled to hold their lands.

Besides, personal property is far more valuable with us than real estate; and yet, no complaints are made of the power of the Chancellor, or the ordinary, to dispose of that. And the administrator may, by a plea of plene administravit, and even without it,

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*subject the land of the infant heir to sale under execution. Martin v. Latta, 4 McC., 128.

But it is said, that the infant has a right on coming of age to show cause against a decree affecting his title to land. It would be a sufficient answer to this to say, that such a thing is unheard of in this State, in any case, and that in cases like the present it would amount to a denial of the whole jurisdiction. But the principle of the cases, in which the infant is allowed to show cause against a decree in England, will not reach cases like this; for he is limited to showing error in law. Thus in Mallack v. Galton, 3 P. Wms., 352, it was held, that where there has been a decree of foreclosure against an infant, he may, within six months after coming of age, show error in the decree, yet he cannot unravel the account. And there is no doubt, but that he is bound by a decree for the sale of his estate. Booth v. Rich, 1 Vern., 295.

It is contended, however, that if the court does possess the power to dispose of the real estate of infants, it was not regularly exercised in this instance; and that the infants

(c) This is not the only instance in which the practice of our court conforms to that of the Irish chancery, departing from that of the English; as, for example, by decreeing a sale of land for the satisfaction of a mortgage, instead of a foreclosure, in the English sense of the word. McDonough v. Shrewbridge, 2 B. & B., 555.—R.

are not bound by the mortgage, because they were no parties to the petition.

To this it may be answered, that the infants were parties, to all substantial purposes. Suppose the mother to have sued as their next friend, or as their official guardian, for maintenance. The court would have directed maintenance. This is a common case, and it is the very case before the court.

Infant distributees are not personally parties when application is made by the executor, or administrator, to the ordinary for a sale of the personal estate; but they are virtually parties, because, as to the personal estate, they are represented by the executor, or administrator.

It is, too, a common case in equity, to order a sale of real estate for payment of debts, upon the petition of the administrator. And it is a most beneficial jurisdiction, as it serves, frequently, to prevent a sacrifice at the sheriff's sale. In such cases the court probably considers the administrator as representing the heir, by virtue of the st. 5, Geo. II, c. 7, P. L., 250, 2 Stat., 570, making lands assets. That he does represent the heir in the courts of Law, is unquestionable; for it is only upon that ground, that lands are suffered to be sold under execution against the administrator, without making the heir a party. Martin v. Latta, (supra.) With how much more reason may he be so considered in this court, which of itself guards the rights of infants, and will look into the circumstances of the estate, and the advantage, or necessity of sale.

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*In an adversary suit as to title, the infant, not being a party, would not be estopped; but where the court is called upon as guardian, or trustee, of an infant, to order the admitted property of that infant to be sold, or invested more profitably, all that should seem necessary would be, that the court should be well satisfied, that it was promoting the interest of the parties. It is a part of the administrative, and not of the judicial power of a court of Equity; and undoubtedly ought to be exercised with great wariness and circumspection. But confidence, after all, must be reposed somewhere; nor is such a power at all more dangerous as to real, than as to personal estate, in which it unquestionably does exist.

It would have been more formal, and regular, perhaps, that the proceedings should have been by bill and answer, and that the infants should have been represented by guardian ad litem; but would this have given the infants, substantially, any additional protection? Would it not have been the merest matter of form; and could it have effected the result, otherwise than by increasing the costs? The court evidently regarded the infants as parties in interest to the proceeding; and the decree was made with reference to their interests. It was intended to convey their title, and it was assumed, that they were properly represented. If no one but the administratrix were concerned, the aid of the court would not have been needed. The reference to the master, could only have been ordered on the ground, that the interests of those entitled to the land were involved; and it was in effect a part of the judgment of the court, that the administratrix did represent them.

Admit, however, that there was irregularity, the mortgagee is not to be prejudiced by that. The court had jurisdiction; and the order directing the land to be converted into money, or to be mortgaged to raise money, for the benefit of the cestuy que trusts, was all that he was bound to look to. It is in vain to say, that the master reported erroneously, and that the court was deceived. To render the mortgagee responsible for that, would be to set afloat every act, and every judgment, of every court.

In England, the court does not usually make any decree by consent, where infants are concerned, without referring it to a master to inquire, whether it will be for their benefit; but when once the decree is pronounced, although without that previous step, the authority is the same, as if it had been referred to a master, and he had made a report that it was for their benefit. Wall v. Bushby, 1 Bro. C. C., 488.

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*The same rule has been acted on by our courts of Law very frequently. A purchaser is not bound to look to the regularity of the proceedings. Barkley v. Screven, 1 N. & M., 408. So a sale of land was held valid, although the sheriff did not advertise conformably to the Act of 1797. Turner v. McCrea, Ib., 11. See also, the State ads., Wakely, 2 N. & M., 410, and Guignard v. Glover, Harp., 463.

In relation to the acts of the courts, the presumption is, that all things have been done, that ought to have been done. McDaniel ads. Richards, 1 McC., 187. And so, too, where executors were authorized to sell at public sale, their deed was held good, without showing that the sale was public, and that was presumed. Turnipseed v. Hawkins, 1 McC., 272.

In Curtis v. Price, 12 Ves., 89, it was determined, that a purchaser under a decree is not affected by irregularities and defects in the decree, by which the application of the money may not have been properly secured. In another case, a purchase under a decree, though affected by irregularity and notice, was not set aside in favor of a subsequent remainderman; a prior tenant in tail having been a party. Lloyd v. Johnes, 9 Ves., 37.

As to the objection, that the mortgage was executed by the master, instead of the administratrix, it is sufficient to say, that according to the settled practice of the court, the master is the proper person to execute all

conveyances which derive their validity from the decree of the court. And it is a mistake to suppose, that in this case the mortgage was directed to be executed by the administratrix. She was authorized to borrow the money, and to mortgage the land; but all was to be done under the direction of the master, and he was, regularly, the person to execute the mortgage.

Finally, it is argued, that the mortgagee was bound to look to the application of the money; and that the validity of the mortgage depends upon showing that the money was properly applied. Such is not the rule of this court. In this State a purchaser is never bound to see to the application of the money. Lining v. Peyton, 2 DeS., 375. This is a good law for us. See Balfour v. Welland, 16 Ves., 155, where Sir William Grant shows the impolicy and absurdity of the English doctrine on the subject.

Pepoon, in reply. If the power of the court, to dispose of the property of its suitors, be conceded, as established by long usage, yet certainly no such inveterate practice can be asserted for the exercise of such a power over the property of those who are not suitors. This at least is new. A decree can lawfully operate only on the title of those who

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are parties before the court; and if *a practice has begun, of disposing of the estate of an heir, on the petition of the administrator, without making the heir a party, the sooner its progress is arrested the better. It is alike inconsistent with the principles which govern the practice of this court, and with all the analogies of the law. It is in fact a violation of magna charta, and the constitution.

HARPER, J. This court, after full consideration, concurs with the Chancellor, and his decree is therefore affirmed.

JOHNSON, J., and O'NEALL, J., concurred.

Decree affirmed.

Bailey, Eq. 479

MARTHA MILLER v. NEWMAN KERSHAW and JOHN CONNOR.

(Charleston, April, 1831.)

[1. *Appeal and Error* ⇐1106.]

It is proper to make parties all incumbrancers, whose claims arose before the commencement of the suit; and in order that more complete and speedy justice might be done, a cause was remanded by the Court of Appeals, for the purpose of making a party to the suit, a purchaser who had applied at the hearing to be made a party, and whose application was then refused, on the mistaken supposition, that he had purchased pendente lite.(a)

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4386–4398, 4585; Dec. Dig. ⇐1106.]

(a) Ante, 208, and note.

[2. *Lis Pendens* ⇐8.]

There is no such lis pendens as will imply notice to a purchaser until bill filed and subpœna served.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 13–19, 25; Dec. Dig. ⇐8.]

[3. *Lis Pendens* ⇐8.]

Acceptance of service of a subpœna, as of a prior date, does not make such a lis pendens as will affect a purchaser before the day of the actual acceptance.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 15; Dec. Dig. ⇐8.]

[4. *Husband and Wife* ⇐29.]

A marriage settlement not duly recorded is void at law; and upon a bill by parties claiming under it against a purchaser, their equity rests solely on the fact, that he had actual notice of the settlement before his purchase; and it is not necessary for his defence, that he should plead want of notice; and although if he suffer the bill to be taken pro confesso, it is within the discretion of the Chancellor to determine whether any and what proof of notice shall be required; yet the question should be decided apart from the rule, which requires that the defence of purchase for valuable consideration, without notice, should be pleaded.(b)

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 167; Dec. Dig. ⇐29.]

[This case is also cited in Fowke v. Woodward, Speers, Eq. 246, on the doctrine of notice generally.]

This was a bill for the execution of the trusts of a marriage settlement; and was heard by Harper, Chancellor, at Charleston, May, 1830.

The complainant was the daughter of John Holland, deceased, and entitled under his will to a distributive portion of his estate;

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*and on her marriage with James Miller, her interest in her father's estate was conveyed to the defendant, Newman Kershaw, as trustee for the uses of the marriage settlement; but the settlement was not recorded as required by the marriage settlement Acts.(c) Subsequently to the marriage, partition was made of the estate of the testator, and a leasehold interest in a house and lot was, amongst other things, allotted to the complainant. This house and lot was afterwards assigned by the husband, Miller, to the defendant, Kershaw, for payment of his debts; and Kershaw, who was executor of testator's will as well as trustee under the settlement, sold and conveyed the lot for a valuable consideration, to the defendant, John Connor. About the time when the bill in this case was filed, Connor assigned his estate for the benefit of his creditors; and the assignee sold and conveyed the house and lot above mentioned to James Calder, who paid the value for it.

Calder was not made a party to the suit, but applied, at the hearing, for leave to

(b) Ante, 1, note 1; Gibbes v. Cobb, 7 Rich. E., 54; Jones v. Godwin, 10 Id., 226.

(c) Ante, 250, 6; 6 Stat., 636, 213, 482; vide Act of 1785, P. L., 357; Acts of 1823, p. 35; and Acts of 1832, p. 53.

shew cause against the complainant's demand. This was refused, on the ground that he was not a party, and his Honor refused to direct that he should be made a party, as it was understood that he had purchased subsequent to the commencement of the suit.

Connor did not enter an appearance, and made no defense to the suit; and the bill had been taken pro confesso against him. At the hearing, no evidence was adduced that Connor had notice of the settlement at the time of his purchase; and it was insisted, on behalf of Calder, that without such evidence the complainant was not entitled to a decree against Connor. His Honor held, however, that Connor was bound to have pleaded that he was a purchaser for valuable consideration, without notice, if that defence was to be relied on. Decree against both defendants.

The defendant, Connor, appealed on behalf of Calder, and now moved that as to him the decree might be reversed or vacated, and the cause remanded.

HARPER, J., delivered the opinion of the court.

I am satisfied that the Chancellor was in error, in supposing that it was necessary for the defendant, Connor, to defend himself by pleading, that he was a bona fide purchaser for valuable consideration, without notice. The marriage settlement was void for want of recording, and Connor's title was good at law. The complainant's equity against him, rested solely on the fact, of his having had actual notice of the settlement before his purchase, and such notice would make out a

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case of fraud; but it was necessary *for the complainant to prove notice, in order to make out her case. The bill, it is true, was taken pro confesso, and this may be regarded as an admission of the fact; and this was for the discretion of the Chancellor, under the Act of assembly and the rule of court,(d) which prescribes that when a bill is taken pro confesso, the Chancellor may require such proof as shall be satisfactory to himself. Whether the admission is sufficient in this case ought, however, to be decided apart from the supposed rule requiring Connor to defend himself by pleading.

But there is another ground on which the court thinks the case ought to be remanded. During the hearing of the cause in the court below, an application was made to the court, suggesting that one James Calder had purchased the premises of Connor, and that he should be made a party. The suggestion, however, was, that he had purchased during the pendency of the suit; and it was decided, rightly I think, that it was unnecessary to make a purchaser pendente lite a party, and that he would be bound by the decree. The rule is, that it is proper to make parties all incumbrancers, whose claims arose before the commencement of the suit, but not those who purchased pendente lite. There seems now, however, reason to doubt, whether Calder did purchase pendente lite. According to the authorities, there is no lis pendens, which will imply notice to purchasers until bill filed, and subpœna served. Anonymous, 1 Vern., 318; Murray v. Ballou, 1 John. C. R., 566. In this case, service of a subpœna appears to have been accepted by Connor, on the day the bill was filed; but, from the affidavit of the complainant's counsel, it appears, that this acceptance of service was written at a period considerably subsequent, and probably after Calder's purchase. It is true the affidavit states, that this was in confidence of an agreement, on the part of Connor, to accept service as of the first period; but such an agreement can hardly be considered actual service. It would, at all events, bind no one but Connor himself. Besides, Connor in his affidavit states, that he does not recollect any notice of the suit until after Calder's purchase.

We cannot now decide as to these facts, or the legal effect of them. But Calder has a right to have them tried. If it be true, that Calder's purchase was not made pendente lite, he would not be bound by the decree, and might defend himself when process is prayed to put him out of possession. This might occasion the necessity of another suit, and the court is of opinion, that more complete and speedy justice will be done by remanding the cause, and making him a party. We have seen, that if, in fact, he purchased before the institution of a suit, he ought regularly to have been made a party: and he

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*seems to have been misled into the suggestion, that he did purchase pendente lite, by the acceptance of service endorsed on the subpœna. It is therefore ordered, that the cause be remanded: and the bill amended, so as to make the said James Calder a party, and heard upon its merits, so as to do full justice to the parties, in relation to the house and lot in question.

JOHNSON, J., and O'NEALL, J., concurred.

Petigru, for the motion.
Inglesby, contra.

Cause remanded.

(d) Miller's Comp., 57, 58; 35 Rule of Court; Act of 1808, p. 33; 7 Stat. 306.

Bailey, Eq. 482

E. W. W. G. HOUSEAL v. WILLIAM H. GIBBES and HUGH PATTERSON.(a)

(Charleston. April, 1831.)

[1. *Limitation of Actions* ⟸102, 103.]

The statute of limitations does not run in favor of a master in equity, against an account for the proceeds of property sold by him in his official character, until a demand on him by the party entitled, or notice by him to the party that he claims adversely; at least the plea of the statute will not avail, where the master had been directed to apply the proceeds to the maintenance and education of the complainant, and to invest the surplus; so that he was, in fact, constituted his trustee. The case of Thompson v. Wagner and Gibbes, 3 DeS., 94, contra, was decided under special circumstances, and is not an authority for any other case.(b)

[Ed. Note.—Cited in Pickens v. Dwight, 4 S. C. 367.

For other cases, see Limitation of Actions, Cent. Dig. §§ 499, 507; Dec. Dig. ⟸102, 103.]

[2. *Equity* ⟸397.]

A master in equity, having sold lands of an infant, under an order of court made upon the petition of one who styled himself guardian of the infant, but who was not so in fact, transferred to the supposed guardian the cash and bonds taken at the sale, having previously endorsed on the bonds an agreement, that interest should not be charged until the obligors had obtained full possession of the lands; and neither the agreement to remit the interest, nor the transfer of the cash and bonds, had been authorized by any order of the court. *Held*, that the master was liable as guarantor of the supposed guardian, for the cash and bonds transferred to the latter; and they were ordered to account jointly: but that the master was liable, solely, and in the first instance, for any loss sustained by the agreement to remit the interest of the bond, even if the agreement had been sanctioned by the supposed guardian, as the latter was without any authority in fact, and his sanction would have been utterly nugatory.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 861; Dec. Dig. ⟸397.]

[3. *Equity* ⟸395.]

Cited in State ex rel. Van Wyck v. Norris, 15 S. C. 257, to the point that the offices of master in equity and that of sheriff are in some respects perfectly analogous.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 854–856; Dec. Dig. ⟸395.]

This was a bill for an account of the value of certain lands of the complainant, which had been sold by the defendant, Gibbes, as master of the Court of Equity, under an or-

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der made upon the application* of the defendant, Patterson, the complainant being at that time an infant. In the petition, upon which the order for sale was made, the defendant, Patterson, styled himself guardian of the infant, but was not so in fact, although, a few years previously, he had been the guardian ad litem of the present complainant in certain proceedings in partition in relation to the same lands. The order of sale was made in the year 1809, but the lands were not actually sold until 1815, when they were purchased by Sampson W. Leith, and Burwell McBride. Parts of them were then in possession of trespassers, and a part of them were actually recovered from Leith, and McBride, in an action at law, by one Youmans. The sale was for one-third cash, the residue to be paid in one and two years, and secured by bonds. The cash payment, and the bonds, were transferred to the defendant, Patterson, by the defendant, Gibbes; but previously thereto the latter had endorsed on the bonds an agreement, that interest should not be charged, until the obligors had obtained full possession of the lands. Previous to the sale to Leith, and McBride, the land had been put up for sale by the defendant, Gibbes, pursuant to the order of sale, and was purchased by the defendant, Patterson, who did not comply with the terms of sale. The bill prayed, that both defendants might be declared liable, either for the price at which the lands were bought in by Patterson, or for that, for which they were sold to Leith, and McBride.

The defendant, Patterson, in his answer, alleged that the proceedings for sale were instituted at the request of the complainant's father, who, together with the complainant, resided in England; and that his own purchase was for the benefit of the complainant, there being in fact no bid at the sale. He admitted the receipt of the cash part of the proceeds of the sale to Leith, and McBride, and the transfer of the bond, as also the receipt of a small payment on account on the bonds; but he alleged, that all the moneys received had been faithfully applied to the use of the complainant, and that every possible exertion had been made to recover the balance due on the bonds, but without success.

The defendant, Gibbes, insisted, by his answer, that he was discharged by the transfer of the cash and bonds to his codefendant, Patterson. He also prayed the benefit of the statute of limitations.

The cause was heard at Charleston, in January, 1831, before Johnstone, Chancellor, who by his decree declared the defendant, Patterson, liable for the whole value of the lands, subject to a deduction for the relative value of the part recovered by Youmans; and it was directed, that the defendant, Patterson, should be charged, either with the price bid by himself, or that for which the

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sale was made to *Leith, and McBride, as should appear to be most for the advantage of the complainant. The grounds of this decree against the defendant, Patterson, it is unnecessary to state, as, upon appeal, the questions in relation to that defendant were reserved by the Court of Appeals. His Honor declined making any decree against the

(a) Ante, 226.

(b) Lever v. Lever, 1 Hill E., 62; Wardlaw v. Gray, Dud. E., 85; Vaughan v. Evans, 1 Hill E., 429.

defendant, Gibbes, considering himself bound by the case of Thompson v. Wagner, and Gibbes, 3 De S., 94, of which, however, he expressed his disapprobation.

The complainant appealed from so much of the decree as discharged the defendant, Gibbes; and the defendant, Patterson, also appealed from the decree.

I. E. Holmes, for defendant, Patterson.
Grimke, for defendant, Gibbes.
De Saussure, for complainant.

O'NEALL, J., delivered the opinion of the court.

As to the defendant, Patterson, the complainant having consented that the decree should be so modified, as to limit his accountability to the purchase made by Leith, and McBride, the decree is, in this respect, modified accordingly; and all the other questions in relation to this defendant are reserved until the master's report shall be made, and decided upon by the Circuit Court.

The only questions now to be considered relate to the defendant, Gibbes; and these are, first, whether he is protected by the statute of limitations; second, how far he is liable in the first instance; and how far in the event of Patterson's being unable to perform the eventual decree.

In the case of Wright v. Hamilton, decided by the Court of Appeals, at Columbia, in December, 1830, (2 Bail., 51 [21 Am. Dec. 513]) it was held, that a sheriff could not avail himself of the statute of limitations, in an action against him for money collected under fi. fa., until four years after a demand for payment had been made on him. The principle decided by that case, applies with full force to that now before us. The office of master of the Court of Equity is, in some respects, perfectly analogous to that of sheriff of the Court of Law. Both are the receiving officers of their respective courts. They both, in this capacity, receive and hold, for the parties, the money to which they may be entitled; and neither of them could be forced to pay over money by a suit, until a demand had been made; nor would either, generally be liable for interest until payment had been required, and neglected, or refused to be made. In the case of the master, where it is his duty to make interest on money, and he either failed to do so, or actually received it, he would of course be liable for interest. It would follow from these premises, that the

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statute of limitations could *not, in most cases, be any protection to the master, for a failure to perform a duty which he owed to a party, and for the performance of which no specific time was fixed.

In this case the complainant's minority, for a great part of the time which has elapsed, would be an effectual answer to the defendant's statutory defence. After maturity he had the right to demand from the defendant an account of the proceeds of the sale of his land; but until that demand was made, he could not have a cause of action against him; much less could the defendant until then be said to hold the funds in a right hostile to the complainant. I am very much disposed to say, that a public officer can never plead the statute of limitations against an account, unless he can shew, that, more than four years before the suit was brought, he put himself on the assertion of a right hostile to the complainant, as by refusing to account on demand; or that notice had been given to the complainant that he ceased to hold the funds as an officer, and claimed them in his own right. In the case under consideration, the sale was made under an order of the Court of Equity, directing the master to apply the interest of the proceeds, and so much of the principal as might be necessary for the maintenance and education of the complainant; the surplus to be improved by the master on interest, or invested in public securities. This made the defendant, Gibbes, as master, the complainant's trustee; and of course, he cannot, in that point of view, plead the statute of limitations, until he had previously divested himself of that trust by discharging it, or by denying his liability to discharge it further. It does not appear that a demand was made upon the defendant to account before the filing of this bill. If it had been, it was for him to have shewn, that it was made sufficiently long to have given him the protection of the statute.

The case of Thompson v. Wagner and Gibbes, 3 De S., 94, cannot be considered as an authority to govern this, or any other case; for the court acknowledging that, generally, the master cannot plead the statute, places its allowance, as a protection in that case, on special circumstances.

On the second question, it appears to me that the defendant, Gibbes, is liable, in the first instance, for the loss which the complainant may have sustained by the agreement to suspend the interest on the bonds of Leith and McBride, until they obtained possession of the whole of the land sold them. This was a stipulation which he had no right to make, and was a plain and palpable violation, both of his general duty as an officer of the court, and of his special duty under the order of sale, for which the complainant has a right to look to him for compensation. It was he who committed the wrong, and even

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if it had *been done with the sanction of Patterson, it was the sanction of one having no authority to give it. It was, therefore, nugatory, and cannot excuse this defendant. It cannot have the effect of throwing the responsibility on Patterson; for under the order of sale the master is made the manager

of the fund, to improve it at interest, or in government securities for the benefit of the complainant. If he violated this trust by the advice of another, having no control over the fund, he must abide the consequences. We have no right to visit them on the head of his adviser; for he owed no duty to the complainant in this respect, and of course there can be no consequent liability.

But as to the residue of the complainant's claim arising out of Leith and McBride's purchase, I think Patterson should be first liable: and in the event of his inability to perform the decree, then the defendant, Gibbes, must be also liable. It appears that the defendant, Gibbes, was authorized to expend the interest and so much of the principal as might be necessary for the complainant's maintenance. Under this order he paid to Patterson, who had no authority to receive it, the cash payment of $500, and turned over to him Leith and McBride's bonds for the balance. Patterson's receipt of the money, and the bonds, was in the supposed character of guardian, when in truth he was not guardian; and although he was not legally the complainant's trustee, yet this act made him a voluntary one; and in that assumed and voluntary character, he must account for the funds which he received. But as the defendant, Gibbes, had no authority to make the payment to him, he stands in the character of guarantor of Patterson's ability to make the account.

The defendants must therefore account, jointly, for the sum of $500, and the interest thereon, and the principal of Leith and McBride's bonds. In that account they will be allowed credit for any proper, and reasonable advances, made by Patterson for the maintenance and education of the complainant, at the dates when they were respectively made; and a credit must also be allowed for the relative value of that part of the land, which was recovered by Youmans, as of the date of the purchase made by Leith and McBride, together with the costs and expenses of the suit brought for the recovery of the land from the time when they were paid by Leith and McBride. After making these deductions, if any balance should be left on Leith and McBride's bonds, the defendants must be charged jointly, with the interest on the balance from the date of the recovery of the land by Youmans. The defendant, Gibbes, must be charged, alone, with whatever loss the complainant may have sustained by his agreement that Leith and McBride should not pay any interest on their bonds until they had recovered the whole of the land.

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*It is therefore ordered, and decreed, that the case be referred to the master to state the accounts between the parties, on the principles contained in this decree. The costs to be paid by both of the defendants.

JOHNSON, J., and HARPER, J., concurred.

Decree modified.

Bailey, Eq. 487

ELIZABETH LAFONT v. FRANCIS RICARD, Executor of Guillaume Lafont.(a)

(Charleston, April, 1831.)

[1. *Executors and Administrators* ⟸241.]

An executor is not precluded, by having written a letter to a legatee, acknowledging her right to the estate, from requiring judicial proof, not only of her identity, but also of the facts and circumstances necessary to establish her right, if there be no ground to conclude, that these facts and circumstances are within his own knowledge.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 849; Dec. Dig. ⟸241.]

[2. *Executors and Administrators* ⟸104.]

To exempt an executor from interest on funds retained in his hands to meet an alleged claim on the estate, it must appear, either that he supposed the claim to be valid, or that some step had been taken to enforce it, as by a suit; and it must also appear, that he actually kept funds in hand to pay the claim. Vide Brown v. Vinyard, ante, *460.

[Ed. Note.—Cited in Burnside v. Robertson, 28 S. C. 587, 6 S. E. 843.

For other cases, see Executors and Administrators, Cent. Dig. §§ 423–432; Dec. Dig. ⟸104.]

[3. *Executors and Administrators* ⟸104.]

The right of a legatee claiming the whole estate being established as to part only, and the right to the residue depending on further proof, the executor ordered to pay such residue into court subject to its further order.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 423–432; Dec. Dig. ⟸104.]

This was a bill for an account of the estate of defendant's testator, Guillaume Lafont, late of Beaufort, deceased, who devised his whole estate to his sisters Marguerite, Marie, and Elizabeth, "but should either of them be dead, then to the survivors, or survivor of them, and to their, or her heirs forever;" and if all his said sisters died before him, the testator bequeathed his estate to his executor. The complainant, who resided in the kingdom of France, claimed the whole estate, as sole survivor of the testator's sisters, and legatees. The cause came on for hearing before Johnstone, Chancellor, at Charleston, in January, 1831, and was heard upon the merits, and also upon exceptions to the master's report on the accounts, which had been taken preparatory to the hearing. The questions made will be sufficiently understood from the opinion delivered in the Court of Appeals. His Honor's decree was for the complainant, and the defendant appealed.

(a) Ante, 23, 460, 98 and note.

O'NEALL, J., delivered the opinion of the court.

The identity of the complainant as the sister, and legatee of the testator, and her right, consequently, to one-third of his estate, is es-

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*tablished, we think, to a reasonable certainty; but whether she is, or is not, the survivor of the other two sisters, and legatees, is altogether without proof. It may be conceded, that the defendant, the executor, soon after the testator's death, supposed her to be the only surviving sister, and addressed her as such; but still it would be unreasonable to conclude, that he knew the state of the testator's family better than the testator did himself. When he made his will, he was uncertain whether his sisters were alive, or dead; and under these circumstances it cannot be inferred, that the defendant knew more than the testator. In asserting a claim of this kind, the complainant ought to furnish, at least, some proof of the death of the other legatees.

In relation to the claim to be excused from the payment of interest, on so much of the funds as would have been necessary to pay Flotard's claim, if it had appeared, that the executor had supposed the claim to be valid, or if any steps had been taken to enforce it, as by a suit, there would have been great force in this objection; but it does not appear, that the claim ever was put in suit, or that the executor believing it to be just kept funds in hand to pay it. He cannot, therefore, be excused from the payment of interest on that sum.

It is ordered, and decreed, that the Chancellor's decree be so modified, that the defendant do pay to the complainant one-third part of the sum reported by the master, with the interest thereon; and that he do pay the residue into court to await its further order, upon any shewing to be made by the complainant, that she is the surviving legatee under the testator's will. In all other respects the Chancellor's decree is affirmed.

JOHNSON, J., and HARPER, J., concurred.

Cross, for the motion.

Petigru, contra.

Decree modified.

Bailey, Eq. *489

*Ex parte SARAH KNUST.

(Charleston, April, 1831.)

[1. *Trusts* ⟸134.]

A conveyance in trust cannot operate as a security to the trustee in derogation of the trusts declared; and although the trustee's having become surety for the grantor in an administration bond, is stated in the trust deed as the consideration of the grant, the consideration enures to the benefit of the cestuy que trust, only.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 177; Dec. Dig. ⟸134.]

[2. *Trusts* ⟸169.]

Where a trust is vacant, a trustee may be appointed on petition; and although a trustee will not be removed, for misconduct, otherwise than upon bill filed, yet a trust must be regarded as in some degree a personal confidence, and the court will more readily transfer it, where it has devolved upon a stranger to the cestuy que trust; and the rule is less stringent therefore, where the application is to appoint a trustee in lieu of the executor of the original trustee. At least it is too late, in the Court of Appeals, to object to the proceeding in such a case having been by petition; nor will that court interfere with the discretion of the Chancellor in the appointment of a trustee.(a)

[Ed. Note.—Cited in Gibbes v. G. & C. R. Co., 13 S. C. 242; Sullivan v. Latimer, 35 S. C. 428, 14 S. E. 933.

For other cases, see Trusts, Cent. Dig. § 224; Dec. Dig. ⟸169.]

[This case is also cited in Cone v. Cone, 61 S. C. 522, 39 S. E. 748, as an illustration of the procedure to appoint a trustee in place of one deceased.]

This was a petition for the appointment of a trustee, and was heard at Charleston, in January, 1830, by De Saussure, Chancellor, from whose decree the questions made will be sufficiently understood.

De Saussure, C. This case arises upon the petition of Mrs. Sarah Knust, which prays, that she may be appointed trustee, under a deed which is set forth in the petition, by which she, some years since, conveyed certain slaves and other personal estate of John C. Jones, and William Wadsworth, in trust for her son, Henry George Knust, to be delivered to him on his attaining the age of twenty-one years. The trustees appointed by the deed are both dead, and the cestuy que trust is still a minor. The petitioner has been appointed his guardian, and has given bond, with security, for the faithful discharge of her trust.

The application is resisted by the respondent, Mrs. Catherine Jones, widow, and executrix of the trustee, John C. Jones, who was the survivor of his co-trustee, William Wadsworth. It seems, that the property comprehended in the trust deed constituted a part of the estate of the petitioner's husband, Henry Knust, who died intestate, leaving the cestuy que trust, Henry George Knust, his only child; that his widow, the petitioner, administered on his estate, and the trustees, Jones and Wadsworth, became the sureties to her administration bond; and that she subsequently executed the trust deed, conveying to them her share of the estate, in trust for her son. The recital of the deed states the fact, that the trustees had become the sureties of the grantor, on her administration bond; but the trusts declared are all for

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*the benefit of the son. It is insisted, how-

(a) Last clause overruled, semble Ex parte Greenville Academies, 7 Rich. E., 471. See Dean v. Lanford, 9 Id., 423.

ever, that it was intended as a security to the trustees against their liability on the administration bond: and the ground, on which the present application is resisted is, that the respondent, on whom the trust has devolved, as executrix of the surviving trustee, is entitled to retain the trust property, to indemnify the estate of her testator against that liability, until the administration bond is cancelled. And, as a reason for retaining this security, it is alleged that the cestuy que trust is illegitimate, having been born before the marriage of his parents; and that there are next of kin of the intestate, entitled in law to a moiety of the estate, for which the petitioner would be liable to them, as administratrix, and her liability attach upon the sureties to her administration bond.

The point in controversy was argued very fully; but it does not appear to me difficult of decision. Prima facie, the mother is best entitled to the confidence of the court, and to the appointment as trustee. Against this there is nothing but an allegation, that the cestuy que trust is not the legitimate son of the intestate, Henry Knust, and therefore not entitled to that portion of the estate, which the administratrix has retained for his use, but for which, it is insisted, she is still liable, as administratrix, to the next of kin. On this allegation, however, there was no proof, and the court cannot presume it. Nor is the inquiry very material. A decree on this petition could not affect the rights of the next of kin, if they should even think fit to set up a claim; nor will the appointment of the petitioner as trustee debar the respondent from any measures to be relieved from the administration bond. Neither can the security be said to be diminished, for the property in the meantime will be protected by the guardianship bond; and if the security to the guardianship bond is thought not to be sufficient, application may be made to enlarge it. It is ordered, and decreed, that Mrs. Sarah Knust be appointed trustee under the deed in question.

The respondent appealed from this decree, and moved that it be reversed, on the following grounds: 1. That his Honor was mistaken in supposing the illegitimacy of the cestuy que trust to rest upon presumption; it being an admitted fact, that the deed of trust was made solely on that ground. 2. That the trust having been granted as a security against the liability of the trustees under the administration bond, it could not be revoked until that liability was discharged. 3. That there is no principle of law, or equity, on which the trustees could be referred to the security of the guardianship bond, when they had stipulated for the legal title to, and the possession of the property itself.

Hunt, for the motion.

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*Pepoon, and Petigru, contra.

HARPER, J., delivered the opinion of the court.

We are of opinion that the case was for the discretion of the Chancellor, and that we cannot interfere with his decision. It is manifest, that no beneficial interest is given to the trustees, Jones, and Wadsworth, by the deed in question. It could not even answer the purpose of a security, as they were bound at all events to discharge the trusts they had undertaken. And although their having been sureties for Mrs. Knust on her administration bond is stated in the trust deed, as a consideration of the grant, it was a consideration which enured to the benefit of the infant, and not of themselves. Their friendship to the father is mentioned as an inducement to the purchase made for the son.

What I have most doubted, is as to the form of the application. The English authorities certainly are, that to remove a trustee the proceeding must be by bill; and if it were sought to remove a trustee for misconduct, I certainly should think he ought to have the means of defending himself by an answer. The proceeding by petition is, however, more used by us than in the English practice; and if the office of trustee were vacant, I think it might be filled upon petition. In strictness, the office was not vacant in this instance, for the trust devolved on the executrix. Yet a trust must be regarded in some degree as a personal confidence, and the court will more readily transfer it, when it has devolved on a stranger to the cestuy que trust. However this may be, it does not appear from the decree, that any objection to the form of the proceedings was taken at the hearing; nor does it form a ground of appeal. We think it too late to take the objection now. The respondent may have a reference on the subject of her accounts, with every advantage that she would have had, if the proceeding had been by bill. The motion is dismissed.

JOHNSON, J., and O'NEALL, J., concurred.

Decree affirmed.

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*ROBERT B. GILCHRIST and MITCHELL KING v. ROBERT MARTIN and CHARLES L. WEST.(a)

(Charleston, April, 1831.)

[1. *Contracts* ⟸93.]

The notion of mistake, such as entitles a party to relief from his contract, seems to involve the having been misled by false appearances, and does not include an erroneous impression spontaneously taken up, not from any deceptive evidence, but merely from the sugges-

(a) See West v. Tupper, 1 Bail. L., 193, for a part of the litigation, and Bank v. Adger, 2 Hill E., 262.

tion of the party's own mind. Per Harper, J., obiter, but concurred in by the court.

[Ed. Note.—Cited in Coates & Sons v. Early, 46 S. C. 228, 24 S. E. 305; Howlett v. Garner, 50 S. C. 8, 27 S. E. 533; Cape Fear Lumber Co. v. Matheson, 69 S. C. 92, 48 S. E. 111; Blassingame v. City of Laurens, 80 S. C. 44, 61 S. E. 96.

For other cases, see Contracts, Cent. Dig. §§ 415–419; Dec. Dig. ⟸93.]

[2. *Witnesses* ⟸98.]

A debtor, who has assigned his estate for the benefit of his creditors, is a competent witness in a suit between his assignee, and one of the creditors claiming a special lien on a part of the estate; his interest being equal either way.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 332; Dec. Dig. ⟸98.]

[3. *Evidence* ⟸277.]

The declarations of the deceased clerk of a wharfinger are not admissible to explain an entry made by him in his principal's wharf books, for the purpose of defeating a vested title to property, not in the actual possession of the wharfinger at the time when the declarations were made; nor would such declarations be admissible in any case, as evidence of title in a third person, although they establish a liability on the part of the clerk, through his principal, if by establishing the title, the liability is discharged.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1136; Dec. Dig. ⟸277.]

[4. *Evidence* ⟸276.]

To render an entry, or declaration, admissible in evidence, it must appear, first, to have been made without any interest to falsify the fact; second, in cases other than those depending upon hearsay, such as pedigree, custom, boundary, and, perhaps, prescription, that it was made against the interest of the party in the subject matter of the entry, or declaration; and third, that the entry, or declaration, itself, unless where it is made by a tenant in possession, is so ancient, as to preclude all suspicion, that it was manufactured for the occasion. And the cases in which entries, or declarations, are generally admissible, are those, in which they are offered, first, to aid, or to repel, a legal presumption from lapse of time; second, to give character to an ancient possession, or to make out an ancient title; third, to corroborate, or repel, a conclusion, arising from other testimony, as to a long past event, or fact; and fourth, to give character to an actual, recent possession, and thereby shew a right of property in a third person.(*b*)

[Ed. Note.—Cited in Taylor v. Easterling, 1 Rich. 317; Coleman & Lipscomb v. Frazier, 4 Rich. 153, 53 Am. Dec. 727; Cameron v. Rich. 5 Rich. 352, 355, 57 Am. Dec. 747.

For other cases, see Evidence, Cent. Dig. § 1135; Dec. Dig. ⟸276.]

[5. *Assignments for Benefit of Creditors* ⟸175; *Judgment* ⟸672.]

W, having three hundred and twenty-nine bales of cotton at the wharf of L, on 7 June, as it was alleged, transferred them, verbally, to M, as a security for moneys advanced. Subsequent to that date, and prior to, or on 20 June, W was permitted by L to remove one hundred and eight of the bales, and to send them abroad, leaving in the stores of L two hundred and twenty-one bales of the original parcel, and also one hundred and two bales of a second parcel; and after 20 June, an entry, dated 7 June, was made in L's wharf books, by his clerk, transferring the original three hundred and twenty-nine bales to M. W subsequently assigned his whole estate for the benefit of his creditors; after which M sued out a writ of foreign attachment

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against L, in an action of trover to recover *the value of the one hundred and eight bales, delivered to W, after the alleged verbal transfer to M; and the attachment was levied on the one hundred and two bales of the second parcel remaining in the stores of L. The assignee of W having interposed a claim to the one hundred and two bales, a written agreement was entered into by him, and M, that the cotton should be sold, and the proceeds invested "to abide the decision of the cause, and any future order to be made thereon." In the action of trover, M recovered against L, the value of the one hundred and eight bales delivered to W; but no issue was made up directly to try the title to the one hundred and two bales levied on under the attachment. On a bill of interpleader to determine the respective titles of M, and the assignee of W, to the proceeds of the one hundred and two bales, *held*, that the judgment in trover ascertaining L's liability to M, for the value of the one hundred and eight bales, did not necessarily establish M's title to the one hundred and two bales; and that as there was no evidence, that any transfer was, in fact, made to M, until after 20 June, when the one hundred and eight bales had been delivered to W, so that the transfer could not operate on them, there was no ground for the presumption, that the one hundred and two bales had been substituted for the one hundred and eight bales, and the assignee of W was consequently entitled under the assignment; but leave granted to M. to apply for an issue at law, to establish an earlier transfer, or a substitution prior to the assignment.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 512; Dec. Dig. ⟸175; Judgment, Cent. Dig. § 1186; Dec. Dig. ⟸672.]

This was a bill of interpleader, heard by Harper, Chancellor, at Charleston, April, 1830; and from his decree the facts in evidence, and the questions made, will be fully understood.

Harper, C. On 26 August, 1825, the defendant, Robert Martin, sued out a writ of foreign attachment in trover against Samuel H. Lothrop, a wharfinger, for one hundred and eight bales of cotton, charged to have been stored on Lothrop's wharf, on his, Martin's, account. The writ was levied on one hundred and two bales of cotton found in Lothrop's stores, which were afterwards claimed by the defendant, Charles L. West, assignee of Joseph T. Weyman, as having been the property of Weyman, and assigned to him for the benefit of creditors. Weyman executed two assignments, one on 19, the other on 20 August, 1825; in both of which mention is made of cotton stored on Lothrop's wharf. Pending the action of trover, to wit, on 17 December, 1825, West, Martin, and Lothrop, together with Jacob R. Valk, to whom the assignee of Weyman had caused the one hundred and two bales of cotton to be transferred on the books of Lothrop, entered into an agreement, that these one hundred and two bales of cotton should be

(*b*) Reaffirmed. Cameron v. Rich, 5 Rich. L., 355 [52 Am. Dec. 747]; Cruger v. Daniel, McM. E., 191; Cameron v. Watson, 10 Rich. E., 93; Williams v. Gregg, 2 Strob. E., 297; Ante, 226.

sold, and the proceeds invested in stock, to be held in trust for the parties to whom the same should be decided to belong. The agreement states, that "it is expressly understood, and agreed, by and between all the parties to this paper, that they sanction, and authorize the sale of the said cotton, and agree, that the proceeds arising from the said

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sale *shall be invested in bank stock, to be held by Mitchell King, and Robert B. Gilchrist, Esquires, in trust to abide the decision of this cause, and any future order to be made thereon." The cotton was accordingly sold and the proceeds invested. The cause was afterwards referred to arbitrators, under a rule of court, who awarded as follows: "That he, the said Samuel H. Lothrop, the defendant, is justly and truly answerable, and accountable to the said Robert Martin, the plaintiff, for one hundred and eight bales of cotton, which were stored in the stores of the said defendant, on account, and subject to the orders, of the said plaintiff, and which, on a demand made therefor by the said plaintiff, were not delivered by the said defendant to the said plaintiff; and we, the said referees, award that the said one hundred and eight bales of cotton were of the value of 17½ cents per lb., or $52.85 per bale of three hundred and two lbs.; and we have ordered, awarded, and determined, and do hereby order, award, and determine, that the said defendant do pay the said plaintiff the said sum of $52.85 per bale, making, in the whole, $5,707.80, with interest thereon from 1 September, 1825, and the costs of this suit." This award was confirmed and made the judgment of the court; but the defendant, West, still insisting upon his rights to the proceeds of the one hundred and two bales levied on under the attachment, the present bill was filed by the trustees, after the termination of the suit at law.

The first question made relates to the agreement mentioned; viz: whether the defendant, West, was not concluded by it. It was, on his behalf, alleged to have been entered into under a mistake. The testimony of his counsel, Mr. Gilchrist, is, that the agreement was entered into under the impression, that the one hundred and two bales of cotton levied on by the attachment, were, identically, a part of the one hundred and eight bales demanded in the suit, and which appeared on Lothrop's books to have been transferred to Martin; and he states that he had seen Martin's letter demanding the cotton of Lothrop. This is confirmed by the fact, that no question was made in the cause, or before the arbitrators, relative to the identity of the cotton. The award only establishes the amount due by Lothrop. Yet I must have some doubt whether this be such a mistake, as will entitle a party to relief in equity. (c) The notion of a mistake, seems to me to involve the having been misled by some false appearances. If a man spontaneously take up an erroneous impression, not from any deceptive evidence, but merely from the suggestion of his own mind, this can hardly be called a mistake. There is a difference between mistake and ignorance of a fact. So it seems to me in this case. The parties having no reason to know, or believe about it, took for granted that the one hundred and two bales were part of the one hundred and eight. The letter of Martin, which is supposed to have misled

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*them, seems to me rather calculated to have a contrary effect, and to make them aware that the identity of the cotton was disputed. An inspection of the books of Lothrop would have informed them, that the one hundred and two bales constituted no part of the cotton which appeared on those books to have been transferred to Martin; and indeed the letter itself expresses this. I do not think it necessary, however, to give any opinion on this part of the case, as my opinion is with the defendant, Martin, on the merits.

The testimony is very imperfect, but upon examination I have come to the conclusion, that the following is the state of facts. On 7 June, 1825, three hundred and twenty-nine bales of cotton, the property of Joseph T. Weyman, were landed on Lothrop's wharf, from the brig Commerce. Soon after landing, and while the cotton was yet at the wharf, they were pledged, or transferred, verbally, by Weyman to the defendant, Martin, as a security for advances of money; but no entry of the transfer was then made on the books of the wharfinger, Lothrop. On 14 June, 1825, one hundred and two bales of cotton, belonging to Weyman, were landed from the sloop Herald. On 18 and 20 June, Weyman, making a shipment of cotton, took from the stores one hundred and eight bales of the cargo of the Commerce, which had been pledged to Martin, leaving the one hundred and two bales which had been brought by the Herald. After this an entry was made on the wharfinger's books, of the transfer to Martin of the three hundred and twenty-nine bales, the cargo of the Commerce, as of 7 June, which was probably the true date. Weyman soon after went to New York, and, as before mentioned, on 19 August, made an assignment for the benefit of his creditors.

If this be the true state of facts, and I were instructing a jury upon them, I should say, that they were at liberty, from the conduct of Weyman in taking the one hundred and eight bales pledged to Martin, and leaving about an equal number of the cargo of the Herald, and making no disposition of these until his failing in business, to infer an intention, on the part of Weyman, to substitute the bales brought by the Herald for those taken away by him; and this, whether

(c) Ante, 436, 456, note; post, 507.

they were taken intentionally, or inadvertently. If designedly, they should so infer, in favor of the fairness, and justice of his conduct; or if inadvertently, they might properly conclude, that Weyman believed, and considered, all the cotton left by him to be pledged to Martin, and that they might so consider it likewise. This is corroborated by the testimony of William Aiken, who states that near the time of this transaction, Weyman told him he had shipped, or was shipping, all the cotton he had in Charleston. He did not intend then to leave any of his own cotton at Lothrop's. Such inferences as I should instruct a jury to draw, I suppose I ought to make myself, when discharg-

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ing the function *of a jury. I must therefore conclude, that the bales of cotton in question, the proceeds of which are now in dispute, were the property of defendant, Martin, substituted by Weyman in the place of the one hundred and eight bales, which he had taken away.

But let us examine how far the testimony makes out the state of facts I have supposed. On the books of Lothrop appears an entry, of 7 June, 1825, of the transfer of three hundred and twenty-nine bales of cotton, the cargo of the Commerce, to Martin. This evidence would be conclusive if it stood alone; but a witness, George Kerr, states that he saw the entry made, and that it was made after 20 June, and after the delivery of one hundred and eight of those bales to Weyman. If this were all the testimony, we should be left to conjecture, why the entry came to be then made. One conjecture which presents itself is, that the clerk, who made the entry, accidentally set down a wrong date, and that the actual transfer to Martin was after 20 June, and after the removal of the one hundred and eight bales. If we suppose the transfer of three hundred and twenty-nine bales to have been made by the direction of Weyman, and perhaps that is the legal supposition, as the clerk was his agent, it would infer a fraud in Weyman, to transfer the three hundred and twenty-nine bales, when he knew that one hundred and eight of them had been removed; or if he was ignorant that any part of the cargo of the Commerce had been removed, and intended to pledge the cotton remaining in the stores, I think I ought to regard the one hundred and two bales as being pledged. But I do not gather from the testimony of this witness, that the misdating was accidental. He seems to have been aware, at the time, that the entry was not dated as of the day when it was made. Then if it was so made by design, it may be conjectured, that Weyman after 20 June, pledged only what was left of the cargo of the Commerce, and that the clerk intended the entry, in collusion with Martin, for the purpose of giving him a claim to more cotton than was intended to be transferred. This is a harsh supposition, and altogether improbable. There is no reason to suppose, that Martin knew that Weyman had any other cotton, in Lothrop's stores, than what was pledged to him. The only other supposition that I can make is, that the actual transfer was of 7 June, but that it was accidentally omitted to be entered, until after the 20; and that the entry was then made as of the same date with the transaction. This seems to me the most probable conjecture, and it casts no imputation on Weyman, if we suppose him to have removed the one hundred and eight bales inadvertently, or even designedly, intending to substitute an equal number.

That this is the true conclusion is certain, if we are to take as evidence the explanation given by the clerk, who made the entry, Mr. Monefeldt, who was proved to be dead,

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to the witnesses, Starr, and *Magrath. It is, in substance, that he was authorized, when the cotton was first landed, and on the wharf, to transfer it to Martin; that he was afterwards, as the witness understood him, directed, by Weyman, to turn out the cargo of the Herald, or such cotton as he had in store; and that he, by mistake, turned out about the same number of the cargo of the Commerce. The witness, Kerr, states, however, that he himself selected the bales that were to be shipped, and that he took bales of the cargo of the Commerce, because they were square bales, and more convenient for packing, the whole then standing on the books in the name of Weyman. I see nothing inconsistent, or improbable in this. The witness was acting under the direction of Monefeldt, who was the principal manager of the wharf. The witness also mentioned something of an explanation made by Monefeldt at the time of making the entry.

The admissibility of the declarations of Monefeldt was objected to however, as being hearsay evidence. If this explanation had been made by Lothrop, who was dead, I should have held it clearly admissible, on the principle, that a deceased person's admissions, against his own interests, and charging himself, are evidence between third persons. See the cases collected 1 Ph. Ev., 191, 192, et seq., and particularly Barry v. Bebbington, 4 T. R., 514. Now, Lothrop's admission, that he was instructed to transfer the cotton to Martin on 7 June, but that he neglected to do so until after 20, when one hundred and eight bales had been removed, would have been clearly charging himself for the whole to Martin; while his declaration could be no evidence in his own favor against Weyman. Monefeldt's admissions seem to me to charge himself in the same way to his employer, Lothrop. He admits, that he was instructed to transfer this cotton on 7, but neglected to do so until the 20, having in the meantime, by gross negligence, delivered

one hundred and eight bales of it to one who was not the owner; and thereby rendering his employer chargeable for it. If Lothrop were pursuing him in a suit at law, it seems to me clear, that these declarations would be evidence to charge him. They are therefore evidence between third persons.

Against the effect of this evidence, the testimony of Mr. Weyman himself was relied on. This was objected to as inadmissible, on the ground of interest; and I am satisfied the objection was well founded. If the decree should be for the defendant, West, the direct effect of it will be that the money goes to the satisfaction of Weyman's creditors. This is as much a benefit, as if it were to go into his own pocket. The court cannot speculate on the supposition, that he is hopelessly insolvent, and, therefore, that it is indifferent to him, whether more or less, of his debts, be paid. If the testimony were

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admitted however, *I should think it immaterial, as it is evident, that he had no distinct knowledge or recollection, of the transactions, as to which he is questioned.

A list of cottons, specified by three various marks, in the hand writing of Mr. Walker, the principal clerk, and agent, of defendant, Martin, and which appears to be a list of cottons pledged by Weyman to Martin, was also mainly relied on. This list, while it specifies two hundred and twenty-one bales of the cargo of the Commerce, which Martin received, makes no mention of the one hundred and eight bales which were delivered to Weyman; and this is relied on to shew, that these one hundred and eight bales were not included in the transfer, or pledge, to Martin. When, or for what purpose, this list was made, there is no satisfactory evidence. If the testimony of Weyman were admitted, it is plain, that he only conjectures, from the probability of the thing, that it was made, and delivered to him, as an acknowledgment, or memorandum, on the occasion of the cotton being pledged; and he therefore believes that it contains a correct list of the cottons that were pledged. There is some improbability in this. It is a naked list of many bales of cotton, designated by their marks, and would not serve the purpose of an acknowledgment. Mr. Aiken on the contrary conjectures, that it may have been made on another occasion. He states that shortly before Weyman sailed to New York, the latter called on him, being the attorney of Martin, who was then absent from the State, and informed him that he had called, at the request of Walker, stating that he had applied to Walker, to release the cottons which were in pledge to Martin, and to take instead certain acceptances in New York. The witness refused to sanction the arrangement; and Weyman called the next day, and informed the witness, that he had been to Walker, and got his account. It is supposed, that on this occasion Walker made a list of the cottons which were actually found in Lothrop's stores entered in the name of Martin. Under this uncertainty I can decide nothing from this list.

My conclusions from the evidence are I confess not so satisfactory as could be wished, nor unattended with difficulties; but I have taken the best view of it in my power. As to the fact that cotton was mentioned in the assignments of Weyman, I think it entitled to very little weight.

The view which I have taken supersedes the consideration of another ground taken on behalf of the defendant, Martin. It was urged that Lothrop, as a wharfinger, had a lien on the cotton of Weyman in his hands, for any general balance that might be due him by Weyman, and that Martin, having acquired a right to the cotton by the levy of his attachment, as against Lothrop, or his creditors, ought to be subrogated to the right of Lothrop, and might insist on the same lien: and it was supposed that a demand or bal-

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ance was established *in favor of Lothrop, as against Weyman, by shewing the delivery of the one hundred and eight bales of cotton to him, as it is supposed, by mistake. The ground is taken on the supposition, that the one hundred and two bales cannot be considered as having been substituted in place of the one hundred and eight taken by Weyman. As to this ground I shall only observe, that it is founded on the assumption of the fact, that the whole cargo of the Commerce, including the one hundred and eight bales, was actually pledged to Martin. This, however, I consider to be the most disputable fact in the case; and if we regard it as established, I think there can be little doubt, but that Weyman must be considered as having substituted for them the one hundred and two bales, the cargo of the Herald. It may be remarked besides, that no balance is established in favor of Lothrop against Weyman. This could only be done by taking an account of their whole dealings. If necessary this might be the subject of a future reference, but from the view I have taken it seems unnecessary.

I shall direct the costs to be paid by the defendant, West, as he seems to me to have been guilty of laches, in not making his claim in the suit at law, or before the arbitrators, thus rendering necessary the present suit.

It is therefore ordered, and decreed, that the complainants pay over to the defendant, Robert Martin, the fund in their hands, arising from the sale of the one hundred and two bales of cotton, mentioned in the proceedings. Costs to be paid by the defendant, Charles L. West.

From this decree, the defendant, Charles L. West, appealed, and now moved that the same be reversed, for the reasons following, to wit:

1. That the declarations of Monefeldt, as

testified to by the witnesses, Starr, and Magrath, were incompetent evidence, being hearsay testimony, and not falling within any of the rules, under which such testimony is admitted.

2. That the depositions of Weyman were improperly excluded, on the ground of interest, his interest being equal on either side of the issue.

3. That there was no evidence, at least no competent evidence, entitling the defendant, Martin, to a decree for the fund in dispute.

Gilchrist, and Petigru, for the motion.
King, contra.

O'NEALL, J., delivered the opinion of the court.

The questions which first present themselves in the consideration of this cause are, 1, whether the testimony of Joseph T. Weyman was competent for the assignee, West; and 2, whether the declarations of Monefeldt, proved by the witnesses, Star, and Magrath, were competent evidence.

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*Upon the first question there is no division of opinion; the learned Chancellor, who pronounced the decree, agreeing that he was mistaken in excluding Weyman's deposition. It is only necessary, therefore, to state the rule, and the exception, under which, we think, his testimony ought to have been received.

The rule of exclusion of a witness on account of interest, instead of being extended, has been very much narrowed by modern decisions. The general inclination of courts at present is to apply the objection of interest to the credit, rather than to the competency of a witness. The interest to exclude a witness must be a certain, and direct, pecuniary interest, in the event of the cause, in favor of the party offering him as a witness; or a certain and direct interest in the record, as evidence, for, or against him. This is the general rule applicable to all cases. But if the interest of a witness is equal between the parties, so that he must be equally a gainer, or loser, let either party succeed, he is without pecuniary interest in the event of the suit. For he will be neither better, nor worse, in any event of the case. This appears to me to be exactly the case with Weyman. If his assignee succeeds, the recovery will diminish the amount of his debts to his creditors, who are entitled to be paid under the assignment, but leave his debt to Martin undiminished; and if Martin succeeds, his recovery will be a satisfaction, to the same extent, of the debt to him, but leave the creditors' debts under the assignment undiminished. So that let the recovery be as it may, Weyman can have no pecuniary benefit from it; for the fund in dispute is applicable to the payment of his debts, and apply it to either of the parties claiming, and it will leave Weyman in precisely the same situation, debtor to one, or the other, in the same sum, so far as this fund is concerned. He was therefore a competent witness.

The second question is not free from doubt, not so much arising out of the decision of the question itself, as from the difficulty of perceiving the reason, on which many of the English cases have proceeded, and of fixing upon anything like a rule which they have established. The Chancellor supposes the rule to be, that the entries, or declarations, of a deceased person against his own interest, and charging himself, are evidence in all cases against third persons. To the rule thus broadly laid down, I cannot give my assent. There are classes of cases in which it would apply; there are others in which it has no application. In the cases where it does apply, it is subject to qualification. In all cases where hearsay is admissible from the antiquity of the dispute, and therefore stands upon the footing of necessity, as in cases of customs, pedigree, boundary, and possibly prescription, it would be admissible as furnishing the best evidence in the power of

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*the party. It has however, it must be confessed, been received in other cases, as in Price v. Lord Torrington, 1 Salk., 285, where it appeared that in the usual course of the plaintiff's dealings, his draymen came every night to the clerk of the brew house, and gave him an account of the beer delivered out by them, which he set down in a book kept by him and the draymen signed it. The drayman who signed the entry was dead, but his handwriting was proved, and the entry was held to be proof of the delivery of the beer. Mr. Phillips, in his treatise on evidence, 1 vol., p. 196, (marginal page, 211,) has given some very sensible reasons, both to doubt the authority of this case, and to prevent its extension beyond the case itself. I will however add to his reasons, that that case was probably decided upon the necessity of the case, in favor of trade, and as falling within the reason on which the books of merchants and shopkeepers are considered as evidence of delivery. The drayman may be regarded as the clerk who delivers the goods, and makes the entry; and in such a case, proof of his death and handwriting would entitle the entry to credit.

In Barry v. Bebbington, 4 T. R., 514, the issue was, whether the waste, or common, was the soil and freehold of the defendant. The plaintiff proposed to give in evidence entries of sums of money received by one Ashley, who had been steward to Lord Barrymore, under whom the plaintiff claimed title, for trespasses committed by several persons on the waste. The case was tried in 1792, and one of the entries was in 1739, and the last in 1785. Ashley was dead, and upon his handwriting being proved, the entries were held to be competent evidence, on the authority of Warren v. Greenville, 2 Str., 1,129. That case is noticed by Lord Mansfield in

Brydges v. Duke of Chandos, 2 Burt., 1,072. It appears that the question in Warren v. Greenville was, whether the surrender of a life estate, which was necessary to make out the title, ought to be presumed after great length of time. The attorney who had been concerned in the surrender had been long dead, the entry in his bill book had been made at the time of the transaction, and a receipt had been given upon the bill for "drawing and engrossing the surrender;" and it was held to be evidence.

From these cases I deduce the following principle: that in ancient and remote transactions, an entry, made by a party, having no interest in the issue before the court, and against his interest in the matter of the entry, may, if he be dead, be given in evidence, as a circumstance in aid of the title of the party offering it. In the case of Barry v. Bebbington, it was to prove a recognition of title, or rather possession, in Lord Barrymore, of the common in question, as far back as 1739, fifty-three years before the trial. It

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*may, perhaps, be ranked as a case depending very much on a right of common, which arises often by prescription from use beyond the memory of man, and in which such evidence is admissible on the broad principle, that such a right may be proved by hearsay. But here the admissibility of the evidence will be more intelligibly defended, by putting it on the footing of the declaration of a person in possession, acknowledging the title to be in another; and such declaration is admitted as part of the res gestæ, giving character to the possession. In Warren v. Greenville, it was allowed in aid of a legal presumption; and anything in such a case which goes either to fortify, or rebut it, may be given in evidence.

The next case which it is important to notice, is that of Higham v. Ridgway, 10 East., 109. The question in that case was as to the time of the birth of William Fowden, Jun. The case was tried in 1808, and he was born in 1768. It was held, that the books of the man-midwife, who was dead, containing a charge for his attendance on the mother of William Fowden, Jun., at the time of his birth, and which was marked paid, on being proved to be in his handwriting, were admissible in evidence. It will be observed, on looking into that case, that the book was received only as a corroborating circumstance to the other testimony establishing his birth on the day set down in the entry. Lord Ellenborough said, "that the books would be evidence in themselves, as recording this event of the birth, and other similar events, in the course of his attendance on his patients, at the several times they took place, I am by no means prepared to say." 10 East., 117. Le Blanc, J., in his opinion, puts the question on, I think, the true ground, the necessity of receiving less evidence as to a remote transaction. He says, "on inquiring into the truth of facts, which happened a long time ago, the courts have varied from the strict rules of evidence applicable to facts of the same description happening in modern times, because of the difficulty or impossibility, by lapse of time, of proving those facts in the ordinary way, by living witnesses. On this ground, hearsay and reputation, (which latter is no other than the hearsay of those who may be supposed to have been acquainted with the fact handed down from one to another,) have been admitted as evidence in particular cases. On that principle stands the evidence, in cases of pedigree, of declarations of the family who are dead, or of monumental inscriptions, or of entries made by them in family bibles. The like evidence has been admitted in other cases, where the court were satisfied that the person whose written entry, or hearsay, was offered in evidence, had no interest in falsifying the fact, but on the contrary had an interest against his declaration, or entry, as in the case of re-

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ceivers' books. Ib., 120. *This case establishes as a rule, that in the case of a birth having taken place at some remote period, the entry of a deceased person having no interest to establish the fact, and against his interest in the subject matter of the entry, may be given in evidence, to corroborate, or repel, a conclusion to be drawn from other testimony as to the fact.

The last case which it appears to me to be important to notice, is that of Haddow v. Parry, 3 Taunt., 303, in which it was held by Lawrence, J., that a bill of lading signed by the master of a vessel, since deceased, for goods to be delivered to a consignee, he paying freight, is admissible as evidence of the consignee's right of property against third persons. In this principle I fully concur, but not for the reason that the master would be liable under it to the consignee; but because it shews that his possession was for the consignee, and is therefore prima facie evidence of property. It is the declaration, of one having actual possession, that he holds for another. This makes it admissible as giving character to the possession; and of course fixes prima facie the right of property.

From this review of the cases, I come to the conclusion, that before an entry, or declaration, can be received in any case, it must appear, first, to have been made without any interest to falsify the fact; second, in cases, other than those depending on hearsay, such as pedigree, custom, boundary, and perhaps prescription, that it was made against the interest of the party in the subject matter of the entry, or declaration; and third, that the entry, or declaration, itself, unless where it is made by a tenant in possession, should be so ancient as to preclude all suspicion, that it was manufactured for the occasion. And the cases in which entries, or declara-

tions, are generally admissible, are first, in aid of, or to repel, a legal presumption from lapse of time; second, to give character to an ancient possession, or to make out an ancient title; third, to corroborate, or to repel, a conclusion arising from other testimony, as to a long past event, or fact; and fourth, to give character to an actual recent possession, and thereby shew a right of property in a third person.

Monefeldt's declarations must be admitted, or rejected, under these rules. It is manifest, that he had a direct interest to sustain Martin in this recovery; for if, as the Chancellor truly supposes, he was liable to Lothrop, and Lothrop to Martin, for the loss of the one hundred and eight bales of cotton, his interest is clear to defeat West's recovery, and to sustain Martin's. If Martin recovers the cotton, he is satisfied, and Lothrop's liability to him is ended, and, of course Monefeldt's to Lothrop. He had, therefore, an interest to falsify the fact; and although his declaration had the effect, first to charge him to Martin, through his employer Lothrop, yet it had also the effect to discharge

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him, by *establishing Martin's right of property. To these conclusive reasons against his declaration being evidence, must be added the fact, that it was made, after it was discovered, that one hundred and eight bales of the cargo of the Commerce were missing, and that his liability, whatever it was, had already attached.

I do not believe a case can be found where a declaration, or entry, unaccompanied by actual possession at the time, was ever held to be, in itself, evidence of title in a third person. Still more difficult will it be to find any case, which will permit the declarations of a third person to defeat a vested right in another. In Phœnix v. Assignees of Ingraham, 5 John. C. R., 412, it was held, that they could not have this effect. At the time when Monefeldt's declarations were made, Weyman had assigned the cotton in dispute to West; and his right could not be therefore affected by anything which Monefeldt could say, or do. If at the time Monefeldt made the declaration, he had been in the actual possession of the cotton, it might have been evidence, that he then held possession for Martin; and this would have put the party claiming to shew a legal title to the property. But his declaration, that, some months before, he had been authorized to do an act, which would have changed the property from Weyman to Martin, cannot be any evidence. I come, therefore, to the conclusion, that the testimony of Starr and Magrath, as to Monefeldt's declarations, was incompetent, and ought to have been rejected.

Excluding this testimony from the case, the transfer of three hundred and twenty-nine bales, the cargo of the Commerce, according to the testimony of George Kerr, was made on 20 June, after the one hundred and eight bales had been taken away by Weyman; so that it could only transfer two hundred and twenty-one bales of that cargo then in store. The one hundred and two bales of the cargo of the Herald not being transferred, and there being no ground to presume, that they were intended by Weyman to be substituted for that part of the cargo of the Commerce, which he had taken away, we should not be authorized to sustain the decree in favor of Martin; more especially when Weyman's testimony, which was excluded by the Chancellor, ought to be thrown into the scale against the claim. But as it may be, that other facts exist, which have not been presented to the court, and which may sustain Martin's claim, he may, if he choose, submit the question of fact to a jury, on an issue to be ordered by the Chancellor.

It is necessary to notice the effect of the recovery in the action of trover by Martin against Lothrop. To that case it is said the defendant, West, made himself a party, by the agreement, to sell the cotton, and invest the proceeds in bank stock, and to abide the event of the cause, and any further order thereon. But the recovery in that case mere-

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ly *fixed Martin's right of property in the one hundred and eight bales, as against Lothrop; which question, it may be admitted, this defendant, West, could not now agitate. It is to be remembered, however, that the writ in trover was a writ of foreign attachment, and levied on the one hundred and two bales of cotton, as the property of Samuel H. Lothrop; and I do not perceive, that any order, condemning them as the property of the absent debtor, has been made, or that the question, whether they belonged to him, or to West, or Martin, was in any shape tried. It might have been tried on a suggestion at the instance of West, laying claim to them; but the question could not legally arise in the action of trover between Martin and Lothrop; and it follows that the recovery cannot now conclude the parties from making it.

It is therefore ordered, and decreed, that Chancellor Harper's decree be reversed, and the cause remanded to the Circuit Court for trial; and that the defendant, Martin, have leave to move that court, if he choose so to do, for an issue to try the right of property to the one hundred and two bales of cotton now in dispute.

JOHNSON, J., concurred.

Decree reversed.

Bailey, Eq. 505

Executors of EDWARD MORTIMER v. WILLIAM PRITCHARD, et al.

(Charleston. April, 1831.)

[*Usury* ⟸12, 60, 92.]

To constitute usury, there must be a corrupt, and wilful intent to violate the statute fixing the legal rate of interest; and where, upon a loan, it was stipulated, that the borrower, in addition to the legal interest, should pay all taxes, and assessments, which might be imposed by the State, or City of Charleston, on the principal, or interest, of the debt, although the contract might be regarded as, in itself, usurious, yet as doubts had been entertained as to its being so, and it was in evidence, that the parties had taken the advice of counsel, before entering into the contract, and had therefore manifestly acted, without a corrupt, and willful intent to violate the statute, but under a mistake of law, *held*, that the lender was entitled to be relieved against the consequences of the stipulation.(*a*)

[Ed.Note.—Cited in Gilliland v. Phillips, 1 S. C. 157.

For other cases, see Usury, Cent. Dig. §§ 133, 146, 191; Dec. Dig. ⟸12, 60, 92.]

On appeal from the decree of De Saussure, Chancellor, at Charleston, January, 1830.

JOHNSON, J., delivered the opinion of the court.

The defendant, being indebted to the complainant's testator, executed a bond, and a mortgage of a house and lot of land, to secure payment at a future day. In the mortgage there is a covenant, that the defendant, in addition to the legal interest, should "pay,

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and satisfy *the said Edward Mortimer, all such sums, taxes, and assessments, as may be imposed by the State of South Carolina, and the city of Charleston, or either of them, on the principal, or interest, of the said bond." This is a bill for foreclosure; and it is contended, on behalf of certain subsequent mortgagees, who have been made parties to the suit, that the foregoing covenant renders the contract usurious, and therefore void.

It has so happened, that no tax, or assessment, was imposed either by the legislature, or the city council, within the period which the bond had to run; but money at interest, or the interest received thereon, is a common subject of taxation, and assessment, against the creditor, both by the legislature, and the city council, and it is evident that this covenant was framed with a view to cover any that might, or probably would be, imposed. The statute against usury declares all contracts void, on which interest, at a higher rate than seven per cent., per annum, is reserved. (*b*) The taxes on money at interest have been heretofore invariably imposed on the lender, in respect to the money at interest; and this contract provides, in terms, that the lender shall be reimbursed that amount, in addition to the seven per cent., if it should be imposed; and it strikes me, very forcibly, that, in strictness, it is a violation of the law. It is clearly not analogous to the cases of bona fide brokerage, or commissions, relied on by the counsel, see Dagget v. Wigley, 11 East., 43, and Dey v. Dunham, 2 John. C. R., 182; for those cases proceed on the ground, that the additional per centage was earned by the broker, for services performed in the regular course of his business; and I cannot perceive any difference between this case, and one of a contract, that, in addition to legal interest, the borrower should pay any taxes, which the legislature, or city council, might impose on the houses, lands, and negros, of the lender, to an unlimited extent. The principle appears to me to be the same in both cases.

The circumstance, that the payment of this additional sum depended upon the contingency, that the legislature, or city council, should impose the tax, does not vary the question; for if that were allowed, the statute would be evaded. The lender would take care to select a contingency, which would approach so near to certainty, as to leave no doubt. The principle is clearly settled in the case of Morse v. Wilson, 4 T. R., 353, referred to by the Chancellor, in which, in addition to the legal interest, the lender stipulated for a share of the profits of a trade, and it was held to be usurious.

On this question, however, doubts are entertained by some of the members of the court: and for that reason I am not disposed to put the issue of this case upon it, as there is another, which is decisive.

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*Usury consists in the corrupt, and wilful intent to violate the statute fixing the legal rate of interest, Nourse v. Prime, 7 John. C. R., 69; and it is in evidence here, that the parties, in the formation of this contract, acted on the advice of a gentleman of this bar, highly respectable both for his legal attainments, and for his moral worth. It is a question of doubt even now; and if the contract be usurious, it is palpable, that the parties, both the defendant, and the complainant's testator, acted upon a mistake of the law, and not with a corrupt, and wilful intent to violate the statute. It is a mistake from which the parties would be relieved, as we have decided during the present term, in the case of Lawrence v. Beaubien, 2 Bail., 623 [23 Am. Dec. 155]; and on this ground the appeal must be dismissed, and the decree of the Circuit Court affirmed.

O'NEALL, J., concurred.

Hunt, for the motion.

Toomer, contra.

Decree affirmed.

(*a*) Ante, 456, note.

(*b*) Vide Act of 1777, P. L., 286; sed vide Acts of 1830, p. 27.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Bailey, Eq. 507

SUSAN M. WHEELER, Administratrix of William Wheeler, Deceased, v. EDWARD MERAY, and SARAH A. MERAY, His Wife, EDWARD MERAY, an Infant, and JOHN T. VAUSSE.(a)

(Charleston. April, 1831.)

[1. *Executors and Administrators* ⟸76.]

Equity will entertain jurisdiction of a suit by an administratrix to recover personal property, in the possession of third persons, and alleged to be claimed by them, under a deed of gift from her intestate, to a woman with whom he lived in adultery. The validity of the gift depends, under the Act of 1795, upon an account to be taken of the estate of the donor at the time of the gift; and even if the account could be taken in a court of Law, there is no proceeding in that court, by which the excess, over the proportion allowed by the Act, could be recovered. So, too, if the deed of gift be in its nature testamentary, equity will nevertheless entertain jurisdiction to prevent circuity of action; and the bill will be retained until the question of probate can be tried before the ordinary.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 338; Dec. Dig. ⟸76.]

[2. *Evidence* ⟸462.]

Where from the terms of an instrument it was doubtful whether it were intended to operate as a deed, or a will, it was referred to the commissioner for inquiry, with directions to receive extrinsic testimony as to the intention with which it was executed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2135; Dec. Dig. ⟸462.]

Heard by De Saussure, Chancellor, Charleston, January, 1830.

This was a bill by Susan M. Wheeler, the widow, and administratrix of William Wheeler, deceased, to injoin the removal of cer-

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tain *slaves, in possession of the defendant, John T. Vausse, who had seized them as agent of the defendant, Edward Meray, and was about carrying them from the State. The bill charged, that the slaves were claimed by the defendants, under an instrument executed by her intestate, in the form of a deed, but testamentary in its terms, by which the intestate "gave and bequeathed" the slaves in question to the defendant, Sarah A. Meray, formerly Sarah A. Evans, a young woman, with whom at the date of the instrument, and at the time of his death, he lived in adultery. The gift was to her for life, remainder to her issue; and her only child, the infant defendant, was made a party to the suit. The bill prayed an injunction, and that the gift might be set aside, and the slaves delivered up to the complainant; or that an account might be taken of the estate of the donor, and the gift reduced conformably to the provisions of the Act of 1795, 2 Faust, 76. An injunction was granted on the filing of the bill, pursuant to the prayer therefor.

(a) The case is further reported, 2 Hill E., 222.

The merits of the cause were not decided until a subsequent appeal, which, with the facts necessary to a full understanding of the points decided, is reported in [Hargroves v. Meray] 2 Hill Eq. 222. The chief question made at the present hearing, was as to the jurisdiction. It was contended, for the defendants, that the complainant had ample remedy at law; and had, in fact, commenced an action of trover, in which the defendant, Vausse, had been held to bail, which action had been discontinued.

His Honor decided in favor of the jurisdiction, and ordered a reference to the commissioner to ascertain the value of the estate of the intestate, at the time of the gift. The defendants appealed, and now moved to reverse the decree ordering a reference, and that the injunction might be dissolved, and the bill dismissed with costs.

HARPER, J., delivered the opinion of the court.

The principal question made in the case, relates to the jurisdiction of the court. If the instrument in question be regarded as a deed, I think there can be no question as to the jurisdiction. Its validity under the Act of 1795, 5 Stat., 271, depends on the question, whether the property conveyed exceed one-fourth of the whole amount of the donor's estate, at the time of the execution; and this depends on an account of the estate, which the administratrix can only have in equity, making parties those who are interested, to contest such account. If the value of the estate could be shewn at law, I am not aware of any proceeding by which the administratrix could recover the excess of the property conveyed, over and above one-fourth of the value of the estate.

So if the instrument were a will, and had been proved as such, I should have no doubt of the jurisdiction. It is a part of the jurisdiction to prevent circuity of action; and the

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court will not drive a *party to law, when it is plain the matter must be settled in equity finally. Although the administratrix, with the will annexed, might recover the property in that character, yet there is nothing to prevent her coming into equity to determine on the claims of legatees under the will. If she should recover at law, the legatees would be driven to equity; and to determine on the validity of the legacy, the same account must be taken of the estate at the time of the testator's death. If the instrument in question appeared to us to be a will, although it has never been offered for probate, yet the bill might be retained until it could be tried in the court of Ordinary; but this would not be necessary, if the complainant should charge it to be a will, admitting the legacies to defendants, and the defendants should admit, and claim under it

accordingly. If the defendants should disclaim, then to be sure the complainant's ground of jurisdiction would fail, and she would be compelled to resort to law.

The question whether the instrument is to be regarded as a will or a deed, is now made; but it seem to us not to have been fully tried, in the court below. The parties appear to us to have been indifferent how it should be regarded; and yet, perhaps, their interests may be materially affected by the decision. Judging from the face of the instrument, it is extremely difficult, perhaps hardly possible, to decide, without resorting to extrinsic testimony, as to the intention with which it was executed. Such testimony is admissible; and perhaps more satisfactory evidence may be obtained, than any which has been heretofore offered. We shall therefore reserve this question for the coming in of the report; directing the commissioner to receive and report such testimony as may be offered on the point. He will also report the value of the estate, at the time of the execution of the instrument, and at the time of the death of William Wheeler, with the amount of debts at either period, as directed by the decree of the Circuit Court. Any question of the instrument's being fraudulent, as to creditors, supposing it a deed, may also be reserved for the coming in of the report. It is ordered that a reference be had accordingly.

JOHNSON, J., and O'NEALL, J., concurred.

Hunt, for the motion.
Petigru, contra.

Decree affirmed.

Bailey, Eq. *510

*MARY E. LORD, Administratrix of Jacob N. Lord, and Others, v. JAMES M. LOWRY, and DUTARQUE FOGARTIE, and ELIZA ANN, His Wife.(a)

(Charleston. April, 1831.)

[1. *Trusts* ⟸43.]

Trust decreed as to a moiety of a plantation, upon proof of admissions by the party in possession, that the complainant was equally interested in the land with himself, and that he had purchased the land jointly with him, corroborated by the evidence of circumstances, and proof of a copartnership between them, in the employment of the land, and a division of the profits. And the title deed being lost, and no evidence of its contents, it was held to be immaterial, whether it were taken in the joint names of both parties, or in the name of the party in possession only; as in the latter case a trust resulted from the evidence going to shew that the complainant had paid half of the purchase money.

[Ed. Note.—Cited in Jones v. Smith, 31 S. C. 535, 10 S. E. 340.

For other cases, see Trusts, Cent. Dig. § 62; Dec. Dig. ⟸43.]

[2. *Chattel Mortgages* ⟸34.]

A trust decreed upon an absolute bill of sale of slaves, on proof of acknowledgments by the grantee, corroborated by circumstances, that the slaves were the property of the grantor, notwithstanding the bill of sale; but the grantor having admitted, that he was indebted to the grantee to the amount of the consideration stated in the bill of sale, ordered that the latter stand as a security for the debt; and it makes no difference, it seems, in such a case, that the bill of sale was executed by the grantor to protect the slaves from his creditors.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 24, 38; Dec. Dig. ⟸34.]

[3. *Appeal and Error* ⟸1009.]

That the evidence upon questions of fact is involved in much doubt, constitutes, perhaps, the best reason, why the Court of Appeals should not review the Chancellor's decision in relation to it.

[Ed. Note.—Cited in Dewitt v. Atkinson, 6 S. C. 142.

For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. ⟸1009.]

At Charleston, May, 1830.

Harper, C. The original bill in this case was filed by Jacob N. Lord against David Scaly, charging that about fifteen, or sixteen years before the filing of the bill, complainant and defendant purchased jointly a plantation called Widehall, the purchase money of which was paid equally by each party; and that by an agreement executed between them, they were to share equally all profits arising from the plantation; that complainant contributed his share of the stock; and that they purchased a sloop, jointly, for the purpose of transporting wood, which, along with the plantation, and stock, went into the possession of the defendant, who still retains them. The bill states, that, until within the last three years, the defendant regularly accounted for, and divided with the complainant the profits of their joint property, but has since refused to do so. The bill further charges, that about three years ago complainant, on a settlement, being found indebted to defendant in the sum of $1,400, or $1,500, executed to him a bill of sale for seven slaves, but being un-

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able to agree on *the price, it was stipulated that they should be sold, and the surplus, if any, returned to complainant; but that defendant has failed to comply with this stipulation, and still retains possession of the slaves. The stipulation is charged to have been in writing, but complainant states that his house was burnt in 1826, by which means this paper, and the agreement relative to the plantation, were burnt.

The answer denies the joint purchase of the land, and states that the title was made

(a) White v. Kavanagh, (Errors) 8 Rich. L., 377, Ib., 463; Bauskett v. Holsonback, 2 Rich. L., 624; Rich. E. C., 146; Cox v. McBee, (Errors) 1 Sp. L., 195.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

in defendant's name alone; and defendant states, that he left the title deed with complainant to be recorded, but has repeatedly inquired, without being able to learn what has become of it. Defendant unequivocally denies any partnership in the plantation with complainant: admits, however, there was an understanding, after the purchase, that if complainant would pay half the price, he should be equally interested, but states that he never did pay any part, or assume any responsibility therefor. He denies any agreement for a partnership. He admits that complainant contributed four horses and one mule to the stock of the plantation, of which the horses have since died; admits also the joint purchase of the sloop, and that complainant put four slaves on the land to cut wood: but alleges that complainant received from his factor the proceeds of wood sold, in payment of their hire. The answer further states, that about two or three years ago, upon an examination of his accounts, complainant was found indebted to defendant, in about $2.060, and offered to sell him the seven slaves mentioned, which were then on defendant's plantation, for $1,460. Defendant states that he was unwilling to take them at that price, as he thought it too high, but regarding this as his only chance of receiving even a part of his demand, he consented to accept them, and an absolute and unconditional transfer of them was made. The bill of sale, absolute in its terms, is made an exhibit; and defendant states that from that time, the sloop and mule have been idle and expensive; and he is willing to allow complainant one half of their value.

It seems that just before the filing of that bill, the defendant, David Sealy, by a deed of the date of 12 February, 1827, conveyed the plantation and slaves mentioned, to the defendant, James M. Lowry, in trust, for the sole and separate use of his wife, Eliza Ann Sealy, who, since the death of Sealy, has married the defendant, Dutarque Fogartie. The complainant, Jacob N. Lord, having died, the present bill was filed by his wife and children, his administratrix and distributees, making the same allegations as the original bill. The defendants principally rely on the answer of Sealy to that bill.

The first question relates to the land. I must consider the denial of the answer that Lord was a joint owner of the land, equally

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interested, *to be fully disproved by the testimony. Five witnesses, Mrs. Buckner, Mrs. Melrose, Mrs. Browning, Mr. Clifford, the factor, and Mrs. Cruikshanks, prove Sealy's express admissions, that Lord was equally interested in the land with himself, or, that he had purchased the plantation jointly with him, and their testimony is strongly corroborated by the fact, that Lord did put stock and slaves upon the land, and that from the time of the purchase, which seems to have been sometime about the year 1812, up to 1819, they jointly employed a factor, who kept an account, in their joint names, of all the profits of the plantation. They certainly held themselves out as joint owners to all intents and purposes. These admissions must have meant either, that the conveyance was to them jointly, or that Lord had paid half the purchase money. I cannot conceive of any other way in which they could have been joint owners. It is admitted that a conveyance was executed, which, it seems, was never recorded. Sealy states in his answer, that it was left in Lord's possession. If so, that is also a circumstance to favor the conclusion, that he had some interest or ownership in the land. If it was in Lord's possession, I think a probable account is given of its destruction by the fire which consumed Lord's house. But if the existence and loss are proved, we have no direct evidence of its contents. The chief evidence is the admissions of Sealy, which have been referred to. If they were joint owners, or equally interested, the natural presumption would be, that the conveyance was to them jointly. This is corroborated in some measure, by the testimony of Mrs. Cruikshanks, who states, that about, or after the conveyance of the slaves, Sealy expressed his desire that Lord should make him a title for half the land. He said "he had everything he wanted but titles for the land." The testimony of Mrs. Melrose tends to show, that Lord advanced the whole of the purchase money. She thinks it was so stated in a conversation, at which Lord and Sealy were both present. But if there was any inequality in their advances for the purchase, I must suppose it was settled in the course of their long transactions. It is immaterial, however, whether the conveyance was in the names of both, or whether they paid equal shares of the purchase money. In the latter case a trust resulted. I must conclude that in one way, or the other Lord was a joint and equal owner of the land.

The demand in relation to the slaves is involved in somewhat more difficulty. According to the testimony of Mrs. Cruikshanks, it would seem that after the execution of the bill of sale, Sealy acknowledged a trust in them for Lord. He acknowledged they were Lord's property, notwithstanding he had pro-

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cured the bill of sale, *and a declaration of trust in personalty may be made by parol. But the testimony of that witness is to be taken with some qualification. It was given in a confused manner, and she may have been under some bias. I do not think there was any unqualified trust in the whole property. It was admitted at the hearing, that Lord was indebted to Sealy to the amount stated as the consideration of the bill of sale. If this had not been admitted, it might be difficult to say, that the slaves were not held entirely in trust. I think the testimony of Mrs. Cruikshanks is corroborated by the

circumstance of the inadequate consideration alleged to have been paid for them, and also by the testimony of Mrs. Buckner, and in some degree by that of Gibson. Three of the seven slaves, were proved to have been worth $1,300, in 1824, nearly the alleged price, and there is testimony of Sealy's having admitted that they were all "prime negros." The price must have been greatly inadequaute. If Lord had been indebted to Sealy $2,060, as stated by the answer, that amount would have been a moderate price for them; and it is not likely that Lord would have conveyed them for a less price than the whole debt. I must take the admission as fixing the true debt. The testimony of Mrs. Buckner is, in effect, that Sealy admitted, that he had in his possession negros belonging to Lord. It does not appear whether this was before or after the execution of the bill of sale: but if it was before, I think it serves to corroborate Mrs. Cruikshank's testimony.

It is probable, that Sealy was a fraudulent trustee for Lord, to secure both the land, and slaves, from creditors, from about the year 1819. It must have been about that time, that Lord became involved in dissipation, and debt, and we find him insolvent, and in gaol, in 1824. In 1819, for the first time, the plantation accounts at the factor's were kept in Sealy's name alone. Sealy was in possession of the plantation and slaves. In 1824, all Lord's other property was sold under Manigault's execution; but property enough could not be found to satisfy it, and it still remains unsatisfied; and about this time the bill of sale was executed. Lord's wife was the step-daughter of Sealy, and the latter expressed the intention of securing the property in his possession to her and her children. Mrs. Browning, as well as Mrs. Buckner, testifies to this. Under these circumstances, if an actual sale of the slaves had been intended, the inadequacy of the price would probably have vitiated it, as being a purchase by a trustee of his cestuy que trust. But I take it rather as evidence that an actual sale was not intended. It is infinitely more probable, that it was intended as an execution of the purpose, in which he expressed his concurrence to Mrs.

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Buckner, to secure something *to Lord's family. It was probably intended to secure his own debt first, and then for the benefit of Lord's family.

It is therefore ordered, and decreed, that the defendant, James M. Lowry, convey to the complainants, as heirs, and distributees, of Jacob N. Lord, an undivided moiety of the tract of land in question; that the slaves mentioned in the bill, and their increase, if any, together with the sloop, and mule, mentioned in the bill, be sold by the master for cash; and that after paying the defendant, James M. Lowry, as trustee, the sum of $1,460, with interest from 30 July, 1824, the surplus to be paid to the complainant, Mary E. Lord, as administratrix of Jacob N. Lord. And it is further ordered, that the defendant account with the said complainant for the rents and profits of the land, and the hire of the slaves, from the said 30 July, 1824.

From this decree the defendants appealed, and now moved that the same might be reversed, as contrary to law, and equity, and against the evidence in the cause.

Lance, and Hunt, for the motion.

Petigru, contra.

JOHNSON, J. All the grounds urged in argument turn upon the question of fact, whether there was a copartnership between Jacob N. Lord, and David Sealy, and when it was dissolved. The evidence as to that fact is certainly involved in much doubt; but that furnishes, perhaps, the best reason, why this court should not review the Chancellor's determination of it. His decree is, therefore, affirmed.

O'NEALL, J., and HARPER, J., concurred.

Decree affirmed.

Bailey, Eq. 514

In re COCHRAN v. LYNAH.(a)

(Charleston. April, 1831.)

[1. *Equity* ⟸407.]

The commissioner's report on matters of account may be opened after confirmation, where the fund is still in the power of the court, for the purpose of correcting an error originating in mistake, or fraud.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 903; Dec. Dig. ⟸407.]

[2. *Assignments for Benefit of Creditors* ⟸321.]

The receipt, by an assignee under the insolvent debtors Act, of funds of the assigned estate, which are applicable to the payment of a debt due to himself, is an extinguishment, or satisfaction pro tanto, of his demand.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 938–941; Dec. Dig. ⟸321.]

At Charleston, January, 1831.

In the year 1822, Edward Lynah made a voluntary assignment of his effects for the benefit of his creditors, of whom Thomas

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Cochran *was amongst those who were preferred; and he was the oldest judgment creditor. In 1825, Edward Lynah, having been arrested at the suit of a creditor, took the benefit of the insolvent debtors Act, and Thomas Cochran, Stephen Elliot, and Charles B. Cochran, were appointed his assignees. Soon afterwards, in the same year, a bill was filed, by the assignee under the volun-

(a) Huson v. Wallace, 1 Rich. E., 19. See Burckmyer v. Beach, 7 Rich. E., 487.

tary assignment, to have the trusts of the deed executed; and subsequently another bill was filed by the assignees under the insolvent debtors Act to have the estate distributed according to the Act. In 1828, the Court of Appeals, by their decree, sustained the voluntary assignment, in opposition to the claims of the assignees under the insolvent debtors Act; and ordered an account to be stated of the debts due to creditors, and amongst others, of that due to Thomas Cochran. In May, 1829, the commissioner reported the sum of $439, due to Thomas Cochran on judgment, and this report was confirmed by the court; but pending these proceedings Thomas Cochran had received, on account of the sale of five slaves belonging to the assigned estate, the sum of $510.05, which was not credited to the judgment, nor otherwise accounted for. And in 1830, and before the assets were distributed, the assignees under the voluntary assignment filed a petition, praying that the account might be opened, and the said Thomas Cochran required to account for the money received on account of the sale of the slaves.

Johnstone, Chancellor, by whom the case was heard, dismissed the petition; from which order the petitioners appealed, and now moved that it be reversed.

Petigru, for the motion. The report may be opened at any time, while the fund is in court. Lashley v. Hogg, 11 Ves., 602. Shubrick v. Shubrick, 1 McC. C., 406. A report will always be reviewed for manifest error, if no decree is grounded on it. Turner v. Turner, 1 Swanst., 156, n. 1 Jac. and Walk., 39, S. C. Manaton v. Molesworth, 1 Eden, 18, 26. Pennington v. Lord Muncaster, 1 Mad. R., 555. Cochran ought to have credited the sum in question to the judgment. He was entitled so to apply it, and it was, therefore, his duty to do so; and the judgment was extinguished pro tanto. The omission was either fraud, or mistake; and Cochran, who was a trustee, cannot have any advantage of either. The debt is still due, for there is no pretence that the sum received for the slaves has been in any way paid, or accounted for; and then both demands are in mutual rights, and they may be set off. This is equity, independent of the discount Act. Francis' Maxims, 36. Ex Parte, Stephens, 11 Ves., 27. James v. Kynnier, 5 Id., 108. Ex Parte, Hanson, 12 Id., 346. Taylor v. Okey, 13 Id., 180.

Gilchrist, contra. The report concludes

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the question; and there *is no evidence either of fraud, or mistake, to furnish a ground for opening the report. This application is not made until after the death of Cochran, who might have explained anything which requires explanation. His Honor was right, therefore, in the absence of any evidence of either fraud, or mistake, in regarding the report as settling all question in relation to the money alleged to have been received by Cochran for the slaves.

JOHNSON, J., delivered the opinion of the court.

The power to open the master's report after confirmation, although rarely exercised, seems fully sustained by the authorities. In Manaton v. Molesworth, 1 Eden, 26, the Lord Keeper exercised it to let in proof that the defendant had by fraud set up certain debts, which had been allowed him. It is distinctly recognized by Lord Eldon, in Turner v. Turner, 1 Swanst., 156; and in a note to that case the editor has collected several cases, in which the power had been exercised. In a case like this, when the fund is still in the power of the court, and all the parties before it, and when no delay or inconvenience would result from it, it would be a mockery of justice to deny the petitioner the right to open this report, in order to correct an error, which, to put it upon the most favorable footing, originated in the neglect of the party benefited by that error; for it was the duty of Thomas Cochran to have brought into the account the amount which he received on account of the slaves sold by the assignees.

On the remaining question there is still less difficulty. Thomas Cochran was the oldest judgment creditor of Edward Lynah, and was entitled to priority of payment. The trust confided to him by the assignment was to pay himself first out of the proceeds of the assigned estate. He received $519.05, the proceeds of the sale of five slaves of the assigned estate; and the effect of the report of 25 May, 1829, which was confirmed, was to leave that judgment still open against the estate of Edward Lynah. But this is inadmissible. Thomas Cochran has received an amount greater than his judgment: and he was bound by the nature of his trust to apply it in payment, and it must be so applied.

The decree of the Circuit Court is, therefore, reversed: and it is ordered, that the amount received by Thomas Cochran, or so much of it as is necessary, be applied to the payment of his judgment against Edward Lynah, and that satisfaction thereof be entered.

O'NEALL, J., and HARPER, J., concurred.

Decree reversed.

APPENDIX

Bailey, Eq. *517

*EMMA B. FRONTY, and HENRY BAILY and EFFINGHAM WAGNER, Executors of Mary Fronty, v. RENE GODARD and JOHN H. MEY, Executors of Michael Fronty.

(In the Court of Appeals, Charleston, April, 1833.)

[1. *Powers* ⟸19.]

The testator devised his real and personal estate in Charleston to his wife for life, with a special charge for the preservation thereof; but empowered her to make some provision, or portion, to their adopted daughter: and directed his executors, immediately after the death of his wife, to sell all his said estate, and to transmit the proceeds to his relatives in France, to whom he bequeathed the same. And by a subsequent clause in his will, he declared his intention to make no disposition of his rights, or claims, to the property of his wife. By a codicil, subsequently executed in France, he bequeathed to the daughter a legacy of the value of $600, as a small portion; and directed it to be paid out of his estate in France. After his death, the wife, by an agreement with his relatives in France, contracted, amongst other things, to exercise no rights over the property out of France, other than such as are conferred by the will. The testator left property in Charleston of the value of $50,000. *Held*—That the power was intended to operate on the testator's own estate; that it was not revoked by the bequest in the codicil; nor impaired by the agreement entered into by the wife in France; and that it was well executed by a devise to the daughter of about two-thirds of the property in Charleston.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 40; Dec. Dig. ⟸19.]

[2. *Wills* ⟸439, 470.]

The intention of the testator, whenever it can be legally ascertained is to govern the construction of his will; and the whole must, if possible, be construed together, so that all its parts may have effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957, 988; Dec. Dig. ⟸439, 470.]

[3. *Powers* ⟸16.]

In determining the extent of a power, the intention of the parties in its creation must constitute the guide.

[Ed. Note.—Cited in Canedy v. Jones, 19 S. C. 304, 45 Am. Rep. 777.

For other cases, see Powers, Cent. Dig. §§ 32–35; Dec. Dig. ⟸16.]

[4. *Powers* ⟸19.]

In the execution of a general power, there can be no rule but the discretion of the party to

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whom it is confided; and where a power of *appointment is to be exercised according to the discretion of the person to whom it is committed, no appointment, however unjust or unreasonable it may seem, can be regarded as excessive by the courts.(a)

[Ed. Note.—Cited in Moody v. Tedder, 16 S. C. 562; Buerhaus v. DeSaussure, 41 S. C. 494, 19 S. E. 926, 20 S. E. 64; Ashley v. Holman, 55 S. C. 131, 32 S. E. 992.

For other cases, see Powers, Cent. Dig. § 41; Dec. Dig. ⟸19.]

[5. *Powers* ⟸36.]

The doctrine of the English courts, in relation to illusory appointments, which has been carried to a most unwarrantable length, and is reprobated by the wisest judges, applies only to powers of distribution, where there is an obligation to give something to each of several objects of the power: and even if the doctrine were adopted by our courts, it is not to be extended to other discretionary powers of appointment, so as to render the execution of them void on the ground that it is excessive.(b)

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 140; Dec. Dig. ⟸36.]

[6. *Executors and Administrators* ⟸291.]

Tenant for life in possession, under a will, of real estate, bank stock, and other securities, having made an appointment of them, by virtue of a power contained in the will, the legal title vests immediately in the appointee; and the executors of the original testator have no authority to collect the rents, dividends and interest, and, therefore, no right to commissions for receiving and paying, if they do so.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1159; Dec. Dig. ⟸291.]

[7. *Life Estates* ⟸15.]

Dividends and interest of bank stock, and other securities, which had accrued, partially, during the continuance of a life estate, ordered to be apportioned between the executors of the tenant for life, and the persons entitled in remainder.(c)

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 34, 35; Dec. Dig. ⟸15.]

[This case is also cited in Sires v. Sires, 43 S. C. 272, 21 S. E. 115; Ketchin v. Rion, 68 S. C. 270, 47 S. E. 376, without specific application.]

Dr. Michael Fronty, formerly of Charleston, by his last will and testament, executed in Charleston, on 10 May, 1825, after disposing of a part of his estate, consisting of rights, credits, and various effects in France, and other foreign countries, devised and bequeathed as follows: "I give, devise and bequeath, unto my beloved wife, Mary Fronty, generally, all the rest of my property and es-

(a) Roux v. Chaplin, 1 Str. E., 161.

(b) Haynesworth v. Cox, Harp. E., 117, and note of reporter, 119; Seibels v. Whatley, 2 Hill E., 605, 7, S.

(c) Davidson v. Ruff, 2 Hill E., 144.

tate whatsoever, real and personal, which I own in Charleston, consisting of houses, lands, negros, bank shares, stock, or otherwise, the same to have and enjoy, and the rents, issues, interest, and profits arising therefrom, to claim and receive, during the term of her natural life, upon the special charge, however, that she will, at her own expense, keep the same in due order and condition, make all repairs, pay taxes, insurance, and other necessary expenses attending the same, and take all proper steps towards the preservation and entertainment thereof. But I do, nevertheless, empower my said wife, by her last will and testament, or other instrument signifying her intention, to make some provision, or portion to our orphan child, Augustine Matilda Emma Barton, whom I recommend to her good and generous heart. At the death of my beloved wife, my friends, Rene Godard, Charles S. Mey, and John Henry Mey, or the survivors of them, shall in the most advantageous manner, and with the least delay possible, proceed to sell, and dispose of all my goods, chattels, property and estate, of all descriptions, real and personal, aforesaid, and trans-

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mit the proceeds *thereof in the safest manner to my brother, Michael Fronty, in France, who shall hold the same in trust for his children, to whom I give all the said proceeds of my estate." In a subsequent clause of his will, the testator declared as follows: "I do not think proper to make any disposition with respect to the rights or claims, which I may have on the property of my dear wife, left her by the will of her deceased aunt, Mrs. Loveday, as I decline interfering in any manner with her personal views and dispositions, which I leave her full liberty to make and execute, at her own pleasure, giving my full assent to any will, or testament, she may make, expressive of the same." And of his said will, the testator appointed his said wife executrix, and the said Rene Godard, Charles S. Mey, and John Henry Mey, executors.

Shortly after the date of this will, Dr. Fronty removed permanently to France, where, on 2 April, 1828, he made a codicil to his will, which contained the following clause: "I give and bequeath to Miss Augustine Emma Barton, orphan, whom we have brought up, and lives with us since the year 1812, a sum of 3,000 francs, as a small portion, which will be paid to her two years after my death, and this portion will be her property, of which her husband will be obliged to give her good security for. To make up this sum, the executors of my will shall sell three of the actions I have in the bank of Bordeaux; and I oppose any more being sold." By this codicil, the testator also devised to his wife for life, "the small domain of Bouscat, near Bordeaux;" and made some other dispositions of his French estates. He also referred to his will made in Charleston, on 10 May, 1825; and added, "I also declare that I confirm my said will, in all which is not contrary to this codicil, which I wish to be executed in all its form and tenor." Of this codicil the testator appointed his wife executrix, and his brother, Michael Fronty, executor; and died on 12 February, 1830, at Bouscat, near Bordeaux, leaving both his said will and the codicil of full force.

The testator at the time of his death possessed the following property in Charleston and its vicinity: A house and lot of land in King street; a house and lot on Sullivan's island; one hundred and nineteen shares in the Union bank; sixty shares in the Planters' and Mechanics' bank; sixty shares in the bank of the United States; thirty shares in the bank of South Carolina; one hundred shares in the Union Insurance Company; $2,500 of South Carolina State six per cent. stock; and $1,000 of South Carolina State five per cent. stock. The testator was also possessed of a bond of the First Presbyterian or Scotch church, in Charleston, for the payment of $6,500, which had been taken by him in payment for a house and lot of land

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*at the corner of Archdale street and Parsonage lane, which was part of the real estate and inheritance of his wife, and which had been sold by him; and also of $5,000 of six per cent. stock of the city of Charleston, which he had received in payment for another lot of land of his wife in Clifford street, which had been taken by the city council for the purpose of widening that street.

Mrs. Fronty, during her marriage with the testator, had acquired a very considerable real and personal estate, on the death of her aunt, Mrs. Sarah Loveday, in the year 1812, partly by a limitation over in the will of John Loveday, made in September, 1792, but chiefly under the will of Mrs. Loveday, who, after some inconsiderable legacies to other persons, devised the residue of her estate, real and personal, to Mrs. Fronty, and appointed Dr. Fronty executor. Dr. Fronty proved the will, and took possession of the estate; the whole of which, both real and personal, he sold before his death, with the exception of a house and lot of land at the corner of Church and Queen streets, in Charleston, and another lot in Beresford street, with a brick tenement thereon: Mrs. Fronty, in every instance of a sale of real estate, joining in the conveyance and relinquishing her inheritance, conformably to the Act of Assembly. Dr. Fronty coverted the whole of the proceeds of the sales of the estate to his own use, never rendered any account of his administration, and never made any settlement on his wife.

Mrs. Fronty returned to Charleston in the year 1831, proved her husband's will, and took possession of his estate. She herself died on 30 December, 1831, having previously

executed a last will and testament, by which, after several small pecuniary legacies to other persons, she devised and bequeathed the residue of her estate, real and personal, to her adopted daughter, Emma Barton Fronty, the present complainant. By the same will, she devised and bequeathed to the same complainant the bond of the Scotch church and the $5,000 of city six per cent. stock heretofore mentioned; devising and bequeathing her own interest therein, and also devising and bequeathing the same by virtue of the power of appointment contained in the will of Dr. Fronty; and by virtue of the same power of appointment, she devised and bequeathed to the same complainant the house and lot of land in King street, and one moiety of the bank shares and other stocks already enumerated of the estate of Dr. Fronty. And of her said will the testatrix appointed the complainants, Henry Bailey and Effingham Wagner, executors; who, shortly after her death, proved the will and undertook the execution thereof.

The defendants, Rene Godard and John H. Mey, who had survived their co-executor, Charles S. Mey, qualified as executors of the

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*will of Dr. Fronty, took possession of his estate, and were about to sell the same, and remit the proceeds to France, when this bill was filed for an injunction and for an execution of the trusts created by the power of appointment contained in the will of Dr. Fronty, and the execution thereof contained in the will of his widow. The bill claimed the whole of the real and personal estate devised and bequeathed to Miss Fronty, by the will of Mrs. Fronty; and prayed an account of the rents, issues, dividends, interest and other profits. And if there were any defect in the creation or the execution of the power, the complainants insisted that they were at least entitled to the bond of the Scotch church and the city stock, which they claimed the right to follow, as the real estate of their testatrix, contending that the relinquishment of the inheritance to the purchaser was no gift of the proceeds to the husband; and that, at all events, these securities passed to Mrs. Fronty, under that clause in her husband's will, whereby he relinquished to her all his rights or claims to the property which she had derived from Mrs. Loveday; a provision in his will which was wholly unmeaning and inoperative unless they applied to this bond and stock. The bill also prayed that an apportionment might be made of the annual, semi-annual and quarterly interest and dividends which had partially accrued during Mrs. Fronty's life, and to which she was entitled for life, under her husband's will, but which had been received by the defendants since her death; the greater portion of them falling due only two days after her decease.

The answer of the defendants admitted the statements of the bill generally; but denied that Mrs. Fronty had any legal title to the bond of the Scotch church, or the city stock. They also contended, that the power of appointment was not intended to operate on Dr. Fronty's estate; and that if it were, yet the execution was so excessive, and unreasonable, that it ought to be either restrained in its extent, or declared altogether nugatory, and void for excess. They submitted the question as to the apportionment of interest, and dividends, to the judgment of the court.

The cause came on for a hearing on the merits before Johnstone, Chancellor, at Charleston, in April, 1832, when some evidence was introduced, which is detailed in his Honor's decree.

Johnstone, C. This case was taken up for trial by counsel, on Wednesday, 25 April, 1832; when Mr. Godard, one of the defendants, was sworn as a witness for the complainants, by consent of parties.

He testified, that the bond for $6,500 was received for the lot at the corner of Arch-

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dale street, and Parsonage *lane, sold by Dr. Fronty to the Scotch church. The church wishing to procure a lot from a Mrs. Logan, bought this, and exchanged it to her, for the one they desired to obtain from her. The $5,000 of city six per cent. stock was taken by Dr. Fronty for the Clifford street lot, which was taken by the city council, when the street was widened. Dr. Fronty went to France twice. Each time, before he went, he sold part of the slaves, and other personalty of the Lovedays. Both sales included all. The Dr. came here in 1793, or '4; having been ruined by the troubles in St. Domingo, and possessing then nothing but his profession. Mrs. Fronty often complained that Dr. F. had possessed himself of all her interest in the Loveday estates; and that if he died without a will, she would be destitute. In all Dr. Fronty's absences, witness was his sole attorney. Fronty's income varied from $3,500 to $4,000. Witness remitted to him, in all, about $28,000, or $29,000. Dr. Fronty took out in 1825, from 40,000 to 50,000 francs. He also took about an equal sum in 1817. The witness proved a list of Dr. Fronty's property; which was offered to show that he had had other property, which he sold; and that the sums remitted were not income alone. The list contains seven houses and lots. Dr. F. was fond of accumulating. He told witness before his first visit to France, that he had money in the hands of Hottinguer, banker at Paris. There were also debts due by Fuertes, at Havana, which were not collected by witness, nor by Dr. Fronty, while he was in this country.

On his cross-examination, the witness stated, that the Scotch bond and the city stock are both payable to Fronty. The other stock also stands in his name; except twenty

shares in the South Carolina Bank, in the name of John, and ten in the name of Sarah Loveday. Fronty has thirty in his own name, in the same bank. He was charitable. Had a considerable practice. He was not a man of great property before he married. His wife's fortune contributed very greatly to his estate. Thinks the remittances exceeded Dr. Fronty's individual acquisitions.

The defendants offered no evidence, and here the testimony closed.

It was contended that in the appointment made by Mrs. Fronty, to Emma Barton Fronty, she exceeded the power given her by her husband's will. This matter of excessive and illusory appointments is new in our courts. No case has occurred in which it has been touched, although in one or two it might have been, if the question had been raised. The English decisions are many of them unsupported by principle. Indeed, it is difficult to believe, that if the question were res integra, the courts would have gone half so far as they have. The decisions are not to be extended.

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*My impression is, that in the case before me, there is nothing by which the power of Mrs. Fronty could be limited, except her own discretion. If I were to attempt to limit her exercise of the power, by what should I be governed? I see no guides in the will. If Dr. Fronty had pointed out any purpose, for which he wished provision to be made, for Miss Fronty, the appointment could have been restricted, so as to answer, and not exceed that purpose. But nothing of the sort occurs in the will. The appointment must be supported.

With respect to the apportionment of interest, I am satisfied that the view taken by the bill is correct, and that an apportionment must be made.

Let the case be referred to the commissioner, to make up the accounts in conformity with this opinion; and when his report comes in, a final decree can be made.

Subsequently to this decree, the commissioner, to whom the matters of account were referred, made a report, accompanied by two schedules. Schedule A contained an account, and apportionment, of interest, and dividends, which had accrued partially during the continuance of Mrs. Fronty's life estate, and which had been received by the defendants after her death; and this account exhibited a balance due to the executors of Mrs. Fronty, of $1,439.21. Schedule B contained an account, and apportionment, of interest, dividends, rents, and profits, accrued since the death of Mrs. Fronty, and received by the defendants, to which Miss Fronty was entitled under the execution of the power of appointment; and it exhibited a balance due to her, of $1,241.06. In both schedules a charge was made, and allowed, for commissions on receiving and paying.

The commissioner further reported a paper produced in evidence before him, by the defendants, which had been received since the hearing of the cause. This was an agreement executed by Mrs. Fronty, and her brother-in-law, Michael Fronty, at Bordeaux, in France, and registered there on 23 February, 1831; by which she relinquished all claim to her husband's estate in France, and contracted to exercise no rights over the property out of France, other than such as are conferred by the will. This agreement, the defendant insisted, was a bar to the execution of the power of appointment. Its effect upon the rights of the parties, was submitted by the commissioner to the judgment of the court.

The complainants excepted to the allowance of commissions on several sums specified in schedules A and B, on the ground; that the said sums either constituted a debt due to the complainants by the estate of the defendant's testator, or are to be regarded as in the nature of specific pecuniary legacies,

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and are in neither case chargeable *with commissions, or other expenses of the administration, which must be borne exclusively by the residuary estate in the hands of the defendants.

The cause came up for a final hearing on the report of the commissioner, and the exception thereto, before Johnstone, Chancellor, at Charleston, in January, 1833, when the following decree was made.

Johnstone, C. This case comes up for final adjudication upon the report of the commissioner, and an exception thereto filed by the complainants.

The paper stated in the report to have been produced to the commissioner by the defendants, in bar of the complainant's claims, is not regularly before the court. It was not relevant to the matters of account which were referred to that officer; nor can it be regularly introduced in evidence here, in the present stage of the proceedings. The complainants, however, are willing that it should receive the same consideration, and be entitled to the same weight, and effect, as if it had been offered at the original hearing. But I do not see, that it can, in any manner, affect any of the questions at issue between the parties to the present suit. It is a contract between Mrs. Fronty and her brother-in-law, Mr. Fronty, and can confer no right upon the defendants. If it has been violated by Mrs. Fronty, her executors are responsible to Mr. Fronty alone, and he is not a party to this suit. It is clear, however, that this contract is in no particular inconsistent with the will of Mrs. Fronty, under which the complainants claim. Mrs. Fronty merely relinquished her claims to the property of Dr. Fronty, her husband, in France, and agreed to exercise no rights over the property out of France, other than such as are conferred upon her by his will. But the claims which the

complainants have derived from the will of Mrs. Fronty, are restricted to the property in this country, and are founded altogether upon the rights, conferred upon Mrs. Fronty, by the provisions of her husband's will. Her own will is, therefore, in strict conformity with her engagements.

The exception filed by the complainants to the commissioner's report, appears to me to be well founded, and must be sustained. The report is in other respects confirmed.

It is, therefore, ordered and decreed, that the sums allowed for the defendants' commissions, in schedules A and B, be stricken out, and that the defendants pay over to the complainants, respectively, the balances specified in schedules A and B, adding thereto the sums allowed in each for commissions. It is further ordered, that the defendants assign and transfer to the complainant, Emma B. Fronty, the various stocks, and securities, which were bequeathed to her by Mrs. Fronty, by virtue of her power of appointment, as set

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forth and described *in complainants' bill; that they also deliver to her, possession of the house and lot in King street, in the city of Charleston, which was devised to her by virtue of the same power; or if the said house is at this time on lease, to assign and transfer to her all leases, agreements, and contracts, for the letting thereof, and all bonds, notes, and other securities, which have been, or may be taken by them for the rent of the same; and to deliver to her all title deeds, and other muniments, and policies of insurance, relating to the said premises, which may be in their possession; and that they likewise pay over to her all moneys which they have received, or may hereafter receive, subsequently to the account taken by the commissioner, for interest, or dividends, of the said stocks, or other securities, and for the rents, issues, and profits of the said house and lot of land, deducting only the necessary expenses of taxes, insurance, repairs, &c. And, as the right of the executors of Mrs. Fronty, to the balance due on the account, stated and set forth in schedule A, is not contested by the defendants, except as to the sum charged for commissions, it is further ordered, that the payment of the said balance, except as to the sum charged for commissions, be made immediately, unless this part of the decree be specially appealed from, in order that the said balance may be applied to the support and maintenance of the residuary legatee of Mrs. Fronty. It is lastly ordered, that the costs of this suit, be paid by the defendants, out of the residuary estate of their testator.

The defendants appealed from the several decrees of the Chancellor in this case; and now moved that the same might be reversed, or modified, on the following grounds:

1. That the devises and bequests by Mrs. Fronty to Miss Fronty, of the property belonging to the estate of Dr. Fronty, under the power given by his will, to provide for their adopted daughter, constitute a clear case of excess in the execution of a power; inasmuch as the testator intended only a reasonable money legacy out of the estate, the whole of which estate, he expressly directs his executors, after his wife's death, to sell, and to remit the proceeds thereof to his brother, and his family, in France. And it is submitted, that from the whole tenor of the will and codicil, the French family were the peculiar objects of the testator's bounty, and that this, his manifest intention, would be clearly defeated, by the disposition of more than one-half of his estate, made by his widow, to Miss Fronty, who, though a member of his family, was not a relation; as it appears from the calculation of the amount of the property left Miss Fronty, out of the Loveday estate, and of the half of Dr. Fronty's own estate, that she would receive about $25,000, more than the residue of his estate, to be divided among his eight nephews and nieces.

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*2. That the bond of the Scotch church, and the city six per cent. stock, although derived from the realty of Mrs. Loveday's estate, belong to Dr. Fronty's estate, there having been a reduction into possession by the husband; and it cannot, therefore, pass under the clause of his will, in which he relinquishes to his wife, his claims on Mrs. Loveday's estate.

3. That by the contract entered into by Mrs. Fronty, and her brother-in-law, in France, she, for a valuable consideration, released all claims on his estate in France, and in this country, according to the French law; and that the large bequests to Miss Fronty, are in violation of this contract.

4. That the amount of $1,241.06 decreed to be paid by the executors, ought to be disallowed, on the chief ground of the will of Mrs. Fronty being an excess in the execution of the power granted to her.

5. That the commissions on the two sums ought to be charged to the respective amounts, and not to the general estate.

Lance and King, for the motion.
Petigru and Bailey, contra.

O'NEALL, J., delivered the opinion of the court.

In order to enable us to pass satisfactorily upon the much contested question in this case, it will be necessary, in the first place, to ascertain the intention of Dr. Fronty, in the power conferred by his will on Mrs. Fronty, "to make some provision, or portion, to our orphan child," the complainant—for it must be conceded, that the intention of the testator, whenever it can be legally ascertained, is to govern. All the rules of construction serve but to enable us to attain this end. So in determining the extent of a pow-

er, the intention of the parties in its creation must constitute the guide. Sug. on Pow., 459. To arrive at this, the whole will must, if possible, be construed together; in order that all its parts may have effect. The different clauses, speaking of different matters, may be construed in relation to their subjects; and thus a difficulty may be removed, which might otherwise be insuperable.

In the fifth clause of his will, executed in Charleston, the testator devises and bequeaths all the rest of his estate, real, and personal, in Charleston, to his wife, Mary Fronty, during her life; "upon the special charge, however, that she will, at her own expense, keep the same in due order, and condition, make all repairs, pay taxes, insurance, and other necessary expenses attending the same, and take all proper steps towards the preservation, and entertainment thereof." Then follow the words containing the power: "But I do, nevertheless, empower my said wife, by her last will and testament, or other instrument signifying her intention,

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to make some provision, or portion, *to our orphan child, Augustine Matilda Emma Barton, whom I recommend to her good and generous heart."

In the succeeding clause, he directs his executors, at the death of his wife, "to proceed to sell, and dispose of all" his "goods, chattels, property, and estate, of all descriptions, real, and personal, aforesaid, and transmit the proceeds thereof, in the safest manner, to his brother, Michael, in France," &c., &c., and then adds, "I do not think proper to make any disposition with respect to the rights, or claims, which I may have on the property of my dear wife, left her by the will of her deceased aunt, Mrs. Loveday, as I decline interfering, in any manner, with her personal views, and dispositions, which I leave her full liberty to make, and execute, at her own pleasure, giving my full assent to any will, or testament, she may make, expressive of the same"

In a codicil to his will, executed in France, where he and his family resided at the time of his death, is the following clause: "I give and bequeath to Miss Augustine Emma Barton, orphan, whom we have brought up, and lives with us, since the year 1812, a sum of 3,000 francs, as a small portion, which will be paid to her two years after my death, and this portion will be her property, of which her husband will be obliged to give her good security for. To make up this sum, the executors of my will shall sell three of the actions that I have in the bank of Bordeaux, and I oppose any more being sold."

Was this legacy of 3,000 francs intended as a revocation of, or substitution for the power, is the first question which naturally presents itself. I think it clear that it was not. It does not purport to be in lieu of it; and unless this appears in terms, or the last is utterly inconsistent with the former, both must stand as distinct provisions in her favor. The power to provide for the complainant, conferred on Mrs. Fronty, looked to an event, which might not take place for years subsequent to the testator's death. In the meantime, the complainant, who was the adopted child of the testator, was to depend altogether on Mrs. Fronty. To prevent this, the testator was willing she should have "a small portion," immediately on his death. It is unreasonable to suppose, that he intended $600 to be all the portion which he ever intended the complainant to receive out of an estate said to be worth, at least, $50,000. Again, the "small portion," given by his codicil, is out of his actions in the bank of Bordeaux, and in which his wife was to have no interest, whatever, under his will, or codicil: whilst the power to provide for the complainant, conferred by his will, certainly applies to the property in Charleston. The legacy is a present interest, given by himself: the power he left to be executed,

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or not, at the discretion of his wife. *I am, therefore, satisfied that the testator did not intend the legacy of 3,000 francs as a revocation of, or substitution for, the power, and that both may stand together.

Out of what property, his own, or that of his wife, did the testator intend that Mrs. Fronty should make "some provision, or portion," to the complainant? The answer to this question will be obtained by recurring to his will. The power is in the clause by which he had given a life estate to his wife in all his estate, real, and personal, in Charleston; and it would seem, when the whole clause is read together, that there could be but one opinion, viz.: that he intended that she should make the provision out of this property. But it is said, that the anxiety which the testator has manifested, in that clause, for the entire preservation of the body of his estate, during the life of his wife, from any charges on those who might take it after her death, is inconsistent with the power to make a provision out of it for the complainant. That is a manifestation of the prudence which a pains-taking, and economical old man, would be apt to exhibit in relation to his property, in the hands of one, who was not to have it absolutely; but it is no evidence that this desire to preserve it unincumbered, was not as much in reference to the provision to be made in favor of the complainant, and to increase its value in her favor, as of his residuary legatees.

The direction in the succeeding clause to his executors, to sell, at his wife's death, all his estate, real, and personal, creates the only difficulty on this part of the case. To give these words a literal meaning, would exclude the idea that the complainant should have any provision out of his estate. The meaning of the testator is, however, to be col-

lected from the whole of his will, and the words used must be understood in the sense in which he used, and understood them. He intended that his wife should make some provision for the complainant; and if he did not intend it to come out of his wife's estate, it must have been from his. In addition to the evidence which the clause, in which the power is contained, furnishes, that the testator intended the provision, or portion, to be made out of his estate, other considerations lead us inevitably to that conclusion. In the last clause of his will, which is the residuary one, he disclaims, in express terms, any intention to dispose of her estate. For the property left her by the will of Mrs. Loveday was the only estate which she had. In relation to that, after declining to make any disposition of it, he assigns his reason, "as I decline interfering in any manner with her personal views and dispositions." If he had supposed he had charged her to provide for the complainant out of it, he would have directly interfered with her free disposition of it, and the reason assigned would

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*have been utterly untrue. But if he intended the provision to be made out of his own estate, then he had not, in any shape, interfered with his wife's personal views and dispositions. From the words, therefore, which he has used himself, the best exponent of his intentions, we must conclude that he did not intend to direct his wife to provide, out of her own estate, for the complainant. But independent of this view, it cannot be supposed that he thought it necessary to empower his wife to make a provision out of her own estate, if she thought proper so to do. Every one has the right to devise his own property to any one he may please; but this right of disposition does not extend to the property of another. This is known to the ignorant, as well as the learned; and it is not to be supposed that the testator thought any power from him was necessary to enable his wife to devise her own estate: more especially when he disclaims any intention to control her in the disposition of it. Being satisfied that the power given to Mrs. Fronty was intended, by the testator, to be applied to, and exercised by a disposition of, his own estate, the direction to his executors to sell, at her death, all his real and personal estate, must be understood to apply to all of it, which she might leave undisposed of by an appointment in favor of the complainant. This satisfies both the intention, and the words of the will. For, "all of his estate, real, and personal, at her death," is the property which she did not appoint in favor of Miss Fronty. This is all which then belonged to him. The property devised to her by Mrs. Fronty is no longer his property. He himself, by creating the power, has parted with his interest in whatever passes by its execution.

Having arrived at the conclusion, that Mrs. Fronty was authorized, under the will of Dr. Fronty, to make "some provision, or portion," for the complainant, out of his estate, it remains to be examined, whether the appointment actually made, can be sustained. Mrs. Fronty's will devises to the complainant, about two-thirds of the property in Charleston, leaving the other third to go to the residuary legatees, under Dr. Fronty's will.

Powers may be general, or limited. In the execution of a general power, there can be no rule, but the discretion of the party to whom it is confided. In a limited one, the limitations contained in it constitute the rule, by which it is to be executed. In the former, no court can undertake to control that, which the party creating the power intended to leave to the honesty, good faith, and discretion of the person, to whom he confided it. In the latter, the courts do no more than execute the intention of the party by whom it is created, by declaring the execution of the power, contrary to the limitations contained in it, void.

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*The doctrine of illusory appointments, which, in England, has been carried to a most unwarrantable length, and is reprobated by the wisest Judges, is, nevertheless predicated on the ground, that the power given has not been executed according to the intention of the testator. This, if it had been confined to plain and palpable violations of the intention, as indicated by the words of the power, could have produced no conflict between law and equity. But when it is attempted to control a discretionary power of distribution among children, by saying that each must receive a substantial part, it is to substitute the discretion of the court for the discretion of the person, to whom the power is confided. It is creating an equity against, and above the law, when it is our duty to follow, and obey the law; to declare it, not to make it.

But the doctrine of illusory appointments has nothing to do with this case. That applies only where there is an obligation to appoint something to each of several objects of the power, and a merely illusory share is given to some one, or more of them. The complaint here is, that too much, not too little, has been done for the complainant. The power executed in her favor, looks only to her. No other person is interested in its execution. The interests of others may be abridged by its being executed, but they cannot complain, if it exists, as we have already seen it does, unless some limitation, contained in it, has been exceeded. Does the execution exceed the power? That is the only question. If it does, then it follows, that the complainant cannot take anything under it.

There are three modes in which a power may be exceeded: 1. in the objects; 2. in the interests; or 3. in the conditions annexed to the gift. Sug. Pow., 533. In relation to the first, the objects, or person, in whose favor the power is created, and the third, as to the conditions, there is no objection to the execution of the power in this case; it is as to the second, the interests, or rather the value, of the "provision" made by the will of Mrs. Fronty, in favor of the complainant, that the execution of the power is alleged to be excessive.

To sustain this objection, it must appear, that more of the estate of the testator has been appointed to the complainant, than his will authorized. If this could be clearly ascertained, the appointment of the excess would be void. But if it is excessive, and the boundaries between the execution and the excess are not distinguishable, it would, as Mr. Sugden observes, be altogether bad. Sug. Pow., 549. So that really the question, now to be decided, is whether the complainant is to receive the whole provision made for her by the will of Mrs. Fronty, out of the estate of Dr. Fronty, or nothing. For it is in vain to say, that any mode exists, by

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which we can ascertain, how *much she ought to receive from his estate, if the will of Mrs. Fronty is not to be our guide. Every one would say she ought to receive something; but the opinion of each would fix that something according to his own standard of right and wrong. "In the multitude of counsellors there is safety;" but it is seldom that certainty and precision, as to either amount, value, or truth, are obtained from a multitude of opinions.

What is the provision, or portion, which the will of Dr. Fronty authorized to be made? The will must answer the question; for it is to that we must look for the limitations of the power, if there are any. It is, "but I do nevertheless empower my said wife, by her last will and testament, or other instrument signifying her intention, to make some provision, or portion, to our orphan child, Augustine Matilda Emma Barton, whom I recommend to her good and generous heart." The true question on this clause is, has the testator left the nature, and amount of the provision to the discretion of his wife? If he has, then his confidence in her must be held to have authorized any disposition in favor of the complainant, be it much, or little. For after all that has been said, and written, on the subject of the execution of powers, the only principle which can be safely extracted from the cases is, that where a power of appointment is to be exercised according to the discretion of the person to whom it is committed, no appointment, however unjust and unreasonable it may seem, can be regarded as excessive; but where any limitation is placed to the exercise of his discretion, the courts will control the execution of the power.

It is said here, that some provision, or portion, did not authorize a devise to the complainant, of two-thirds of the testator's estate. Why? It is, in the words of the will, some provision, or portion. It is not the whole estate. If it was, there would be some plausibility in the argument, from the residuary clause; but I am not sure that an appointment of even the whole estate would have been excessive. There is nothing in the power which restricts the gift to be made, in amount; and it is apparent, that the testator did not intend that his wife should dole out a scanty pittance, with a niggardly hand, to the complainant; for he recommends her to the kind and generous heart of his wife. And what was to be expected from the kind and generous heart of a childless woman, to her adopted daughter? Could less be expected, than that she would act a mother's part towards her? Such would be the ordinary calculation of every one acquainted with human nature.

The provision is liberal, but I cannot say that it is excessive. I can see nothing which enables me to say, that the testator did not

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intend* that two-thirds of his estate should be given to the complainant; and if the intention to restrict the donation cannot be ascertained, it is manifest that the testator did not intend that it should be restricted; but that his wife should provide for her, as she might think best, and most suitable to her wants and prospects.

It will be only necessary to refer to a few, out of the many, cases on this subject, to shew, that when the testator leaves the appointment to be made to the discretion of the person who is to make it, any appointment which he makes, must be sustained.

The case of Cook and wife v. Farrand, and others, 7 Taun., 122, approaches more nearly to this case, than any other. That is, it is true, the opinion of a court of Law, but it was on a case sent from chancery for the opinion of the Judges. John Sanders devised "all the residue of what he should die possessed of, or in expectancy, of what nature, or kind soever, in that, or any other country, to his wife, E. Sanders, for her natural life, reserving to her full power to will away any part, or proportion, of his said residue, at her decease; and after that period, he bequeathed the said residue and remainder, of what was undisposed of by his wife, to his daughter, Sophia Cook, (the plaintiff,) to her, and the heirs of her body forever." The widow E. Sanders, by her will, appointed the whole residue to Farrand, Cathcart, and Oldershaw, in exclusion of the plaintiff; and the court held that the power was well executed. In that case it was as manifest, as it is in this, that the testator looked only to an appointment of some part of his estate by his widow;

but still the power was general, and her discretion unlimited by anything, which could enable the court to say, that the testator intended that the power should not be executed beyond such a part of the estate. As was well said, in the argument of this case, the gift of the residue for life, with the power of disposing of any part of it, turned the life estate into an absolute one, and hence the devise was good. So in the case in hand; the devise to Mrs. Fronty, for life, is of the residue of his property in Charleston, with the power of disposing of some part of it, with only one restriction, that it should be in favor of the complainant. This did not make her legal estate absolute for all purposes, but it made her estate for the purpose of the power absolute, and the analogy between the cases is, in this respect, complete.

In the case of Wollen v. Tanner, 5 Ves., 218, James Winter, by bond, bound his executors to pay £600, after his decease, unto and among all such children of Susannah Wollen, in such parts, shares, and portions, manner, and form, as the said James Winter should by deed or deeds, writing or writings, or by his will, appoint, and in default of appointment, then unto, and among, all the children

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of Susannah *who might survive the said James. James Winter, by his will, gave the whole £600, to Thomas Wollen, one of the children of Susannah, and it was held by the Lord Chancellor to be a good appointment. The words "all such children," reserved to himself the discretionary power of selecting, from among them, the object, or objects of his bounty. It would have seemed, that at least more than one ought to have been selected, to have satisfied the words; but there was a right to select, and no rule by which its exercise could be regulated; and hence, being wholly arbitrary, and discretionary, the court could not declare the appointment to be bad. The reason of that case touches this. For here some provision is to be made. How much? Who can tell? The person to whom the testator confided the power, can alone answer the question, by her appointment. For it is wholly discretionary as to the amount, and her opinion of the proper portion of his estate to constitute that provision, is more apt to coincide with what were the testator's wishes, than any conjecture which any other human being can make.

The case of Long v. Long, 5 Ves., 445, was the case of a power under marriage articles. Coombe farm was, according to their terms, purchased and settled to the use of the husband, for life; remainder to the use of the wife, for life, for her jointure, and in bar of her dower; remainder to the first and other sons in tail male; remainder to the daughters, as tenants in common; remainder to the right heirs of the husband; with a power to charge the premises with the payment of such sums of money as he might, by deed or writing, or by will, appoint in favor of the younger children of the marriage. He devised Coombe farm to be sold, and appointed the money among his younger children, excluding the eldest son. The power to charge and appoint was held well executed by the sale and appointment of the proceeds; for the power to charge was unlimited in amount, and might have been exercised to the full extent of the fee simple value, and a sale was, in effect, a charge to this extent. In the appointment of the proceeds, the discretion of the father was not restricted, in either the amount or the objects. His right of selection among the younger children was not limited; and as to his eldest son, he could not complain of an act of the father, which, although it conveyed the estate from him, was, in effect, the same as a charge to the fee simple value, which the power gave the father the authority to make.

The correctness of this decision is questioned by Mr. Sugden, on the authority of Tankerville v. Coke, Mosley, 146; and there is certainly some discrepancy between the two cases; but still, I see no reason to find fault with the case of Long v. Long. It is decided upon what seems to me the correct principle, that when a power is discretion-

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ary *as to the objects and interests, and without condition, the appointment is good. In Tankerville v. Coke, Mr. Baron Comyn states what I should not be willing to admit in the general terms used; "I allow," says he "that this court will take care a general power be executed in a reasonable manner, but it will not interpose if the execution is not apparently unreasonable." If, by a reasonable manner is meant, that the discretion of the court is to be substituted for that of the person making the appointment, under a general power, I deny it to be law. The rule is, that if any boundary is fixed to the exercise of the power, or can be ascertained, by a reasonable construction of the words, to have been intended, then the execution must conform to it, otherwise equity, as well as law, must hold it well executed.

In Bax v. Whitbread, 16 Ves., 24, Lord Eldon, while sustaining the doctrine of illusory appointments, yet admits, that when there is a discretion allowed to the person who is to execute the power, the court ought not to interfere. He observes: "with regard to the quotation, in the case of Butcher v. Butcher, 9 Ves., 382, which I take to be Lord Nottingham's words, from his own manuscript, speaking with all due humility, I should have found it very difficult, construing that will, to say the wife was not intrusted with a discretion, because there was no convenience in trusting her; the only question in judicature being, not upon the convenience, but whether she was intrusted with the power. As I read the will, whether con-

venient or not, she was intrusted with the power; and speaking with the same humility, I could not have declared, in judgment, that it seemed to me very apparent that the true meaning was an equal provision." Under the will in the case before us, the wife has the power to make "some provision or portion," for the complainant; and as to the nature and amount of it, she was intrusted with a discretion, which, having been exercised, we have no right to interfere with it. "She was intrusted with the power," and has executed it, and the appointment must be held to be good.

This dispenses with the necessity of considering the question, whether the city stock and Scotch church bond, are the estate of Mrs. Fronty. Whether hers, or her husband's, is perfectly immaterial: they will, in either event, go to the complainant, under her will, according to the view taken of the power of appointment.

Her power of appointment is not effected by the contract in France, with her brother-in-law, Mr. Fronty. Her rights under her husband's will, were intended to be neither increased nor diminished by it.

In relation to commissions, I concur with the Chancellor. The bequest to Mrs. Fronty, carried all the rest of the testator's property

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*in Charleston, to her in specie. Upon his executors assenting to the legacy to her, the stock vested in her, and the executors had no right to receive the dividends, as executors afterwards. At her death, her will carried to Miss Fronty the property bequeathed to her, and her executors assenting to the legacy, it vested in her. She alone was entitled to receive the rents, dividends, interest, or principal of the bond. The executors of Dr. Fronty, having received for another, that which, as executors, they had no right to receive, can give them no title to commissions.

It is therefore ordered and decreed that Chancellor Johnstone's decree be affirmed.

JOHNSTONE, J., and HARPER, J., concurred.

Decree affirmed.

Bailey, Eq. 535

SARAH HENRY, and ELIZABETH TALBIRD, an Infant, by Her Next Friend, Isaac B. Ulmer, v. HUGH ARCHER, Sheriff, and Others.(a)

(In the Court of Appeals, Charleston, February, 1837.)

[1. *Wills* ⟸555, 594, 610.]

Bequest of personalty to testator's daughter, to her, and the lawful issue of her body, forever; but if any of testator's sons or daughters should die without leaving lawful issue of their bodies alive, then their part of the estate to be equally divided amongst testator's then surviving children. *Held*, that the issue were entitled as purchasers.

[Ed. Note.—Cited in Waller v. Ward, 2 Speers, 792; Hay v. Hay, 4 Rich. Eq. 384; O'Dom v. Davis, 7 Rich. 538, 539; Dehay v. Mitchell, 1 Rich. Eq. 270; Moore v. Paul, 7 Rich. Eq. 368; Markley v. Singletary, 11 Rich. Eq. 396; Simons v. Bryce, 10 S. C. 366; Mendenhall v. Mower, 16 S. C. 312.

For other cases, see Wills, Cent. Dig. §§ 1202, 1313, 1380; Dec. Dig. ⟸555, 594, 610.]

[2. *Perpetuities* ⟸4; *Wills* ⟸495.]

Where there is an express gift to issue, generally, a limitation over, in the event of the first taker's dying without leaving issue living at his death, will confine the gift to such issue as are living at that time, and entitle them to take as purchasers.

[Ed. Note.—Cited in Hay v. Hay, 3 Rich. Eq. 392; Id. 4 Rich. Eq. 383; Nix v. Bay, 5 Rich. 425; O'Dom v. Davis, 7 Rich. 538, 539; Dehay v. Mitchell, 1 Rich. Eq. 269, 270; Hay v. Hay, 4 Rich. Eq. 383; Moore v. Paul, 7 Rich. Eq. 367, 368, 369; Markley v. Singletary, 11 Rich. Eq. 396; Simons v. Bryce, 10 S. C. 366; Renwick v. Smith, 11 S. C. 306; Mendenhall v. Mower, 16 S. C. 312; Bethea v. Bethea, 48 S. C. 443, 26 S. E. 716.

For other cases, see Perpetuities, Cent. Dig. § 23; Dec. Dig. ⟸4; Wills, Cent. Dig. § 1063; Dec. Dig. ⟸495.]

[3. *Executors and Administrators* ⟸152.]

An administrator cannot hold adversely to the distributees of the estate, so as to mature a title by the statute of limitations, although he claim by a title inconsistent with that of his intestate. Vide Manigault v. Deas, ante, 284.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 621; Dec. Dig. ⟸152.]

[4. *Limitation of Actions* ⟸174.]

The minority of one, or more, joint owners of personal property, will not protect the rights of such of them, as are of full age, from the operation of the statute of limitations; nor will the bar of the statute, against those who are of full age, affect the right of those of them, who are under disability, to recover to the extent of their respective interests. Vide Henry v. Means, 2 Hill, 328.(b)

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 659–661; Dec. Dig. ⟸174.]

[5. *Wills* ⟸610.]

[The rule that any words which would give an estate tail in a devise of real estate will give the absolute estate in a bequest of personalty is subject to the qualification that a different intention is not expressed in the will.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1381; Dec. Dig. ⟸610.]

[6. *Wills* ⟸610.]

[The questions whether the heirs take as purchasers, and whether the first taker takes an absolute estate under a bequest to a donee and "the lawful issue of his body forever, and

(a) The above case, which is referred to in the note to Manigault v. Deas, ante, 299 is here inserted at the request of the Chancellors, who are desirous that the two cases should be reported in the same volume. R. Ril. E., S. C. 247; see a branch of the case, Rich. E. C., 361; and another, 2 Hill L., 597. This case was heard together with Waller v. Alford, and the will in that case came again under consideration in Waller v. Ward, 2 Sp. L., 786; and was distinguished from Bell's will.

(b) See Mazyck v. Vanderhost, ante, 18, and cases cited there and at the end of this case.

if he should die without leaving lawful issue of his body alive," remainder over, are identical.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1380; Dec. Dig. ⟸610.]

[7. *Wills* ⟸610.]

[The rule that the same words in a will which would create an estate tail in real property will give the absolute property in a bequest of personalty must be restricted to a direct bequest, unlimited by subsequent words.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1381; Dec. Dig. ⟸610.]

[8. *Wills* ⟸601.]

[Cited in Hay v. Hay, 4 Rich. Eq. 384, to the point that questions of restriction of first taker to less than absolute estate and goodness of limitation over are identical.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1340-1350, 1608; Dec. Dig. ⟸601.]

[This case is also cited in Pell v. Ball, 1 Rich. Eq. 422, without specific application, and, in Waller v. Ward, 2 Spears, 786, and distinguished therefrom.]

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*Heard by De Saussure, Chancellor, Coosawhatchie, January, 1835.

This was a bill for an injunction, and to quiet the title of complainants to certain slaves, which they claimed under the will of their grand-father, Thomas Bell, bearing date 16 August, 1795, which contained, amongst other things, the following devises and bequests to his daughter, Elizabeth, the mother of the complainants, to wit: "I give and bequeath, unto my beloved daughter, Elizabeth Bell, one-half of the tract of land, containing two hundred and fifty acres, being half the tract formerly my mother's the westerly part adjoining land of Keatings, to her, and the lawful issue of her body, forever. I also give her one-fifth part of my negro slaves, including the increase, or issue, of those mentioned to my wife, with their issue, and increase, to her, and the lawful issue of her body, forever. I also give her one-sixth part of all my stock of cattle, hogs, &c., and one-fifth part of my stock of horses, to her, and the lawful issue of her body, forever. The estate to be divided whenever she gets married, or at the age of twenty-one years." And after other devises, and bequests, to the other children of the testator, the will provided as follows. "And it is my will, and desire, that if any of my sons, or daughters, should die without leaving lawful issue of their bodies alive, then their part of the estate to be equally divided amongst my then surviving children."

The circumstances, under which this suit was brought, and the questions made by the pleadings, and evidence, will be sufficiently understood from the decree of his Honor, the Chancellor.

De Saussure, C., It appears, in substance, that Thomas Bell, who died in 1795, bequeathed one-fifth of his slaves to his daughter, Elizabeth Bell, with limitations over to her children. She intermarried with John Talbird, in 1801, when her portion of the estate was allotted to her by proceedings in partition, and put in the possession of her husband. She died in the year 1819, leaving her said husband surviving her, and leaving also three children, the complainants, Mrs. Sarah Henry, and her sister, Elizabeth Talbird, who is a minor, and unmarried, and John Talbird, who died in the year 1824, a widower, and without issue, and on whose estate his father has administered. John Talbird, the elder, has been in possession of the slaves bequeathed to Elizabeth Bell, since his marriage with her, under the impression that they were his, by virtue of the marital rights; and under that impression, he has sold a number of them to sundry purchasers, for valuable consideration. The question of right has been tried in a suit at law, entitled Sarah Henry, and others v. The executors of Robert Means: 2 Hill L., 328, and the Court of Appeals, by its judgment therein, in March, 1834, decided, that Eliza-

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beth, the daughter, and *legatee, of Thomas Bell, took only an estate for her life, in the slaves bequeathed to her, and that her children living at her death were entitled, under the limitations of the will, to the slaves in question; but that Sarah Henry, and John Talbird, Sr., as administrator of his son, John Talbird, Jr., were barred by the statute of limitations. 2 Hill, 328. This decree would seem to have settled the rights of the parties; but the bill filed in this court, on April, 1834, is intended to make another case, and to obtain the judgment of the court on that case. As far as the judgment of the Court of Appeals has gone, it is final, and conclusive, on the rights of the parties; and it would be presumption in me to undertake to change or weaken, the effect of the decree of that high and enlightened court, and any desire to do so I utterly disclaim. It is a human institution, and filled by human beings, and therefore liable to err; but I am neither authorized, nor qualified, to correct such alleged errors, if any exist (as doubtless there may,) in any causes decided by that tribunal, and of which, I believe there are as few as will be found in the judgments of any human tribunal. The complainants, however, have a right to a fair hearing, and to a full consideration of the case alleged to be made; and to have justice therein, if they are entitled by law to relief.

This is a struggle between the creditors of John Talbird, the husband of Elizabeth Bell and her children, who were entitled to the slaves, under the will of their grand-father, Thomas Bell, as since decided by the Court of Appeals. But the same decree decided, in the suit at law between the children of Elizabeth Bell and the executors of Robert Means, a purchaser for valuable consideration from John Talbird, the father, that Sarah Henry and the administrator of John

Talbird, Jr., were barred by the statute of limitations; for that John Talbird, the father, had been so long in possession of the slaves in question, after the death of the wife, when the title of the children accrued, and when two of them came of age, as to be protected by the statute of limitations. It is now, however, contended for the children, the complainants, that circumstances exist in the transaction which would get rid of the effect of that decision in this case.

These circumstances are, that John Talbird, the father of the complainants, having become sensible that he was mistaken in supposing that he was entitled, by virtue of his marital rights, to the slaves bequeathed to his wife, and had therefore done wrong in selling any of them, as he had done, to purchasers for valuable consideration, in order to correct that error, as far as lay in his power, executed a deed on 24 October, 1833, by which he covenanted with the complainants not to interpose the plea of the statute

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of limitations to *any actions or suits which they might institute against him for the recovery of the slaves remaining in his possession, and some which he had sold; and that afterwards the counsel of the said complainants, employed by them for the purpose, agreed on their behalf to receive from the said John Talbird, their father, eighteen slaves, which were still in his possession, in extinguishment of their claims on the said slaves then in his possession, and on those which he had sold to Fripp and to Martinangel, and in extinguishment also of their claims for the hire of the slaves. That to carry this agreement into effect, their counsel took from the said John Talbird a confession of judgment in trover, in conformity to the Act of 1827, (c) as would appear by the judgment and amendment thereto of record, and as would also appear by the affidavit of their said counsel; and that on 28 March last, (1834,) the said John Talbird executed a deed of assignment, transferring the said slaves to the complainants. Under all which proceedings the complainants claim a right to the said slaves; but state that Hugh Archer, the sheriff of Beaufort District, has, by his deputy, levied on the said slaves to satisfy the judgment creditors of the said John Talbird, the father. They, therefore, pray an injunction; and the bill prays also for further relief and for a subpœna. The commissioner granted the injunction on 7 April, 1834.

The principal defendant, Thomas Talbird, a judgment creditor, (and judgment creditors are the real litigants in the suit,) states, that after their judgments were obtained, the sheriff levied, on behalf of the judgment creditors, on the slaves in question, which John Talbird, the father of complainants, had held and claimed by virtue of his marital rights, and had sold some of them, and got credit on his possession of the rest; that when the sheriff was proceeding to sell said slaves, Mr. Isaac B. Ulmer, the guardian of the minor, Elizabeth Talbird, and agent of Sarah Henry, interposed a claim on their behalf, whereupon an agreement was entered into by him, with this defendant and with the attorney of the other creditors, that if the sale were not proceeded in, but the property allowed to remain in the hands of the complainants, the slaves should be kept safely, to abide the issue of the suit then pending between the complainants and the executors of Robert Means, deceased; and that the judgment creditors of John Talbird, in pursuance of this agreement, forbore to press their executions until the decision of the Court of Appeals should be made. The defendant states, that as that decision had established, that Sarah Henry and the administrator of John Talbird, Jr., were barred by the statute of limitations, the creditors hoped to have the benefit thereof, and that the slaves would be delivered up to be sold under the executions; but that in-

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stead *of this, the complainants have resorted to various expedients to defeat their just claims, by a confession of judgment, and other acts, intended to defraud them. The answer alleges, that the judgment is not in conformity with the Act of 19 December, 1827; and that if it were, it could not vary the rights of these parties, nor alter the decision of the Court of Appeals, to the prejudice of bona fide judgment creditors. The defendant also insists, that the complainants have adequate remedy at law, if they have any rights.

The affidavit of Mr. Dawson, the counsel for the complainants, states, that it was their intention, and that of their father, that the confession of judgment should be conformable to the Act of December, 1827; and that it was erroneously entered up from haste, without complying with all the particulars prescribed, but was afterwards corrected.

Mr. De Treville, who had been the attorney of the creditors of John Talbird, testified, that at the sale of the slaves under the executions of the creditors of John Talbird, in 1833, two slaves were sold; and then a proposal was made, that the sales should be suspended, and an agreement was entered into, that the title to the rest of the slaves should depend on the decision of the court as to those two, as they all stood on the same footing, under the will of Mr. Bell. Mr. Ulmer was the agent of the children. The sale was suspended in pursuance of this agreement, but not reduced to writing.

The complainants come for relief, and ask the aid of this Court, in a case already decided by the Court of Appeals, which has declared what are the rights of the parties; and Mr. De Treville's evidence is clear and positive, that an agreement was made by Mr. Ulmer, the agent of Mrs. Sarah Henry, and

(c) Vide Acts of 1827, p. 81; 6 Stat., 337.

guardian of Miss Talbird, that the decision of the Court of Appeals, then pending as to two of the slaves, should bind all the rest; in consideration of which, the sale of the slaves was suspended, in order to wait the judgment of the court. That judgment has been rendered; and in conformity with the agreement, the slaves ought to be delivered up. It is true, that the agreement was not reduced to writing: but the parties acted upon it, and the complainants had the benefit of it, and now deny the benefit to others. This court does not relieve parties under such circumstances.

It is contended for the complainants, that although the Court of Appeals has decided, that Sarah Henry, and the administrator of John Talbird, are barred by the statute of limitations, their father, John Talbird, has a right to renounce that advantage. It might be said to come too late after the judgment and decree of the Court of Appeals. But independently of that, the rights of the

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creditors had attached: *their judgments and executions had a lien on all the property of John Talbird; and the decree had fixed his rights in the slaves, before he declared, on 24 October, 1833, that he did not mean to avail himself of the statute. This effect is not weakened by the confession of judgment by John Talbird, to Sarah Henry, and the minor: for admitting that judgment to have been correctly entered up according to the Act of December, 1827, although it required an amendment of the proceedings, to render them conformable to that enactment, it was subsequent to the judgments, and executions of the creditors.

Upon the whole, I do not perceive that this is a case in which the complainant, Sarah Henry, can have the aid of this court. Nor was there any insuperable objection to the complainants having remedy at law, if they had rights. So far, therefore, as regards the rights and claims of Sarah Henry, the bill must, and is hereby ordered to be dismissed and the injunction dissolved. The right to the share of the slaves, to which John Talbird, the deceased son, was entitled, is also bound by the decree of the Court of Appeals. But the injunction must be supported, and continued, as far as it protected the rights of Elizabeth Talbird, the minor, as established by the decree of the Court of Appeals. And it is so ordered.

From this decree the complainants appealed, and now moved, that it might be reformed, and the injunction made perpetual as to all the property in dispute, on the following grounds:

1. That the agreement of the complainants to abide the issue of the suit against the executors of Means, was not intended, nor can it be understood, to amount to more than an agreement to abide the decision of the court, on the only analogous question in that case, to wit: whether the complainants took as purchasers, under the will of their grandfather, Thomas Bell; and the decision of that question having been in their favor, the decree in this case ought to have conformed thereto.

2. That this result cannot be affected by the circumstance, that in the case against the executors of Means, the court decided, that the right of one of the present complainants was barred by the statute of limitations; inasmuch, as the circumstances of the two cases were not analogous in that respect; Means having, as purchaser, for a valuable consideration, held an adverse possession for more than four years; whilst Talbird could not hold adversely to the present complainants, or plead the statute of limitations against them, both because as tenant for the life of his wife, he was trustee for the complainants, who were entitled in remainder, and had never determined his trust, and as administrator of his son, John Talbird, was tenant in common with them, besides being liable to them as such adminis-

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trator for their distributive *shares, under the Act of 1791, 5 Stat., 162, of their said brother's proportion of said slaves. Nor has the answer of the defendant in this case pleaded any title, by the statute of limitations, in John Talbird.

3. That the possession by the father, John Talbird, of the slaves levied upon, was as trustee for, and tenant in common with the complainants, and as administrator of his son, of whom the complainants are distributees; that he had therefore, no interest in the said slaves, which was liable to his creditors in equity, although at law, they may have been liable to levy; and inasmuch as he had a legal right of possession, without the equitable interest, the levying of an execution, of itself, furnished a sufficient ground for the interposition of equity by injunction, there being no adequate relief at law.

4. That the proceedings in trover do not affect the question, inasmuch as the judgment, under the circumstances stated in the decree and pleadings, did not operate to vest any new title in John Talbird, or to divest the title of complainants, nor to convert it into a merely legal title, but was only a collateral security for the performance of the trust. Nor did even the assignment by John Talbird, subsequently to the levy of defendant's executions, dispense with the necessity of applying to equity for relief.

The defendants also appealed from so much of the decree as continued the injunction, in relation to one-third part of the slaves, in favor of the minor, Elizabeth Talbird, on the ground that the complainants were not entitled to take as purchasers under the will of Thomas Bell.

The appeal in this case, and one in the case of Isaac Ferrill v. Elizabeth Talbird, and

Sarah Henry, an action of trover for slaves, which were claimed by the defendants in that action under the same clause in the will of Thomas Bell, under which they claimed as complainants in the equity suit, were argued together, by Mazyck and Bailey, for the children, and by Frost and Petigru, for the creditors of John Talbird, at Charleston, in April, 1836, before the Court of Appeals, consisting of the Chancellors and Law Judges, organized under the Act of December, 1835. The decision was postponed, and in the meantime separate Courts of Appeals, in law and in equity, were established by the Act of December, 1836. On the assembling of the two courts under that Act, at Charleston, in February, 1837, opinions were delivered in these cases as follows:

HARPER, C. I propose only to consider the question, arising under the will in these cases, upon the limitation to the legatee and her issue. Until the case of Lyon v. Mitchell, 1 Mad. R., 467, was brought to my view, I had thought it so perfectly settled as to have become familiar, that if there be a devise of

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personalty to one and *his issue, with a limitation over in the event of his not leaving issue, the limitation over is good, and the issue take as purchasers. The cases of Read v. Snell, 2 Atk., 643, and Lampley v. Blower, 3 Id., 396, so often referred to, seemed to me expressly in point, and I was not aware that any doubt had been suggested, either as to their construction, or their authority. And I am still satisfied, upon the fullest examination I have been able to make, that except the case of Lyon v. Mitchell, there is not a single decision, dictum, or principle, in the slightest degree at variance with them, or which would tend to give them a different interpretation.

There is no quesion at all respecting the principle so strenuously contended for in argument, that the words, which give an estate tail in real property, will give the absolute estate in personalty, if it be rightly understood. Whether the devise be to A and his issue, or to A for life, and at his death to his issue, or whatever be the terms of the direct devise which will give an estate tail in real property, these words standing alone, will give an absolute estate in personalty. But if it be meant, that if, upon the construction of the whole instrument taken together, the effect of it would be to give an estate tail in real property, the devisee will take an absolute estate in personal property, it is unsupported by the slightest shadow of authority; and I think I may venture to say, there is not a passage in the books, alluding to the doctrine, in which the idea is not contradicted.

The doctrine is laid down by Mr. Fearne, Con. Rem. and Ex. Dev., 491, 2. After noticing the effect of the rule in Shelly's case, he says, "but in the limitation of personal estates, a similar rule does not always hold. If a term be devised to one for life, and afterwards to the heirs of his body, these words are generally words of limitation, and the whole vests in the first taker." After quoting cases to support this, he adds, "however, if there appears any other circumstance, or clause, in the will, to shew the intention was, that these words should be words of purchase, and not of limitation, then it seems the ancestor will take for life only, and his heir will take by purchase." So the rule is laid down by Fonblanque, 2 vol., p. 78, n. (t.) Or take it as given by Lord Rosslyn, in Chandless v. Price, 3 Ves., 101. "I have understood the rule that has for a long time prevailed, to be to try it by this: would the words give an estate tail in real estate? If so, they give the absolute property in personalty, unless you can find in the will, something to shew he meant to tie it up." The rule is not laid down in the unqualified manner which seems to be contended for, even by Sir Thomas Plumer, the vice chancellor, in Lyon v. Mitchell. After stating the rule as to giving the absolute property, he adds, "un-

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less the testator shews a clear intention *that they shall not be so applied." But it would be endless to refer to all the authorities: the rule is never, in any instance, laid down without the qualification. Suppose a gift to one expressly for life, and at his death to his issue, but if he should die without leaving issue, over. This, no doubt, would give an estate tail in real property: for the word leaving, when applied to such property, imports an indefinite failure of issue, (perhaps after the gift of an estate tail in real property.) But would any one contend that these words would give the absolute estate in personalty? If so, it would be to defeat the intention: an intention which the law does not forbid to have effect, when it is expressed as plainly as words can express it.

The question then is, whether the circumstance of limiting the property over, on the event of not leaving issue, is sufficient to shew the testator's intention to use the word issue, not as a word of limitation, but of purchase. When the words "issue," or "heirs of the body," are used in a devise, they must have one of two meanings, and only one of two. They mean either the indefinite lineal succession of heirs of the body, or the particular individuals who, at a given time, answer the description of issue, i. e., children, or other descendants. There is nothing doubtful or questionable in this. The former is the natural and obvious technical import, when used in a will: and so they will be understood, unless there is something to give them a different meaning. When, therefore, there is a devise to one and his issue, the law gives him the absolute estate; not because the testator intended to give an absolute estate, but because you cannot reject the word as un-

meaning, which has an obvious, settled technical meaning. He intended to give an estate restricted indefinitely to the lineal succession, as in the case of an estate tail in real property. And the devisee takes the absolute property, not because the testator so intended, but because the law will not permit that which he did intend.

But though the former be the more obvious sense of the words, they will admit of the latter. There is a whole class of cases, in which they have been so understood, as in Hodgeson v. Bussey, 2 Atk., 89, and Doe v. Collis, 4 T. R., 294: and it is said they will be construed as words of limitation, or of purchase, as may best effect the intention. Does the circumstance of limiting the property over on the event of not leaving issue, express that intention? It is admitted on all hands that the limitation over is good. And why is this? Because the word leaving has reference to the death of the first taker, and shews that the testator did not use the word issue to signify the indefinite succession, but the individuals then living to answer the description. Yet the argument is, that we must take him to have used the word in the former sense.

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*This was the only question in the case of Lyon v. Mitchell, although the vice chancellor seems to me to touch it very slightly, and to have expended the strength of his argument upon matters which did not, and could not, arise in the cause. He refers, as authority, to the various cases collected by Fearne, 463; to Seal v. Seal, Pr. C., 421, in which there was no doubt of the intention to give an estate tail with a remainder after that estate; and to Dodd v. Dickenson, 8 Vin., 451, pl. 25; Butterfield v. Butterfield, 1 Ves. 133, 154; Daw v. Pitt, 1 Mad. R., 448; Chandless v. Price, 3 Ves., 101, and Brouncker v. Bagot, 1 Mer., 271; in all of which, after the limitation to issue, the limitation over was for want of issue, or on failure of issue, terms in themselves importing an indefinite failure of issue, and in which the limitation over was held to be void.(*d*) What was wanted, and what was not, and, I am persuaded, cannot be found, was a case in which, after an express limitation to issue, the limitation over [on failure of issue] was held to be good, in which the issue were not held to take as purchasers.

The position, which is chiefly labored by the vice chancellor, is one, which I suppose hardly anybody would now think of disputing. It is, that there is no inconsistency in giving the first taker the entire, or absolute estate, and limiting it over on the event of his dying without issue then living, in abridgment of the preceding estate. His argument is, that it is competent for a testator to say "if my sons have children, I mean that they shall have an absolute interest in all my personal property, but if it ultimately turns out that they have no children at the time of their death, or if any of them should not, I give it over in the way I propose." This he insists upon again and again; speaks of the fallacy of confounding distinct propositions; says that an executory devise operates to defeat the preceding estate; and supposes the case of a gift "to my son, absolutely, forever." In all this there is no difficulty.

But there seems to me to exist confusion and ambiguity in the vice chancellor's argument, arising from this: that he himself has not distinguished between the cases, where the testator intends to give an absolute estate, and where the law gives that effect to his words in spite of his intention. If I give to my son, his executors, administrators and assigns, with a limitation over, in the event of his not leaving issue, there is no inconsistency in his taking an absolute estate, and the limitation over having effect. So, if I give to my son indefinitely, which, as respecting personal property, imports an absolute estate. But when a testator gives to one, and his issue, it is certain,(*e*) as I have said, that he does not intend to give an absolute estate. He intends a benefit to the issue in some way. He either intends that

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they shall take *in indefinite lineal succession, or that the persons answering that description, at a particular time, shall take. In every case of a gift to one, and his issue, the question is, in which of these senses he intended to use the words, and this question was not considered by the vice chancellor, in Lyon v. Mitchell.

It is admitted, that if a testator gives to one, and his issue, and stops there, he must be understood in the former sense, and the word will be one of limitation. So if he gives to one for life, and at his death to his issue; although in this case it would seem that he intended to give to issue, as purchasers, yet the law counteracts his intention. But besides the idea of conformity to the rule in Shelly's case, there is a reason of necessity for this. The testator apparently intends to part with the whole estate; yet if the devisee were not held to take the absolute property,

(*d*) The vice chancellor's argument is, that the question whether or not issue take as purchasers from the terms of direct bequest to them, is distinct from the question of the validity of the limitation over, even to them. That the construction must be made from the whole will, and that the limitation over is not controlling, more than any other portion of the context, unless it be confluent in expression with the terms of the direct bequest to issue, or explanatory of the sense in which issue is therein used. See Corbett v. Laurens, 5 Rich. E., 301; Hay v. Hay, 3 Id., 396.

(*e*) How can intention be pronounced certain, when contrary to the import of technical words, not shown by the context to be used in a popular or deflected sense? What does testator intend, in case there be no issue, and no limitation over on that event?

the remainder would be undisposed of in the event of his not leaving issue. This reason, however, does not exist when there is a valid limitation over on that event.

I have said, that the cases of Read v. Snell, and Lampley v. Blower, seemed to me to be expressly in point; and upon the best examination which I have been able to give them, I find myself unable to regard them otherwise, or to perceive that they are in the slightest degree ambiguous. In both cases, there was a devise to A, and her issue, with a limitation over, in the event of her not leaving issue; and this seems to me to be the whole of either case. With respect to the latter of these, the vice chancellor, in Lyon v. Mitchell, says, "the case of Lampley v. Blower, is not an authority in favor of the plaintiff. In that case, however, Lord Hardwicke says, 'if it stood barely upon the words, to A, and her issue, or to A, and the heirs of her body, the first taker would have taken the whole; but it is not meant in that sense.' Now if this is law, it decides the present case; because those are the very words in the present. Here the personalty is given to the four sons, and the issue of their bodies." And again, Lampley v. Blower, itself, is not an authority in favor of the plaintiff, because the terms of the will are very different, there being in that case a manifest intent to use the word issue as a word of purchase; and it could not be interpreted in any other sense consistently with the object of the will; but Lord Hardwicke, prevents a general inference being drawn, that in every case that will be the construction, by putting a case like the present, and stating that there the construction would be different. This case of Lampley v. Blower is an authority, therefore directly in favor of the defendants, and not against them." Now with proper deference, the quotation made by the vice chancellor, or the application of it, seems to me a mutilated one. In the case before Lord Hardwicke, there certainly ex-

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isted *the additional circumstance of a valid limitation over, and it seems to me that Lord Hardwicke decided upon it. The same circumstance existed in the case before the vice chancellor, and he rejected it as immaterial. Immediately after the quotation made by the vice chancellor, Lord Hardwicke adds, "and if either of them happens to die, and leaves no issue, the share of her so dying shall go to the survivor. What is the meaning of this contingency?" To say that the case was a direct authority in favor of the defendants, scarcely requires comment.

Lord Hardwicke says, "the word issue is capable of three senses. In one sense, as a word of description, to take in joint tenancy. In another, as a word of limitation. And in a third, as a description of the person in remainder." He supposes it to be used in the last sense in the case before him. "The words leave no issue, are relative to any child the legatee might have at the time of her death." "The word leave, explains the word issue, in the first part of the devise, to mean such as was left at the time of the death. There is nothing more common, than that the subsequent words descriptive of the contingency explain the former; as a devise to a man, and his heirs, and afterwards testator says, if he shall die without heirs of his body, controls it to an estate tail; so here the subsequent words, if she shall happen to die, &c., and leave no issue, confine it to leaving issue at her death, and not generally."

If this stood alone, it would be impossible for words to express more explicitly the principles of the decision. The only additional circumstance in the case, was, that the legatees lived in Barbadoes. I cannot suppose Lord Hardwicke to have decided on this circumstance; however, he may have used it as matter of argument, to strengthen his conclusion from the terms of the will.

Lord Hardwicke says, "the will was made in England, and the legatees lived in Barbadoes; and the testatrix would not know at that distance, but that both might have issue. The legacies vested immediately, and therefore it was intended to secure them to the issue, if the parents died in the testatrix's lifetime. Suppose Mrs. Lampley had died without leaving issue, would not this have been a good devise over to the survivor of the nieces? Therefore, I am of opinion, that this was a contingent limitation to the other niece, Ann Blower, if Mrs. Lampley died without issue, and the whole did not vest in the first taker; and according to the restriction in Forth v. Chapman, 1 P. Wms., 663, ought to be construed, leaving no issue at the time of the death."

Lord Hardwicke uses the whole argument derived from the circumstance that the legatees lived in Barbadoes, only to lead him to

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*this conclusion; that the words must be taken to mean, leaving no issue at the time of the death. But this is now admitted to be the uniform construction of the words, leaving no issue, and it does not require the argument to give the construction. I understand the argument thus: if you give to the legatee an absolute estate, then by her death in the lifetime of testatrix, the legacy will lapse if it be several, or go to the survivor if it be a joint one, although she may have issue, and notwithstanding the intention expressed in favor of issue. But make it a life estate, with remainder to the issue as purchasers, and then the death of the tenant for life will not defeat the remainder to the issue, or the contingent remainder substituted in place of it, in the event of the want of issue. This argument would apply in every case, whether the legatee lived in Eng-

land, or Barbadoes. In every case, the intention might be, in like manner, defeated by the death of the first taker in the lifetime of the testator: although to be sure, it applied more strongly in the latter case.

If, as was intimated, it be contended that it was a mere substitution, confined only to the event of the legatee's dying in the lifetime of the testatrix: and that if the legatee had survived, she would have taken an absolute estate, and not an estate for life with remainder to the issue as purchasers, it is a method of construction totally unwarranted by the context. It would amount to this: if she never takes anything under the will, she shall be restricted to a life estate: if she ever does take anything, it shall be an absolute estate.

As to the case of Read v. Snell, there is even less pretence of ambiguity. It was suggested, that the case was one of an executory trust. It might be enough to say, that in considering the question, whether the issue took as purchasers, Lord Hardwicke did not determine on that ground. But in considering the goodness of the limitation over, he says, "it has been objected, the words for life are not in this will. But though weight has been laid upon those words for life, when they had been in, yet I do not know that any weight has been laid on the want of them, when the intention has otherwise appeared: but if weight has been laid upon the want of them, when there has been a trust executed, yet there can be none when it is a trust executory." He plainly intimates, that although the circumstance of its being an executory trust, puts the matter out of doubt, it was not necessary to the decision. But suppose it a trust executory, that authorized the chancellor to give effect to the intention. If there be no rule, as there certainly is not, to forbid our giving effect to the intention in the case of a legal estate, or trust executed, why should the case be of less authority on that account? Then it would be a summary, but somewhat bold, method of disposing of a cer-

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tainly not *unconsidered decision, of one who has been commonly regarded as the greatest of English chancellors, to say that it is not law.

With respect to this case, the vice chancellor in Lyon v. Mitchell, simply says, "the authority of that case is overruled by the decision in Garth v. Baldwin." 2 Ves., 646. I confess that I am at a loss to perceive, how the case is overruled by the decision in Garth v. Baldwin. In that decision, no mention is made of the case of Read v. Snell, nor is there any reference to it. The limitation was to pay rents and profits to Edward Turner Garth, for life, and afterwards to pay the same to the heirs of his body, and for want of such issue, to pay, &c. Lord Hardwicke held, that the first taker, took an absolute estate, and that the limitation over was too remote and void: the words, "for want of such issue," importing an indefinite failure of issue. Real estate was given by the same words, in which the devisee was held to take an estate tail. But Lord Hardwicke does manifestly take for granted, that if the limitation over were good, the first taker would have been restricted to a life estate, with remainder to issue as purchasers. He quotes the case of Beauclerk v. Dormer, 2 Atk., 307, in which the limitation over, if the devisee "dies without issue," was held to be too remote: which doctrine, he says, has been followed ever since, and the words held to import failure of issue at any time. There was nothing, therefore, to prevent the first taker's having an absolute estate. I think it will not be difficult to determine, whether the case of Garth v. Baldwin does not rather support the decision in Read v. Snell, than overrule it. The existence of the two cases certainly strengthens each. If there had been but one, then it might have been thought that there was some error of the reporter, or something ambiguous in the grounds of the decision. But I do not perceive, what question there can be, with respect to both cases standing together.

But let us see how these cases have been regarded by the elementary writers, who read them for no other purpose than that of understanding them. Mr. Fearne may be supposed capable of understanding them, and weighing their authority. After laying down the rule, as I have quoted from him, that where there is any circumstance to show such an intention, heirs of the body, or issue, shall take as purchasers, he gives, as instances, the cases in question: "the like point was decreed in the case of Read v. Snell, before cited; in which case the decision was grounded on the words, leaving no heirs of her body, which were considered as relative to the time of her death, and, therefore, restrained the general import of the first limitation to the life of the first taker." And again, referring to the case of Lampley v. Blower: "a limitation of a term to A and her issue, it seems,

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*vests the whole in A, if the devise rests there: though the addition of the subsequent words, and if A die and leave no issue, Lord Hardwicke said, related to any child living at A's death, and, consequently, the word issue there, was to be considered a word of purchase." This is laid down as familiar elementary law, and not a doubt is intimated of the construction or authority of these cases.

Mr. Sanders, the editor of Atkyns, in his note to Hodgeson v. Bussey, refers to these, among other cases, and lays down the rule, in terms which might be applied as the rule of this case. "The general rule, with respect to terms of years, (and the same rule applies to other personal estates,) seems to be, that whenever an estate, in a term of years, is

limited to a person, which limitation, if applied to freehold property, would create an estate tail, and a remainder is therein given, after a general failure of issue, or heirs of the body, the whole vests in the first taker. But if there be any clause or restriction, whereby it plainly appears that the words, heirs of the body, or issue, were intended as words of purchase, (as in the present case of Hodgeson v. Bussey,) or if the dying without issue, is restrained to the death of the tenant for life, whereby the remainder over may take effect, as an executory devise, in either case, the words, heirs of the body, or issue, will operate as words of purchase." 2 Atk., 88, n. 1.

The same thing may be found in Bridgman's Dig. tit. Limitations over, 1. This is not propounded as anything doubtful, or questionable, but as the settled, familiar law. And so I apprehend, before the case of Lyon v. Mitchell, it was universally regarded. Certainly, I have not been able to find anything in any of the elementary books, in the slightest degree contradictory of it. It may be worth remarking, that the reporter, in his marginal note to both the cases, giving the principle of the decision, states the issue to take in remainder, the words, leaving no issue, restricting it to issue living at the time of the death. But that which is perhaps quite as conclusive, as the authorities referred to, is the circumstance, that throughout the whole of the English cases, where there is a limitation to one, and his issue, or the heirs of his body, or any equivalent words, the questions, whether the issue take as purchasers, or the limitation over be good, and whether the first taker takes an absolute estate, or the limitation over be void, are universally assumed to be identical.

When the question is as to the goodness of the limitation over, the inquiry is, whether the first taker takes for life, or an absolute estate, and the contrary. As in Theebridge v. Kilburne, 2 Ves., 233, where the limitation was to a daughter for life, and immediately from and after her death, for the heirs of

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her body, and on failure of such *issue over, the question of the heirs of the body taking as purchasers, and of the goodness of the limitation over, are, throughout, treated as the same. So in Chandless v. Price, 3 Ves., 101, before referred to, the question was of the goodness of the limitation over; and the Chancellor, throughout, inquires, whether there is any restriction in point of time, to tie up the first taker to less than an absolute estate. In Butterfield v. Butterfield, 1 Ves., 133, the gift was to the son for life, and to the lawful heirs of his body, and if he should die without heirs, over. Lord Hardwicke held the son to take the whole estate, because the limitation over was too remote. "I should clearly have thought him entitled to the absolute interest, and the devise over, void, as a devise of a personalty after such a limitation, as would be a clear entail of lands, and too remote a contingency: because heirs of the body import ad infinitum, if nothing to restrain is superadded; and in these cases, where something is superadded, both courts of Law and Equity have, with much difficulty, come into a construction to restrain to issue living at the time of the death." It is plain, that if this had been superadded, the legatee would have been restricted to a life estate. So in Wilkinson v. South, 7 T. R., 551. In Guery v. Vernon, 1 N. & M., 71, it was said by a Judge, whom it was the misfortune of his State to retain but for a short time on the bench, and whose opinions are always entitled to the highest consideration, "I think the frequent reference to the rule, that where the words give, in real estate, and estate tail, the first taker shall have an absolute estate in personal property, has led to a confused understanding of the principle. It is not a primary rule, but only auxiliary to the general rule of remoteness. The real question is, always, whether the limitation over is too remote or not: whether the words, heirs, issue, heirs of the body, children, and the like, are words of limitation, or words of purchase: whether they express an indefinite succession of persons, included within those terms, or whether they point out certain particular persons, who may exist, and must take within a period not excluded by the rules of law."

But the idea is so familiar, and has been so universally taken for granted, that I certainly should not have enforced it at so great length as I have done, if I had not learned, with no little surprise, that the decision of the Appeal court, in the case of Henry v. Means, 2 Hill, 328, seemed new to some of the profession. I believe it may safely be said, that there is no adjudged case, except that of Lyon v. Mitchell, of such limitation to issue, &c., in which the questions, of the first taker's being restricted to less than an absolute estate, and the goodness of the limitation over, were not regarded as identical. Certainly, there

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is no other case in which he was held *to take an absolute estate, when the limitation over was good. It is impossible to read through the third and fourth chapters of Mr. Fearne, on executory devises, without perceiving that this is assumed throughout. See particularly pp. 478–9, XII, (y.) Thus he resists the notion, that when the words are such as to give an estate tail by implication only, (that is, when personalty is given indefinitely, and limited over for want of issue,) these words "are always to be understood restrictively, and to relate only to his dying, without issue living at his death, and therefore, to give him the term only during his life." Certainly, it is taken for granted, that such must be the effect, if such were the terms of the limitation over.

So prevalent has been this idea, that where the devise has been to one, his heirs, executors, administrators, and assigns, as in Bigge v. Bensley, 1 Bro. C. C., 187, a vague impression seems to have obtained, that the effect of sustaining a limitation over, for want of issue, would be to cut down the first taker to a life estate. Mr. Kenyon says, in his argument, "prima facie, 'to a man and his heirs,' signifies the whole interest, unless there are words to show the testator meant issue living at the time of his death." So when the gift is indefinite, which, when of personalty, of itself, imports an absolute estate, some such impression seems to have been entertained by Mr. Fearne, in the passage referred to. This, I have no doubt, was what embarrassed the vice chancellor, in Lyon v. Mitchell. He saw that there was no incompatibility in giving the whole estate, and limiting it over, by executory devise, on the event of not leaving issue; without perceiving that it is a very different question, when there is an express gift to issue, and an express intent to benefit issue, in what manner the testator intended them to take. But there was no decision to stand in his way, and the matter had been put upon the proper footing, by Lord Eldon, in the case of Barnfield v. Wetton, 2 Bos. and Pul., 324, in which there was a devise to one, her heirs, and assigns, with a devise over, in the event of her not leaving issue, at the time of her death. She was held to take the fee, with an executory devise over.

This, too, I have no doubt, led to the decision in Carr v. Green, 2 McC., 75. It was said that the word leaving, is a word of purchase, instead of serving, as it is more accurately expressed by Judge Cheves, in the passage before referred to, to qualify the words, issue, &c., as words of purchase.

And it is obvious that it must have this effect. The limitation over, as I have said, is good, because the words, leaving issue, import individuals answering the description of issue, at the time of the death, and it is impossible to give them any other sense.

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With what show *of reason could you say, that in the direct devise, the testator intended to use the word in a different sense? By the construction contended for, you must read the devise to Elizabeth Bell, and the lawful issue of her body, in indefinite lineal succession; but if she die, not leaving any individuals, answering to the description of issue, at the time of her death, then over. But it is a solecism, in construction, to give a different meaning to the same word, in the same clause, in relation to the same matter, and more especially, in such immediate juxtaposition. The testator gives to issue; he limits over for want of issue. In point of fact, and reason, what ground is there for such a conjecture? When there are other circumstances to show that issue are to take as purchasers, as in Hodgeson v. Bussey, 2 Atk., 89, where the devise was to issue, their executors, administrators, and assigns, there a limitation over, in terms, which would, of itself, import an indefinite failure of issue, is good. And this is because the testator is supposed to use the word issue, in the same sense in which he had before used it, to denote particular persons. So where the limitation is to children, and the estate is limited over, on the event of dying without issue, generally; here the word issue is taken to denote the sort of issue before described, i. e. children, as in Doe v. Lyde, 1 T. R., 593.

The cases on this subject are numerous, but it is not thought necessary to refer to them. The rule is familiar and uniform. Suppose the limitation were to one, and his issue, and if he should die, leaving no such issue. Here the testator plainly expresses his intention to use the word in both instances, in the same sense. Will any one say that they should, notwithstanding, be taken in a different sense? Or that such a limitation over, would not be good? Or that it would differ, in any respect, from a limitation over, after leaving no issue, generally? Such limitation over, explains the word issue, as first used, to designate particular persons, as is explained by Lord Hardwicke, in Lampley v. Blower. It explains, too, that they were to take in remainder, and not as joint tenants, with the parent. This is the express import of the words, if we have given them their right meaning. It is to Elizabeth Bell, and to her children, or other descendants, who shall be living at the time of her death. This is absolutely incompatible with the notion of a joint tenancy, and as perfectly unequivocal, as if it had been to her for life, and at her death, to her issue, who shall be then living. Such limitation over, would be inappropriate and unmeaning, unless it were intended that the persons then answering the description of issue, should take, if such were in existence. If the testator supposed that he could create, and intended to create, an estate tail, then it is natural to infer, that he would have limited

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over, in remainder, after that estate *tail: and not that if the issue should fail within a year after the death of the first taker, his bounty to the devisee over should be disappointed. That he has confined the limitation over to the death of the first taker, is evidence that he had no such intention of giving to heirs in indefinite succession.

I have not relied on the cases of Peacock v. Spooner, 2 Vern., 43, and Dafforne v. Goodman, 2 Vern., 362, because these were cases of marriage settlement, and because their authority has been questioned. But if we assume them to have been wrongly decided, that does not affect the present question. In these cases, there was no limitation over. Nor have I referred to the case of Knight v.

Ellis, 2 Bro. C. C., 570, in which under a devise to one for life and at his death to his issue male, and in default of such issue over, the issue male were held to take as purchasers. This case, also, has been questioned; but, I apprehend, solely on the ground, that the terms of the limitation over of themselves import an indefinite failure of issue. If it had been on the event of not leaving issue, I do not conceive that any question could have been suggested.

It is somewhat singular, that the decision in Henry v. Means should have been thought a departure from the principle settled in Carr v. Porter, 1 McC. Eq. 60. In that very case, the authority of the cases of Read v. Snell and Lampley v. Blower is recognized; and the same construction is put upon them, and they are sustained by the same sort of reasoning, which I have attempted to use here. Judge Nott says, "the next case is that of Read v. Snell, 2 Atk., 642. The testatrix left her whole estate to her daughter, and the heirs of her body; but if she should die, leaving no heirs of her body, then to go over. Lord Hardwicke held that the word leaving meant leaving issue at the time of her death. It might, therefore, be construed a direct gift to the issue, after the death of the first legatee. But, in that case, there is a direct gift over to the heirs of her body. It is not left to implication. Lord Hardwicke does not say that the word 'leaving' may be construed into a gift, but that when the testator has given to the heir, or issue, it may serve to qualify the gift, so that the issue may take by limitation or purchase, according to the intention of the testator." 1 McC. Eq. 88. So of the case of Lampley v. Blower, Id., 89. Indeed, the mere decision, that issue cannot take as purchasers by implication, leaves us to infer that they may so take by express limitation. As to the difficulty suggested, in argument, to which the court would be exposed in determining whether the issue, supposing the term to include all descendants, children, grand-children, &c., would take per capita or per stirpes, I do not anticipate any great difficulty when the case arises. Certainly, the difficulty would

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*be no greater than if the limitation in remainder were express to one for life and at his death to his issue, or descendants, who shall be then living.

The whole argument then rests exclusively on the authority of Lyon v. Mitchell. I trust that it will be found that the court has not departed from established rule in the vain pursuit of a conjectural intention; but that it has refused to depart from a perfectly well-settled rule, only for the purpose of defeating a very plain intention. Whatever deference we may pay to the able Judges of England, it can hardly be expected that we should depart from our well considered decisions to follow all the fluctuations of theirs. And certainly we do not perceive such argument or authority in the case of Lyon v. Mitchell as should induce us to this course.

RICHARDSON, J. It might be enough to say, that the proper construction of Thomas Bell's will has been already decided by the late Court of Appeals in the case of Henry v. Means, 2 Hill, 328. But as that decision appears not to have given entire satisfaction to the parties concerned, we have again investigated the doctrine involved. Lawyers and Judges differ not unfrequently in questions upon estates in expectancy. "The doctrine," says Sir William Blackstone, 2 Bl. Com., 163, "contains some of the nicest and most abstruse learning in the English law." And whether the issue take an indefeasible estate by purchase, after a previous estate, given by the same will to their immediate ancestor, or take the same property by inheritance only, is among the most frequent of that class. Christian, in his notes to Blackstone, 2 Bl. Com., 173, says, "in innumerable instances, from the ignorance of the persons employed, family settlements, particularly in wills, have proved abortive," &c. In the instance before us the difficulty is to discover the intention in the limitation; that is, whether the testator offers to extend the limitation beyond a life in being and twenty-one years after. In this case, I will present the principles of construction and the process of reasoning, by which my own judgment has been finally convinced; in the hope that they may have weight with others. Next to the principle of doing legal justice, and closely united with the duty of supporting our own judicial independence, is the call upon Judges to give satisfaction.

We are "to place the construction upon the entire will, and not upon disjointed parts." To regard strictly the maxim, "that the words used are to be made subservient to the intention." And "if the words will bear two senses, one agreeable to and another against law, that sense is to be preferred which is most agreeable thereto." 2 Bl. Com., 379.

Upon these rules, which are taken from

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the highest authority, and *carry an intrinsic weight of reason, we are to read the will in the spirit of the testator. He certainly intended to limit the property bequeathed to his daughter, Elizabeth, and her lineal issue; but he has left it questionable whether he has so expressed his meaning as to secure her immediate issue in the practical enjoyment of his bounty, by the means of an independent estate in themselves, or only as distributees of their mother. By an executory devise, a remainder may be limited of a chattel interest. 2 Bl. Com., 171. And the limitations of real and personal property are the same in wills. Our object will, therefore, be, 1, to discover from the will itself

the intention of the testator in the distribution of his property; and 2, to inquire if the intended distribution constitutes such estate as the law allows to be raised by last wills. If so, the intention forms the law of the particular will. But such individual law is like the law of a corporation, to be restricted by the superior law of the country, if they come in conflict.

First, then, what do the terms of Thomas Bell's will import? He says, "I give and bequeath to my daughter, Elizabeth Bell, one-half of the tract of land, containing, &c., to her, and the lawful issue of her body, forever. I also give her one-fifth part of my negro slaves, &c., &c., to her and the lawful issue of her body forever," &c. For the present, I omit the subsequent clause of the will, in order to confine the question of intention, in the first instance, to those words alone. Such a division of the two clauses will give the defence its full force, and present the opposite argument more distinctly.

The words "lawful issue of her body, forever," import not merely her immediate issue, but the most remote, from generation to generation. It is an estate in tail. 6 Rep., 16. 1 Kent, 229. 6 Cruise, 280. When property is so given to a person and his issue, in endless succession, the gift is termed a perpetuity; and is forbidden to be so long restricted to the successive issue of the first donee. 2 Bl. Com., 172. For a full review of the doctrine, see the Thellusson case, 4 Ves., 227. But still, the law, while it unfetters the estate from the endless entailment intended by the testator, regards his intention, so far as is consistent with its own rules of policy. It gives to the first legatee the whole estate, to be at his disposal; but which may, nevertheless, be beneficial to his issue, by the chance of inheriting it. This sense is agreeable to law, and follows the intention, in part, which was to benefit the issue.

If the testator were allowed to limit his property to successive generations, such a limitation would interfere too much with the unforeseen changes and convenience of society, and would fetter men in the necessary use of the prime material of a thriving industry, upon which national prosperity depends, as for its lifeblood.

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*Still the law permits us to limit property to a certain extent. A man may will his estate to any number of persons, in being, jointly, severally, or in succession, and for nine months and twenty-one years after the death of the survivor, as to all his children, and then to their issue surviving them, or surviving the age of twenty-one years. Long v. Blackall, 7 T. R., 98. Thellusson's case, 4 Ves., 313. 2 Bl. Com., 172, 3. 3 Cruise, 4, 94.

Now then, we have to inquire further, whether Thomas Bell has, or has not, by a subsequent clause of his will, so explained the bequest to Elizabeth, and "the lawful issue of her body," as to mean no more than the issue of Elizabeth, surviving her, and thereby limit a remainder to specific issue, after her previous estate for life. If this be his meaning it is within the legal limitation, and the intention then forms the law of his will. Let us, therefore, see if the words of the subsequent clause fairly qualify the former, and may be made subservient to such intention.

"And it is my will and desire, that if any of my sons or daughters should die without having lawful issue of their bodies alive, then their part of the estate to be equally divided among my then surviving children."

Let us abridge the two clauses, and connect them in the following sentence:

"I give to Elizabeth one-fifth part of my slaves, to her, and the lawful issue of her body forever. And if Elizabeth should die, without leaving lawful issue of her body alive, then her part to be equally divided between my then surviving children."

When the two clauses are thus brought together, the impression of a perpetuity, made by the terms, "lawful issue of her body," is immediately repressed by the words, "leaving lawful issue alive." Because the latter words may go to confine the issue indicated by the former, "to surviving issue." As if he had said, "I give to Elizabeth," &c., "to her and such issue of her body, as she may leave alive at her death." If such be the rational connection, and this the fair meaning of the two clauses, as they stand in the will, then the intention is plain. 1. The negros go to Elizabeth for life; 2. to the surviving issue forever; 3. if no such issue, to the surviving brothers and sisters. This would be a lawful limitation. But proof of it must be inherent in the will itself, which, like other instruments of writing, may have its different parts brought together, to aid in the construction of each other, in order to show the connected meaning, or entire scheme of the author, in the distribution of his property.

The argument on the part of the defendants is, that although if the contingency, of leaving no issue alive, had occurred, the part

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of *Elizabeth must have gone over, yet, as this negative condition did not occur, it simply passes for nothing, and of course the absolute estate of Elizabeth remains unaltered. It is, therefore, urged that we are not to impair the strength and legal import of the words, "to her and the lawful issue of her body, forever," by turning the expression of an independent contingency into the qualification of an express estate given to Elizabeth, and thus abridge her right, by a mere implication in favor of her surviving issue. Such a construction must strike every professional understanding. It is a strong one for the defendants, and brings us to the next step

toward the just interpretation of the testator's intention. Does the property bequeathed to Elizabeth continue, after her death, as a part of her estate, by reason of the rule, that a perpetuity cannot be created by will, or do the words of the latter clause shew that no perpetuity was intended?

The testator may have meant, by that clause: 1st, to describe a contingency upon which the property was to go over: and 2nd., to point out, that he restricted the meaning of the general expressions, "to her, and the lawful issue of her body, forever," i. e., to such issue only, as might survive her. This simple fact presents a distinction, and a ground for reasoning, which corrects the first impression; and carries absolute conviction to many minds, but not to all. And in a contest between two such constructions of the will, in question; although we would willingly place the true meaning upon the force of proofs, inherent, in the will itself, and "expound it, rather, on its own merits," 2 Bl. Com., 381, yet we are not to reject the lights, from cases already adjudged upon wills, which contain analogous limitations.

It would, however, be needless labor to review the cases upon the general question of limiting estates by will, from the foundation case of Pells v. Brown, Cro. Jac., 590. They have been often collected. See Porter v. Bradley, 3 T. R., 145: Robinson v. Robinson, 3 Atk., 736: 1 Bur., 38. And they are no where better compared and digested, than in 1st. U. S. L. Jour., 583; reviewing our own case, of Carr v. Green, 2 McC., 75. A review, by the by, which, by pointing out a judicial deviation, affords wholesome admonition to Judges, that the old highway, marked out by former decisions, is a safe one.

But the principles of construction which I first notice, are fully recognized; and especially, those now immediately applicable, to wit: that wherever property is willed to one, and his issue, generally, the first donee takes a fee conditional in lands, or an estate forever in chattels; not, however, because

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such words gave an absolute estate *in chattels, but by implication of law. But if the gift be to certain particular issue, named, or described, as to the issue that shall survive the first donee: such specific issue may take an independent estate, after the life estate of the first taker. At the same time, it is conceded, that this will not be done by implication merely, when it would destroy an absolute estate, plainly and expressly given to the first taker. The lucid exposition, in Carr v. Porter, 1 McC. Eq. 66, given by Judge Nott, upon the principles of construction, is full and convincing upon this last point.

That decision lies at the foundation of the defence: and if the defendant's case can be brought within its true principles, it must prevail. But, in that case, the devise was to the Wilsons, and no more—no devise to their issue—and that gave them the whole estate, expressly; whereas, in the case now before us, the bequest is "to Elizabeth," "to her, and the lawful issue of her body." What do these words indicate under the foregoing principles? A perpetuity, assuredly. And Elizabeth would take the whole estate, i. e., by legal intendment: but the same words express, also, the intention, to give an estate to the issue. Thus we have, before us, two things equally plain: 1, an estate given to Elizabeth, which is like Wilson's will: but 2, the intention is expressed, that the same shall pass to her issue, forever. This latter is not in Wilson's will, and is illegal, only if intended for issue, generally.

"It is very common," says Christian, in his notes to 2 Bl. Com., 174, "to bequeath chattel interests to A, and his issue: and if he die, without issue, to B, &c. Where the words are such, as would have given A, an estate tail, in real property: in personal property the limitations are void," &c. But if it appears from any clause, or circumstance, in the will, that the testator intended to give it over, only in case A had no issue living at the time of his death: upon that event, the subsequent limitation will be good, as an executory devise. See Fearne, 371, 3 P. Wms., 262.

Now then, when after other bequests of the like kind to other children, the testator adds: "and it is my will and desire, that if any of my sons and daughters should die, without leaving lawful issue of their bodies alive, then their part," &c., "to be divided among my then surviving children:" does he not reasonably indicate, that the two clauses were connected in his mind: and that the issue meant by the former words, "her lawful issue forever," are the children of Elizabeth, alive at her death? This appears to me the proper conclusion, from the letter of the will. If the testator had meant to limit the estate to each child's issue respectively and in succession, he would naturally have kept up the idea, and

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ended the second clause, "among *my then surviving children;" and their lawful issue, forever. If perpetuity had been in his head, would he have abandoned his scheme of entailment, upon his estate falling into the hands of one, or more, of those very children? I think not, from the apparent object of the testator. When, therefore, you place the construction in the language of Sir William Blackstone, "upon the entire will, and not upon disjointed parts," no perpetuity appears. But the remainder takes effect, simply because, in the former clause, it is expressed as the wish of the testator, that the issue shall get it. And in the latter, his wish is brought within the rule of legal limitations, by confining the estate to such issue as may be alive at Elizabeth's death.

Let us, however, fairly weigh the defendants' answer to this construction of the two clauses. It is, that you give the remainder to the surviving issue, in diminution of the absolute estate, first given to Elizabeth: and that this is done by implication, and is the mistaken use of the doctrine of implication; which, in Carr v. Green, was so justly corrected by Carr v. Porter. But what is the rejoinder to this answer? By the express terms of Bell's will, Elizabeth gets no more than a life estate in the slaves; and they are as expressly given to the issue, after her death. If she can get more than a life estate, it is only by legal implication, in order to substitute an absolute estate in the mother, which her issue may inherit. And this is done for the purpose of following the general intention, in favor of the issue, as near as the law permits, in cases of which the perpetual limitation cannot be carried out legally.

To assume, that Elizabeth took an absolute estate, is to take for granted, the very point for discussion. By the expression of the will, she takes only an estate for life. She can take an absolute estate, only if it was the evident intention of the testator to give the same property to all her issue, forever. But was such his intention, is the very question, and gist of the case. And we are to understand his meaning from his whole will, without excluding any part, which may reflect light upon the true construction of the estate given.

The implication is complained of. But is it not plain, that the implication from the second clause quoted, is, at most, opposed to the implication, that Elizabeth took an absolute estate, instead of the one expressly given by the testator?

But, again, the implication, in favor of the surviving issue, does no more than uphold them in the estate, liberally given to the issue; and does in no way, derogate from the express estate to Elizabeth for life. This, as I understand, and especially from the fine argument of Judge Nott, in the case of Carr

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v. Porter, is the proper office of *implication; that is, to carry out the general intention, which may have been unskilfully expressed, in the devising clause: provided, you can do so under the terms used in the explanatory clause. And the complaint should rather be against the mistaken use on the other side of an implication of law, which would give an absolute estate to Elizabeth, by reason of a supposed perpetuity. Whereas, such implication can apply only, after first deciding that the gift is to the issue, in endless succession.

Can there be any doubt, upon authority, of the manner of connecting the two clauses? In Daintry v. Daintry, 6 T. R., 314; the will gave an estate for life, to the son, which was afterwards enlarged to an estate tail, by a subsequent clause, to wit: "if my said son should die, without leaving issue," then over. The whole court concurred in this mode of connecting the two clauses. In Robinson v. Robinson, 1 Bur., 51, the same decision was made. In Porter v. Bradley, 3 T. R., 145, the court say, the first part of the devise carries a fee; "but it is clear, that those words may be restrained by subsequent ones, so as to carry only an estate tail." Now, giving the utmost force to the construction of an absolute estate in Elizabeth, we go no further in Bell's will. In Thelusson's case, 4 Ves., 329, it is said, "every word must have its effect." In Knight v. Ellis, 2 Bro. C. C., 570, "the court will go any length to carry the intention," &c., "for the benefit of those to whom the testator intended a benefit." Meaning, doubtless, the general intention; which, in Bell's will, is obviously in favor of the issue. How clear it is, then, as Fonblanque says, "that an estate may be enlarged, or controlled, by implication." 2 Fonbl., 55, book 2, ch. 3, sec. 2, n. (h.) Meaning, unquestionably, with Sir William Blackstone, "necessary implication," or, at least, "highly probable." Bl. Com., 382.

In Bell's will, I should rather call it his plain intention, expressed, in the latter clause, that no other than the surviving issue should take the remainder. Assuming that a skillfull lawyer had written the will, we would conclude that the second clause had been added, in order to render the several bequests, referred to, explicit, and lawful. Are we, then, to disjoint the obvious adjunct from the principal clause? On the contrary, is it not the unforced induction from the will itself, that we should give the surviving issue the benefit of the rule; that we are to adopt the sense agreeable to law, when the right meaning of the will gives them an independent estate? I here readily grant, that if the negros given to the issue, in the first clause, could enure to their benefit, as a fee conditional in lands, there would be room for urging, that we might leave the latter clause, to mean no more than the contingency, upon

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which the property was to go over; *because it might then be superfluous for any other purpose, as a lawful estate would have been already given by the first clause to the issue named.

It is for that reason, I apprehend, that in England, such explanatory clauses have been sometimes construed differently, as they relate to real, or to personal estate; that is, according as their aid is requisite to make the benefit intended by the testator, to the issue, practicable, or not. See Forth v. Chapman, 1 P. Wms., 667. Stafford v. Buckley, 2 Ves., 180. Sheffield v. Lord Orrery, 3 Atk., 288. Crook v. De Vandes, 9 Ves., 203.

Without such a distinction, we might, in some cases, explain away a fee conditional, really intended to be given, from a notion, that such a distinction was more technical

than sound. See the reasons in Knight v. Ellis, 2 Bro. C. C., 578. But, at all events, it points out in what cases the subsequent clause may be considered explanatory of the clause, which directly devises the property; that is, wherever it supports the general intention of the testator to give to the issue.

But I now leave off reasoning from the details, and forms, of the particular will, and will proceed to cite adjudications upon similar wills; and these are so strong and applicable, as to induce the hope, that all parties will agree, that this court could make no other decision than in support of the former case of Henry v. Means, upon the same will.

In the case of Lampley v. Blower, 3 Atk., 397, the bequest was to nieces and their issue; but if either should die, and leave no issue, then to the survivor. It was held that a surviving son of one of the nieces, took his share in his own right, and not by inheritance. If so, must not the surviving children of Elizabeth Bell take her fifth part in their own right?

In Read v. Snell, 2 Atk., 642, the bequest was to a daughter, and the heirs of her body; but in case the daughter died, leaving no heirs of her body, then over, &c. This was held a gift for life, to the daughter, with a contingent remainder to the issue surviving her; which is, precisely, what is claimed for the issue, left alive by Elizabeth Bell.

I have assumed, in one part of the argument, that the will of Thomas Bell may have been drawn by good counsel. And I here ask, if it had been drawn by the best lawyer in Beaufort, and he now stood before this court, in support of an independent estate to the surviving issue of Elizabeth Bell, and had adduced the two cases I have just noticed, as his authority, and justification, for giving such independent estate, in the terms set forth in Thomas Bell's will; I ask, if his skill could be questioned, or the orthodoxy of his language doubted?

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*Let us now take a different case. In Forth v. Chapman, 1 P. Wms., 667, the bequest was to a nephew, generally; but should he die, and leave no issue, then over. Here the devise over was held good, no issue being left. But it must be admitted, that it does not follow, that if there had been issue surviving, such issue would have taken the estate; because there was no gift to the issue. And to imply a remainder to the issue would be to derogate from the estate given to the nephew in absolute terms; which would be an implication, without any plain intention in favor of the issue, on the part of the testator, and without any necessity arising out of the character of personal estates.

For an instance, in which such an implication in favor of surviving issue might arise, take our own well-considered case of Brummet v. Barber, 2 Hill, 543. The gift was to the use of Comfort Perry, "and the heirs of her body;" "but should she die without children to heir the said negros," then over, &c. The limitation over was held good, on failure of "children to heir," &c. And assuredly, had any children survived Comfort Perry, they might have taken the negros, because the direct gift was to the "heirs of her body," in plain terms. It is the conclusion drawn in favor of the first taker, the nephew, in such cases as Forth v. Chapman, and not attending to the distinction, when the gift is also to the issue, which leads to the error of supposing, that Elizabeth Bell took an absolute estate in the slaves now in question; and this by confounding the construction, placed upon similar limitations, in some of the English cases, in order to create an estate tail in lands. But how explicity is the distinction between such a case as Forth v. Chapman, and the one now before us, pointed out in the case of Knight v. Ellis, 2 Bro. C. C., 578; while at the same time, the reason for construing the same words differently, when they refer to lands, is presented as consistent with the character of real estates.

The court says, "A man by his will, devises to A for life," &c. "If that were all, the disposition would end there, as to A; and any other disposition would be effectual, after his, A's death. The testator then gives the same fund over to B, after failure of the issue of A. What is the court to do? It is clear, that a life interest only, is given to A. It is clear, that no interest is given to B, while there is any issue to A. The consequence is, that as no interest springs to B, and no express estate is given, after the death of A, the intermediate interest would be undisposed of, unless A were considered, as taking for the benefit of his issue, as well as for himself; and as the words are capable of such amplification, the court naturally implies an intention in the testator, that A

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should so take, that the property *should be transmissible, through him to his issue, and he was, therefore, considered as taking an estate tail, which would descend on his issue. Now, an estate in chattels is not transmissible to the issue in the same manner as real estate, nor capable of any kind of descent, and, therefore, an estate in chattels so given, from the necessity of the thing, gives the whole interest to the first taker; but if the testator, without leaving it to the necessary implication, gives the fund expressly to the issue, they are not driven to the former rule, but the issue may take as purchasers, and then there is an end of the enlargement, of any kind, of the estate of the tenant for life; for another estate is given, after his death, to other persons, (the issue,) who are to take by purchase; it no longer rests on conjecture." 2 Bro. C. C., 578.

This reasoning appears to me conclusive. Whether we ought to adopt the English judicial construction in reference to real estate,

is not now to be decided. But the distinction between such wills as make an express gift of chattels to the issue, and those which do no more than give the same property over, upon the contingency of no issue surviving the first taker, is plain and conclusive.

Without meaning to imply that a different construction might be put upon Bell's will, in reference to the landed estate, let me remark that the distinction, under the English authorities, in reference to real and personal property, does, in no way, derogate from the rule, that in executory devises, the limitations are the same in real and personal estate. The distinction is, between the implication of the same words, when used in reference to real and personal property, because they differ in their transmissible quality; and the object of the distinction is, to prevent an immediate reversion to the testator's estate, when he himself clearly contemplated none. Fearne, 487, note. In such cases, the rule of construing wills, so as to follow the intent, as nearly as law permits, technically called construction "cy pres," takes place. 4 Cruise, 161.

Let us now take our own case of Carr v. Porter, 1 McC. Eq. 60. It turned upon the construction of William Wilson's will. "The rest and residue of my estate, both real and personal, to be equally divided between my two grand-sons, Wilson and Thomas," &c., &c., "but should they die, leaving no lawful issue, in that case, I give and bequeath the whole of my estate, both real and personal, to Richard Godfrey" and others. The Court of Appeals decided that Wilson and Thomas took an estate, which they might alien forever; subject to be defeated only upon both dying without issue surviving. This decision corrected that of Carr v. Green, 2 McC., 75, which had given the estate to the issue surviving Wilson and Thomas.

But, for illustrating the present case, let us

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suppose that the will of *William Wilson had run thus: "The rest and residue, &c., to Wilson and Thomas, to them and their lawful issue forever; but should they leave no lawful issue, I give and bequeath the whole to Richard Godfrey and others." If William Wilson's will had so given the rest and residue to the issue, as well as to Wilson and Thomas, I ask if Judge Waties' argument, in favor of the issue taking by purchase, see Carr v. Green, 2 McC., 75, could have been answered?

On the other hand, interpolate those words, "their lawful issue forever," into the extract from William Wilson's will, made by Judge Nott; and instead of that regular series of skillful arguments, with which his opinion abounds, it would be inconclusive, if not powerless, to shew, that Wilson and Thomas, took more than a life estate. The whole strength of this admirable refutation of the former decision, in Carr v. Green, turns upon the want of those words, in William Wilson's will; and had they been found there, the fine, ingenious argument of Judge Waties would have withstood any test upon the point of construction, at least, as far as relates to personal estate, either under English, or American decisions.

I have taken, perhaps, needless time, in pointing out the precise point of difference between the antagonist opinions, given by two great Judges, on William Wilson's will. Because I do suspect, that some apprehension has been felt, that the late adjudication in Henry v. Means, may shake the principles of the decision in the case of Carr v. Porter. But this is, certainly, a groundless fear. On the contrary, Bell's will presents the precise case, in which, from the reasoning of both Judge Nott and Judge Waties, the two courts would have been unanimous in giving, at least, the personal property, to the surviving issue, as purchasers; which is all that is now in dispute. Bear in mind, that the terms, "to A. and the issue of his body, forever," give to A an absolute estate, only by implication of law. The bare expression gives A no more than a life estate in chattels; as it does a fee conditional in lands, which, literally, means a life estate to A, and after his death, to his issue, in succession. Bear in mind, this plain distinction, between the estate literally given, and the absolute estate implied by law, when such implication becomes necessary, in order to avoid perpetuity; and the apprehension, that the authority of the decision in Carr v. Porter is impaired by that of Henry v. Means, vanishes. On the contrary, we would support the true meaning of that leading case; and the confidence in our present decision, is not a little derived from the intellectual lights of that approved adjudication.

The trite maxim, of "stare decisis," may have been sometimes treated with little respect, and in some few instances neglected;

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but *there can be few greater errors, than such license. Every lawyer, of necessity, gives advice, bottomed upon the decisions of the courts; and in purchases, sales, and contracts, men assume such decisions, as pointing out the law that is to govern. From which it clearly follows, that adjudged cases make practical law; and if the courts, themselves, do not adhere to such decisions, we cannot be safe in the rights of property, or person. Forms and pleas, rules and orders of courts, and the judicature itself, may be changed with trifling inconvenience, and but to a few; but for the purposes of men in general, for the rich, and for the poor, the widow, and the infant, we may, more wisely, and more morally, try experiments upon the constitution of the State, than innovate upon established principles, or the known rules of

construction, that apply to every day conduct, and every day business. In these respects, and they occur every hour, the ancient observation, "misera servitus est, ubi jus est vagum, aut incognitum," is true to the letter.

For what purpose do wise counsellors treasure up judicial adjudications, from their first annals in the year books, down to the present moment; but for the object of renewing, and making sure of the beaten track, where they find the best means of their own justification, as well as safe footing for their clients. Lawyers are never more truly in their avocation, nor doing better their duty to the country, than when they closely, but fairly, supervise the decisions of the Judges. This professional attribute is so important to the regular administration of justice, that it cannot but presume the standing, and usefulness, of a vigilant body of counsellors, always ready to sound the alarm, when just, or to defend the bench, when unjustly suspected of error, or of the temper, that would render the rules of law unsteady. But in the particular instance, of the construction of Bell's will, to be found in the case of Henry v. Means, I must add, and I was not of the bench, that decided the case, that I find only confirmation, in the principles of law that governed the decision in Carr v. Porter.

Per curiam, O'NEALL, J. For the reasons stated in the opinions which have been delivered, the appeal in this case, on behalf of the defendants, must be dismissed. And so far as relates to the claim of Sarah Henry, as one of the issue of Elizabeth Bell, this court has come to the conclusion, that the appeal on behalf of the complainants must also be dismissed. We think, however, that the possession of John Talbird, Sr., cannot avail to vest a title in him, by the statute of limitations, either against the distributees of his son, John Talbird, Jr., of which he was administrator, or against the claims of his infant daughter, Elizabeth Talbird. The shares of John Talbird, Jr., and Elizabeth

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Talbird, in the property devised to *the issue of their mother by the will of their grandfather, are, therefore, neither of them, liable under the executions against their father, John Talbird, Sr.; and as to both of these shares in the slaves now in question, the injunction must be perpetual. In other respects, the decree of the Circuit Court is affirmed.

DE SAUSSURE, JOHNSON, and HARPER, Chancellors, and GANTT, RICHARDSON, and BUTLER, Justices, concurred.

Decree modified.

[END OF BAILEY, EQ.]

REPORTS

OF

CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

FROM MAY TERM 1831 TO MAY TERM 1832

BOTH INCLUSIVE

By J. S. G. RICHARDSON

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PREFACE

At the Session of the Legislature in December, 1851, on the report of the judiciary committee of the Senate, a resolution was adopted authorizing the Clerks of the Court of Appeals, at Charleston and Columbia, to furnish the present Reporter, with copies of such Chancery decisions, made during the term for which the late Henry Bailey, Esq. was State Reporter, as had not theretofore been reported. Rep. and Res. of 1851, p. 265.

In pursuance of that resolution copies of the cases contained in this volume down to page 400, were placed in the hands of the Reporter; who has added, in the Appendix, a few other decisions of the Court of Appeals, and some Circuit decrees of Chancellor Harper, which he deemed of sufficient interest and importance to justify him in publishing. This volume was intended, and does, it is believed, complete. the series of the Equity reports of this State from Mr. Bailey's volume down to the present time. The cases of December term, 1832, are reported, as of January term, 1833, in Mr. Hill's first volume.

JUDGES

OF THE COURT OF APPEALS

Hon. DAVID JOHNSON.
Hon. JOHN BELTON O'NEALL.
Hon. WILLIAM HARPER.

CHANCELLORS

Hon. HENRY WILLIAM DE SAUSSURE.
Hon. JOB JOHNSTON.

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA, MAY TERM, 1831.

JUDGES PRESENT.

HON. DAVID JOHNSON,
" JOHN B. O'NEALL,
" WILLIAM HARPER.

*Ex parte JOHN MAYRANT, Jun., Trustee.

(Columbia. May Term, 1831.)

[*Trusts* ⟸294.]

A trustee substituted by the Court of Equity in the place of a trustee appointed by the parties, who has surrendered his trust, in pursuance of the Act of 1796, is within the provision of the Act of 1824, requiring trustees appointed by the Court to return annual accounts of the estates in their possession.

[Ed. Note.—Cited in Ex parte Robert, 2 Strob. Eq. 89; Gibbes v. Greenville & C. R. Co., 13 S. C. 242; Sullivan v. Latimer, 35 S. C. 428, 14 S. E. 933.

For other cases, see Trusts, Cent. Dig. § 412; Dec. Dig. ⟸294.]

Before Johnston, Ch., at Sumter, February, 1831.

Under a marriage settlement made by the parties themselves, William Mayrant, sen. was the trustee. He surrendered his trust, and John Mayrant, jun. was substituted in his place, in pursuance of the Act of 1796.

The Commissioner reported the said John Mayrant, jun. as having neglected to make annual returns; and, upon exception to the report, his Honor ruled, that he was required, by the Act of 1824, to make such returns. He appealed.

Blanding, for appellant.

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*The opinion of the Court was delivered by

HARPER, J. The Act of Assembly of 1824, 7 Stat. 327, directs that "it shall be the duty of every trustee or guardian appointed by the Court to make an annual return of the estate in his possession." The Act of 1796 provides that where the persons entitled to an estate which may be vested in trust may be willing to have other trustees substituted in the place of those in whom the legal estate is vested, the Court of Equity may "permit such one or more of the first or former trustees to surrender his, her or their trust, and to appoint such one or more trustees in his, her or their room, as to the Court of Equity may appear fit."(a) The trustee in this case was appointed under this provision. He certainly comes within the letter of the Act, and I see no reason for supposing him out of its true intent and meaning. What are the other instances in which a trustee may be appointed by the Court and which are supposed to be contemplated by the Act? Where a trust is created by will and no trustee is appointed, the Court will in general make the heir at law a trustee of real estate or the executor or administrator of personal estate. Sonley vs. The Clock Makers Company, (1 Bro. C. C. 81); White vs. White, (1 Bro. C. C. 15). I suppose, however, where the purposes of the trust require it, the Court would direct the heir or executor to convey or transfer to a trustee. Where the trustee who is appointed refuses to accept the trust; 2 Fonb. 171, n.; or where the trust fails, as by the death of a trustee, to whom a legacy is given, in the life time of the testator; or where the trustee is removed from the trust for misconduct; in all these instances, except the first, the trustee may be said to be substituted by the Court in place of

(a) 5 Stat. 277.

the trustee appointed by the party; and I do not perceive what should make the difference in the case of a trustee appointed in the place of one who has surrendered his trust.

There was reason why the original trustee appointed by the party should not be included in the Act. First, the donor or creator of the trust has thought proper to re-

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pose confidence in *the trustee of his own appointment, and he had a right to annex what terms he pleased to the trust. But the creator of the trust has nothing to do with the substitution under the Act. Secondly, the Court may not be aware of his existence. Though it is said that a Court of Equity has a general superintendence of trustees, yet it does not interfere with a trustee appointed by deed or will until he is brought before the Court by suit. When that is done, however, it will superintend the entire execution of the trust and may provide by its decree or order for the trustee's accounting periodically to the Master.

Where power was expressly given to a trustee appointed by will to substitute another trustee, the Court would not permit him to exercise the power without its approbation; though it was urged by Mr. Romilly that all that the Court could do, was to superintend his conduct so far as to require him to pass his accounts before the Master. Webb vs. The Earl of Shaftesbury, 7 Ves. 480. When the trustee is appointed by the Court, it is then aware of his existence, and the object of the Act was to render him amenable to the Court, and to compel the Court to superintend his conduct without the necessity of any suit for the purpose. The motion is dismissed.

JOHNSON and O'NEALL, JJ., concurred.

Appeal dismissed.

Rich. Eq. Cas. 3

Ex parte E. H. LYDE and D. MANDEVILLE, Committee of C. Mandeville, a Lunatic.

(Columbia. May Term, 1831.)

[*Insane Persons* ⇐⇒41.]

The committee of a lunatic is entitled to five per cent. commissions for receiving and paying out the funds of the lunatic.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 63; Dec. Dig. ⇐⇒41.]

The only point decided in this case will be sufficiently understood from the following opinion of the Court of Appeals delivered by

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*JOHNSON, J. The only question submitted to the Court, is whether the committee appointed by the Circuit Court to manage the estate of a lunatic, is entitled to compensation for their care and labor bestowed upon it? And I am at a loss to conjecture how any doubt could arise about it. The 11th Sect. of the Act of 1745, which is preserved by Judge Brevard, (1 Brev. Dig. 392, Tit. Guardian and Ward) expressly allows to executors, administrators, guardians, and trustees, for their care, trouble and attendance in the execution of their trusts, 2½ per cent. for receiving, and 2½ per cent. for paying away all monies that may pass through their hands, in the management of the estate committed to them. And by 12th Sect. of the same Act (P. L. 202—3) they are authorized when they have had extraordinary trouble in the discharge of their duty, and are not satisfied with the allowance, to bring an action in the Court of Common Pleas, where they are entitled to recover an additional compensation not exceeding five per cent., in addition to the sum so allowed. Judge Grimke, it is true, has not retained the 11th Sect. of the Act, but the word "trustee" is used in the 12th Sect. in reference to it, and it is evident that it was a mere omission. The office of a committee of a lunatic is that of trustee. The duties to be performed are those of trustee, and the invariable practice of the Court has been, to allow them compensation. We are, therefore, very clearly of opinion that for ordinary care and trouble, this committee are entitled to the ordinary commissions, and if in the discharge of their duties, they are compelled to bestow extraordinary care and trouble, they will be entitled to bring their suit in the Common Pleas, to recover the additional compensation provided by the Act.

O'NEALL and HARPER, JJ., concurred.

Rich. Eq. Cas. *5

*CHARLES GEE and Wife v. ANN V. HICKS et al.

(Columbia. May Term, 1831.)

[*Frauds, Statute of* ⇐⇒136.]

A nephew, a single man, desiring his aunt, a widow, who resided in Mississippi, to break up her establishment there, and come with her children to South-Carolina and reside with him, to induce her to do so, promised to pay her son, a lad about sixteen years of age, who was unwilling to come, $3000 when he arrived at twenty-one years of age, and to pay his aunt Mississippi hire for her negroes: the aunt complied with his request, came within a year to South-Carolina with her children, and resided with him several years, when he died intestate: —*Held*, that the promise to pay $3000 to the son when he arrived at age, and the promise to pay Mississippi hire for the negroes, were on sufficient consideration and not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 300; Dec. Dig. ⇐⇒136.]

[*Executors and Administrators* ⇐⇒210.]

Held, also, that the aunt was not liable to the estate of the intestate, for the board and clothing of herself and children, and the education of her daughters, during the time she resided with the intestate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 737; Dec. Dig. ⇐⇒210.]

[*Infants* ⇐54.]
What is a sufficient consideration to support an executory agreement?

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 130–134; Dec. Dig. ⇐54.]

[*Contracts* ⇐47.]
A promise made in consideration of an act to be done by a minor binds the promissor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 220, 221, 256–258; Dec. Dig. ⇐47.]

[*Executors and Administrators* ⇐52.]
It is not necessary, in all cases, that the consideration on which a promise is founded should proceed from the party for whose benefit it is made.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1873; Dec. Dig. ⇐52.]

[*Frauds, Statute of* ⇐54.]
The provision of the statute of frauds, that no action shall be brought on any unwritten agreement not to be performed within a year, is not applicable to contracts to be performed on either side, within a year: If the consideration or the promise is to be done or performed within a year, the agreement is not within the statute.

[Ed. Note.—Cited in Carter v. Brown, 3 S. C. 305, 306; Mendelsohn v. Banov & Volaski, 57 S. C. 149, 150, 35 S. E. 499.

For other cases, see Frauds, Statute of, Cent. Dig. § 81; Dec. Dig. ⇐54.]

[*Frauds, Statute of* ⇐133.]
If a contract, not to be performed within a year, is, after the expiration of the year, entirely executed by one party at the request, or by the consent, of the other party, the promise to pay for this performance, is not within the statute.

[Ed. Note.—Cited in Bates v. Moore, 2 Bailey, 616; Carter v. Brown, 3 S. C. 305, 306; Walker v. Wilmington, C. & A. R. Co., 26 S. C. 90, 1 S. E. 366; Surasky v. Weintraub, 90 S. C. 534, 73 S. E. 1029.

For other cases, see Frauds, Statute of, Cent. Dig. § 293; Dec. Dig. ⇐133.]

[*Executors and Administrators* ⇐504.]
Where an administrator pays a debt as the debt of his intestate, the presumption is that the payment was rightly made; and the party impeaching the payment must show that the debt was a mere pretence.

[Ed. Note.—Cited in Hinton v. Kennedy, 3 S. C. 490.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2157–2167; Dec. Dig. ⇐504.]

[*Appeal and Error*, ⇐1009.]
Where the evidence is given to the Chancellor viva voce by the witnesses, his decision on facts is like that of a jury, not examinable on appeal, unless manifestly against, or rather without evidence to support it. But, where the testimony is altogether in writing, the reason of the rule ceases, and with it the rule itself must cease.

[Ed. Note.—Cited in Pool v. Dial, 10 S. C. 445; Hughey v. Eichelberger, 11 S. C. 50.

For other cases, see Appeal and Error, Cent. Dig. § 3973; Dec. Dig. ⇐1009.]

[*Equity* ⇐409.]
Where the Commissioner examines the witnesses his decision on the facts should generally be adopted by the Court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 904, 920–923; Dec. Dig. ⇐409.]

[*Executors and Administrators* ⇐500.]
An administrator who has made no returns is entitled to commissions on paying over the balance in his hands.

[Ed. Note.—Cited in Lay v. Lay, 10 S. C. 222; Davidson v. Moore, 14 S. C. 252, 266; Epperson v. Jackson, 83 S. C. 164, 65 S. E. 217.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2131–2139; Dec. Dig. ⇐500.]

[*Executors and Administrators* ⇐504.]
The onus of showing that an administrator has not made returns to the ordinary is on the party objecting to the allowance of commissions.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2157–2167; Dec. Dig. ⇐504.]

Before De Saussure, Ch., at Darlington, February, 1830.

This case will be sufficiently understood from the circuit decree, and the opinion delivered in the Court of Appeals. The circuit decree is as follows:

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*De Saussure, Ch. This case comes up upon the report of the Commissioner, and exceptions thereto by complainants and defendants.

The report states the sums received annually by the defendant, the administratrix of her nephew, W. C. Vernon, for the years 1822, 3, 4, 5, and 6, and also the payments and expenditures made by the administratrix on account of the estate, which appears on the face of the report. There were large balances in the hands of the administratrix at the end of each year. On these balances the Commissioner charged the administratrix with interest, because there were debts to a large amount due and unpaid, and which have been since in part paid out of the sales of the real estate. This charge forms the subject of the defendant's seventh exception to the report, which is in these words. "Because the Commissioner has struck a balance at the end of every year, and charged the defendant interest on such balances, when, in fact, it will appear from the said account and statements thereof, that the intestate's estate was largely indebted, and it was necessary to retain funds in hand to meet the demands against the estate." This is not a question open for argument. It has been perfectly settled by repeated decisions. The rule is, that whenever executors or administrators have balances in their hands at the end of each year, they shall be charged with interest thereon, because it is their duty to pay debts, if there be any, and thereby stop interest; and if there be none, then it is their duty to invest such balance in stock or in some other safe manner for the benefit of those interested. In some special cases the rule has been relaxed, especially when there were suits pending against the estate, on which sudden demands might arise for money. In such cases the Court will excuse the executor or admin-

istrator for retaining funds to meet those demands. That has not been shewn in this case, and, therefore, the exception on this point must be overruled and the report sustained.

The Commissioner goes on in his report to state—"That one of the principal items of

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controversy was a payment made *by the defendant of three thousand dollars to her son Vernon C. Hicks." On this item the Commissioner makes a special and very full statement, which accompanies the report, and to which he refers. He states, that it was fully proved before him that W. C. Vernon, the intestate, was exceedingly desirous to induce his aunt, Mrs. Hicks, and her son, Vernon C. Hicks, to leave their settlement on the Mississippi, where they were well established, and to settle in South-Carolina, near him: and that to induce them to acquiesce in this arrangement, he made a parol promise, or declaration, that if they would do so, he would pay three thousand dollars to his cousin, Vernon C. Hicks, who was then about 16 years of age, when he attained 21 years of age. The Commissioner further states that Mrs. Hicks and her son did comply with the solicitations of Mr. Vernon, and did break up their establishment on the Mississippi, where they were advantageously settled, and returned to South-Carolina as Mr. Vernon desired. That Mr. Vernon died intestate, before the youth, Vernon C. Hicks, attained 21 years of age, so that the payment of the three thousand dollars was not made in his life time. His aunt, Mrs. Hicks, administered and has paid out of his estate the said sum of three thousand dollars, on the ground of the said promise, which was objected to by the complainant. The Commissioner, assuming these facts, has examined the questions growing out of them, diligently and skillfully. He states that the agreement or promise to pay three thousand dollars by Mr. Vernon, was a parol one, and was without any pecuniary consideration or benefit to him: but it was founded on a compliance with his earnest desire to have these relations near him, and that they, at his instance, did break up their establishment on the Mississippi, and return to South-Carolina, to their disadvantage in a pecuniary point of view. The Commissioner then examines the objections to this contract. He thinks the consideration sufficient to support the contract or promise, and that the objections founded on the Statute of Frauds as to the contract being by parol and as to its not being to be performed within a year,

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are both got rid of by *the complete execution of it by Mrs. Hicks and her son, Vernon C. Hicks. He, therefore, allowed the charge of three thousand dollars which the administratrix had paid to Vernon C. Hicks, on the ground of this promise. The complainant filed an exception to this part of the report as unwarranted. There is strong sense in the view taken of these nice questions, by the Commissioner, and the leaning of the mind is certainly to sustain the contract or promise, against the technical rule. But I have doubts as to the facts and as to the conclusion. If the fact of the promise of three thousand dollars be made out by sufficient proof, I think the consideration sufficient to support the promise. A valuable consideration may be either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made; and the prejudice and trouble of breaking up a settlement, selling out and coming back to South-Carolina, would be sufficient. But there is a previous question—Was such promise so satisfactorily proved as to warrant our considering it as established? The Commissioner thought that it was, and, therefore, I have hesitated a good deal: my mind is not, however, satisfied with the proof. The principal proof is the testimony of Mrs. Williams, the daughter of Mrs. Hicks, and the sister of V. C. Hicks. By comparing dates, it seems that Mrs. Williams was only eight years of age at the time of the alleged promise, and her testimony is given from recollection twelve years afterwards. She, doubtless, from hearing it frequently spoken of subsequently in the family, at an early age, supposed that she had heard the promise made. But we cannot venture to decide questions of right on such uncertain recollections of mere children. It would be too dangerous, and this attempt to establish a parol agreement by such evidence, is itself proof of the wise provision of the statute. It was argued, correctly, that a death bed declaration or direction of Mr. Vernon to pay three thousand dollars to V. C. Hicks, does not strengthen the case—for it was not a contract, nor was it a will, written or nuncupative, nor was it donatio causa mortis, for there was no delivery. Up-

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on the *whole, after comparing the whole evidence, I have come somewhat reluctantly to the conclusion, that the fact of the alleged promise is not sufficiently made out legally. There are, also, other difficulties. It appears, by other evidence, that Mrs. Hicks was anxious to come back to South-Carolina and wrote to Mr. Vernon to come for her; and her son, being a minor, was under her control, and could be brought back without being consulted, and without the necessity of a pecuniary reward. There are other objections too. Supposing a promise made, it was a promise not in writing and not to be performed within a year. Some of these difficulties are susceptible of, and have received strong answers. But, upon the whole, I do not think I can concur with the Commissioner on this point. This exception is, therefore, sustained.

The report of the Commissioner further states, that another subject of controversy

was brought before him. He says, it was satisfactorily proved, that Vernon, in his lifetime, had promised Mrs. Hicks, the defendant, to pay her Mississippi hire for the negroes, if she would remove to and reside with him in this State. This item, he says, he allowed at what was proved to be the value of the hire at Mississippi: but as an offset against this demand, the Commissioner charged Mrs. Hicks for the expenses of educating her daughters at a boarding school, and for her own and her children's boarding and clothing, all of which, it appeared, had been promised by Mr. Vernon. To this part of the report both parties have filed exceptions. The complainants except, because the evidence was that Mr. Vernon went to the Mississippi, and removed Mrs. Hicks at her own earnest solicitation, she being much embarrassed and distressed, and desirous to return. On this subject we are to inquire whether there was any evidence to support such a contract, and if not, whether the sum charged and allowed is a reasonable hire, conformable to the usage in South-Carolina. On the question of contract, the Commissioner reports, that the evidence of Vernon C. Hicks stated that the hire of the slaves was,

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by agreement, to have been $1500 per *annum. This evidence, however, he rejected, as he considered Vernon C. Hicks interested. He then resorted to the testimony of other and disinterested witnesses, who said that Mississippi hire was to be given. I have gone over the testimony, in this cause, which is in writing, and is extensive, and, I confess, it does not strike me that the fact is sufficiently proved. It is true, that Mr. Murphy testifies that Mr. Vernon solicited his aunt to leave the Mississippi, and return to South-Carolina, and to live with him, and that she consented, and observed to Mrs. Hicks, in presence of witnesses, that if she would remove to South-Carolina he would pay her the hire for her negroes that she could obtain in Mississippi, and that he would make good any loss the estate might sustain in consequence of the removal. On his cross-examination, Murphy stated that he did not know of any positive contract between the parties. This witness appears to have been under the impression that Vernon was the person soliciting Mrs. Hicks to return to South-Carolina, and that she was reluctant to return; that considerable entreaty was necessary to prevail on her. In this there must be a mistake. Several reputable witnesses testify that they saw letters from Mrs. Hicks to her kinsman Mr. Vernon, stating that her affairs were embarrassed and her desire to return to South-Carolina, and requesting him to come for her and remove her to Carolina; and in pursuance of this urgency, Mr. Vernon went for her, and aided her in the removal, and brought her back to this State. It is quite probable, that at the moment of acting, Mrs. Hicks may have been somewhat irresolute in breaking up and removing, as often happens. But that she first desired and solicited the assistance of Mr. Vernon, is quite certain from the weight of evidence. With respect to the parol promise to pay Mrs. Hicks Mississippi hire for her slaves, which Mr. Vernon was to employ on his lands in Carolina, Mr. Murphy is very distinct. Yet the other witnesses, more conversant with the parties and their transactions, do not support this; they know nothing about it. I think it may be reasonably doubted. But if it be considered as an established fact, still the question

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arises *is the parol promise or agreement so stated, on a doubtful consideration, so naked of detail, so uncertain how long it was to last, within the statute of frauds as to be sustainable on the ground of performance on one side? On the best consideration I have been able to give the subject, after looking into the doctrine, I am disposed to say that it cannot be supported under the statute. The refinements which have been made to take cases out of the Statute under the force of peculiar circumstances have been unfortunate and even mischievous. They have frittered away the provisions of the Statute. Experience has shown the evil of this, and the Judges have desired to check the evil. The report, then, so far as it allowed the usual hire of slaves in Mississippi, instead of the usual hire in Carolina, where the slaves were employed, must be overruled, and so much of the complainants' exception sustained. As the case will be sent back to the Commissioner to correct the accounts, I might as well state my views here, which may assist the Commissioner in fixing on the rate of hire which would be proper to be allowed. I do not consider this as a case of common hiring and letting, for the most which one party could get, and for the least which the other would give. Mr. Vernon was unmarried and without children, in bad health, and resolved not to marry. He was greatly attached to his aunt; called Mrs. Hicks his mother; took her to his house with her children, as part of his family; supported her and them; expressed an intention to make them his heirs; but died sooner than he expected, and before he made a will; from which, it is said, he was diverted, by some information that they would be his heirs by law. Under such circumstances, I am of opinion, that in fixing the wages or hire of the slaves, which Mr. Vernon employed, the most liberal wages known to that part of the country should be allowed, and I direct the Commissioner to act accordingly. This will apply to all the exceptions on both sides as to the hire of the slaves.

The defendant's second exception is, "Because the Commissioner has charged the de-

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fendant with the education of her *daugh-

ters in North-Carolina, and in Charleston, when in fact, the said Vernon educated the said daughters without charging or intending to charge for board or education." The third exception of defendant is for the charge of "board, clothing and expenses at home, when in fact the said Vernon had invited his aunt, Mrs. Hicks, to reside with him as part of his family, without charging or intending to charge them." From all the circumstances of the case, I think these exceptions well founded. Acts of bounty and kindness can never afterwards be converted into charges. These exceptions are sustained, and the report must be corrected on this point.

The defendant's fifth exception, is "Because the Commissioner has not allowed the defendant interest on the account for the hire of the slaves." I am of opinion that interest should be allowed, and sustain this exception.

The sixth exception is, "Because the Commissioner has allowed interest on the annual balances of account in the hands of the administratrix." I have already stated that the Commissioner did right in allowing that interest; this exception is, therefore, overruled.

The eighth exception is "Because the Commissioner has not allowed the defendant commissions on the amount of her annual receipts and expenditures for the estate." The statutory rule must be applied, and commissions allowed or refused, according as the administratrix has made or neglected to make annual returns. She will, however, be allowed commissions on paying over any balance at the settlement of the estate.

The ninth exception is as to the Commissioner's rejecting the evidence of V. C. Hicks. Mr. Hicks was interested, and therefore properly rejected.

The tenth exception is "Because the Commissioner has charged the defendant with sales of thirty-one bales of cotton, and five hundred bushels of corn in 1822, when they were already accounted for." This has not been shewn, and therefore I cannot say the Commissioner is wrong. The report on this point must, therefore be confirmed.

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*It is ordered and decreed, that the report be corrected according to the principles of this decree.

The complainants appealed on the following grounds:

1. That the Chancellor should not have directed the Commissioner to allow the most liberal wages for the slaves, known to that part of the country where they resided; but should have directed the hire to be estimated according to the rules adopted by this Court, to wit—the sum of $42.85 per annum, and that under the peculiar circumstances of this case, no interest should be allowed on such hire.

2. That after charging the intestate's estate with hire of the slaves, which belonged to the estate of Claudius P. Hicks, the Chancellor should not have rejected the charge for educating, supporting, boarding, and clothing the defendants, who were entitled to that hire if decreed: and the complainants will insist on sustaining such charges against them if the negro hire is allowed them.

3. That the Chancellor ought not to have decreed to defendant commissions for paying over the balance of the estate in her hands. 1st. Because she had never made any returns whatever, to the Ordinary; and 2dly. Because whatever balance may be in her hands arises from the circumstance, that the debts due by her default, have been paid out of the real estate sold by order of the Court of Equity, and if she had applied the estate properly there would have been no balance in her hands.

The defendants also appealed on the grounds, inter alia.

1. Because defendant, Mrs. Hicks, was entitled to Mississippi hire for her negroes.

2. Because the charge for $3000 paid Vernon C. Hicks, was a proper one against the estate.

Blanding, for complainants.
Ervin, for defendants.

The opinion of the Court was delivered by

O'NEALL, J. Before discussing the questions which have been here made in this case,

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it will be well to premise that the *defendant was the aunt of the whole blood of her intestate. That she was, in 1816, a widow residing in Mississippi, with a family of young children, possessed, however, of a sufficient competency. That the intestate being in bad health, and determined never to marry, and desirous that his aunt and her children should, after his death, enjoy his whole estate; either of his own mere motion, or at her solicitation, visited her with a view of removing her and her family to this State. On arriving there he found her either reluctant to remove, or surrounded with such difficulties as, in her estimation, rendered it imprudent to do so, until they were removed. Amongst other things, her son, Vernon C. Hicks, then a lad in his sixteenth year, was unwilling to leave Mississippi: the slaves belonging to her deceased husband's estate, were also to be removed, and for them she was liable to account for as much hire as could be obtained in Mississippi, which she could not expect to realize in South-Carolina. To remove these difficulties and to induce his aunt and her family to accept his invitation and remove with him to this State, it is alleged, he agreed to pay Vernon C. Hicks, on his arriving at 21 years of age, $3000, if he would come with him to South-Carolina; and that he promised his aunt, the defendant, as much hire for her slaves as she could obtain in Mississippi. On these promises and assur-

ances, the defendant, the son and her family, returned to this State with the intestate, and became part of his family. During his lifetime he had the services of the slaves of the defendant, on the contract made in Mississippi. He maintained the defendant and her children, and educated her daughters. After he had taken the defendant home, he appears to have treated and regarded her as the head of the whole family. He called her mother, gave her up the entire management of his household, and placed at her disposition his cash. In 1822, in his last illness, he repeated to his aunt his desire, that she and her children should enjoy his property: said, that he had been legally advised that she was his heir at law, and that it was therefore unnecessary to make a will:

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and requested her, out *of the first funds, to pay to Vernon C. Hicks, the sum of $3000, which he had promised to pay him if he would come with him to South-Carolina. The complainants are the representatives of an aunt of the half blood, to whose claim to recover as distributees of his estate, no objection has been made before us, and, upon which, we intend not to be understood as giving any opinion. This aunt of the half blood appears to have been, if not an actual stranger to the intestate, at least one for whom he entertained no affection, and for whose interest he would not jealously guard his estate from incumbrances in favor of relations, whom he has adopted as mother, brother and sisters. After having thus possessed ourselves of the whole circumstances, in reference to which the main questions in this case must be considered, I will proceed to notice, in their order; 1st. The $3000 paid by the defendant to Vernon C. Hicks, agreeable to the promise made by the intestate to him. 2d. The allowance of Mississippi hire for the slaves of Claudius P. Hicks, deceased. 3d. The allowance for the maintenance of the defendant and her family, and the education of her daughters. 4th. The allowance of commissions on her receipts and expenditures on the estate of her intestate.

1. It is objected that the sum of $3000 ought not to have been paid to Vernon C. Hicks. 1st. Because the contract as proved was without consideration. 2d. That it was void, being within the Statute of Frauds: and 3d. That the contract was not proved.

It is perfectly clear that to constitute a consideration sufficient to support an executory contract, it need not be an exact quid pro quo. Any thing which is to benefit the party making the promise, and which he could not otherwise obtain, or which puts the party to whom the promise is made, to any trouble, inconvenience or loss, will prevent the contract from being nudum pactum. This has not been controverted in the argument: but it is said, that the mother had the right to require and compel her son to remove, and that, therefore, neither his consent or removal could be a consideration. I have no

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doubt *that a mother, as well as a father, has the right to the custody of the person, and the services of a child until twenty-one. But this general rule is subject to some qualifications. A child resident in this State, and entitled to a part of his deceased father's estate in it, after fourteen years of age could not, even by his mother, be taken out of it against his will. In such a case, Chancery would appoint a guardian for him and protect him from removal. Such, I presume, is the law of Mississippi as well as of this State. So that, in this point of view, his consent and removal might have been a sufficient consideration, even although the mother had attempted to compel him to do so. But although during the minority the father, or mother, is entitled to the person and services of a child, it does not follow that every contract made for an act to be done by him is, therefore, nudum pactum. They may waive their right to both; and if they choose to do so, he is as much a free agent, as to what he will demand for his services, as he is after twenty-one. True, he cannot bind himself by contract, except for necessaries, but this is his protection and not that of an adult who contracts with him. If he performs his part of the contract, he has a perfect legal right to demand the performance of the other part from the other party. Let the case before us be tested by these principles. The mother declines to exercise the parental authority to require her son to remove: he was then perfectly free both in morals and in law to remain in Mississippi, or remove to South-Carolina: he preferred the former: to induce him to adopt the latter, the intestate promised to pay him $3000, and upon this promise he does remove. This would seem to be a sufficient consideration. It is also a rule of universal application, that the consideration, on which a promise is founded, need not in all cases proceed from the party for whose benefit it is made. For illustration, let it be supposed that A to benefit B, sells C a horse, and C in consideration of such sale, promises to pay B $100, the consideration will sustain the promise. In the case before us, as I understand the testimony, the mother declined to remove to this State, unless

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*the intestate could induce her son to consent to remove. Her removal was then in part the consideration of the promise to her son: and if she chose to make her removal a benefit to him, she had the right to do so, and a promise to him, founded on that consideration, is as good as if he had himself done the act, upon which the price of it was to be paid by the intestate.

The 4th section of the Statute of Frauds provides, that "no action shall be brought upon any agreement that is not to be performed within the space of one year from the

making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c.

In the construction of this, as well as other clauses of the Statute, much refinement has, I know, been resorted to, and, in some cases, distinctions have been taken which have almost amounted to a repeal of it. I have no disposition to trench, in any respect, upon the written law. Construing it upon plain and practical principles of common sense, it shall be, so far as I am concerned, the rule of decision. In the construction of the clause before us as applicable to this case, I am not aware of any difficulty whatever. This clause of the Statute was intended to be applicable to contracts wholly executory and not intended, on either part, to be performed within a year. In other words, both the consideration and the promise must be executory, and neither to be done or performed within a year. If the consideration is executed at the time of the contract made, or intended to be and is performed within a year, the contract is not within the Statute. If a contract, not to be performed within a year, is, after the expiration of the year, entirely executed by one party at the request, or by the consent, of the other party, then the promise to pay for this performance cannot be within the Statute. The party, for whom it is done, has waived that protection, and has put himself on the footing of a debtor for a past and executed consideration. In the case of Boydell vs. Drummond, 11 East, 152, a case is put of goods sold and delivered on a credit of thirteen months, and Lord Ellenborough in reference to it, as not being within the Stat-

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ute, *says: "In that case the delivery of the goods, which is supposed to be made within the year, would be a complete execution of the contract on the one part; and the question of consideration only, would be reserved to a future period." In the case of Mavor vs. Pyne, 12 Eng. C. L. R. 41, it was held that, if a party agree to take a work, which is to be published in eighteen numbers at intervals of two months, and after receiving several numbers, refuses to take any more, and also to pay for those which he has had, an action will lie for the price of the latter, and the Statute of Frauds does not apply, although the original contract was not to be executed within a year; for the law, in such cases, will imply a further contract to pay for each number as it is delivered. In the case of Bracegirdle vs. Heald, 1 B. and Al. 726, Lord Ellenborough says, "will an inchoate performance or part execution satisfy the terms of the Statute? I am of opinion it will not, and that there must be a full, effective and complete performance." In the same case, Abbott J. says: "The case put in argument, of an agreement for goods to be delivered by one party in six months, and to be paid for in eighteen months, being after more than a year has elapsed, is distinguishable on this ground, that there, all that is on one side to be performed, viz: the delivery of the goods is to be done within a year; whereas here, the service, which is the thing to be performed by the plaintiff, cannot possibly be completed within that period." Those authorities fully sustain the positions which I have assumed, and it only remains to be seen whether, the contract proved, according to them, is, or is not, within the Statute. The intestate promised to pay, at twenty-one years of age, to Vernon C. Hicks $3000, if he would come with him to South-Carolina. The removal to this State was what was to be performed by Vernon C. Hicks. It was capable of being and was actually performed within a year of the time the contract was made. It was not, therefore, a contract within the Statute. If it had originally been, and performance was made at the request, or by the consent of the intestate, I should have held that the executory character of the

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contract *was changed, and that it became, on the part of the intestate, debitum in presenti, solvendum in futuro. And in this point of view, his death bed declaration would and ought to be regarded as an admission of a subsisting debt.

When an executor or administrator pays a debt which he thus recognizes as a debt of his testator or intestate, it is enough on an account by him, to shew the payment. The legal presumption is that the debt is the debt of the deceased. A contrary presumption can only be raised by showing fraud and collusion between the executor or administrator and the creditor,—or, in law, that the debt was not a legal subsisting debt,—or, in fact, by creating some suspicion of its truth and justice. This proof must necessarily come from the party objecting to the payment, before the executor or administrator can be put to proof of the bona fides of the debt. In the case before us, the administratrix paid the debt supposed to be due, and, on the proof which she had before her, it was a good and subsisting debt in law against her intestate. This was enough to justify her payment: and it would not be enough now to subject her to an account to the heirs, for that debt, to say that the proof is not exactly enough to satisfy us of the nature and extent of the promise. On the other hand, before we could disallow the payment, we must be satisfied that the debt was a mere pretence. But taking up the question as an original proposition to establish the debt for payment out of the estate, I am satisfied the debt should be allowed.

Before, however, I proceed to notice the proof, it is necessary to dispose of some preliminary matters. It is said that the Chancellor has decided that the contract between the deceased and Vernon C. Hicks had not

been satisfactorily proved, and has therefore disallowed it; and that his decision, on facts, is like that of a jury, not examinable on appeal, unless manifestly against, or rather without evidence to support it. This is true where the evidence is given to the Chancellor viva voce by the witnesses in Court. In such cases, an infinite variety of circumstances enables him to decide more correctly,

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on the credit *of the witnesses, and the weight of the testimony, than we can. But where the testimony is altogether written, the reason of the rule ceases, and with it the rule itself must cease. So, where the Commissioner examines the witnesses, his decision on the facts should be generally adopted by the Chancellor; but he has the right to examine and correct the conclusions of the Commissioner, where he thinks they are incorrect. In such cases of difference of opinion between the Chancellor and the Commissioner upon the facts, this Court is bound to examine the Chancellor's decision and either adopt or reject it, as the facts may appear to warrant. On this question the testimony is in writing, and upon it the Commissioner, who examined the witnesses, thought the contract was fully proved. The Chancellor came to a different conclusion. The only witness, (whose testimony is regularly before us,) who proved this contract, was the daughter of the defendant, and a sister to Vernon C. Hicks. She was eight, nine, or ten years old, when she says she heard the contract made in Mississippi. At different times afterwards she says she heard the deceased admit that he had made this contract; and on his death bed she heard him direct the money to be paid. If this witness is to be credited, it appears to me the contract is clearly and fully proved. Her credit is assailed, first, on account of her tender years at the time the contract was made, and it is hence argued that she could not now recollect it. But I have no doubt that facts and circumstances, occurring in infancy, and attended by circumstances calculated to arrest the attention, are longer and better remembered than events which happened in maturer years. The witness was at that age when every thing novel was likely to make a lasting impression. She saw then, for the first time, her cousin Vernon; her father was dead; her mother was about breaking up and removing: all these circumstances were calculated to fix on a young and tender mind, every thing connected with them, with a most lasting impression. I would sooner believe a story thus emanating from the recollections of a child, than many a well digested tale which is told on

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the recollection of age from *the occurrences of manhood. But her proof does not rest on the recollections of infancy; it is sustained by repeated admissions of the contract by her cousin Vernon; and, above all, by his solemn admission, at a time when with him time was about to cease and eternity begin. In the second place, her testimony is assailed on account of some alleged discrepancies in it. These, however, were so slight that I cannot permit them to overthrow the testimony of a witness whose credit was not otherwise impeached. Neither the Commissioner nor Chancellor attached any consequence to them, and with them before him, if the Commissioner, who took her testimony, thought her still worthy of credit, I will adopt his conclusion. On the whole, I am satisfied that the Commissioner was correct in allowing the defendant a credit for the sum of $3000 paid to her son Vernon C. Hicks: and that the exception of the complainants to his report, in this respect, was improperly sustained by the Chancellor.

2. The contract to allow for the hire of the slaves of the estate of Claudius P. Hicks, deceased, as much as could be obtained in Mississippi, is fully proved by the evidence of Mr. Murphy, and Mr. Driggers. It is true that Mr. Murphy does not prove that he heard the proposition regularly made by Vernon to Mrs. Hicks, and by her accepted, but he proves that which is exactly equivalent to it. He proves that Vernon, to induce his aunt to remove, in her presence said to him that he would pay her for the hire of the slaves as much as she could get for them in Mississippi. She afterwards did remove, and allow him to have the services of the slaves. This was her assent to his proposition, and made, in the language of the law, the aggregatio mentium necessary to a contract. But it is said how long was this contract to last? From year to year, until one or the other of the parties chose to end it, is the only answer. Like other contracts of hiring, it was a contract for the ensuing year. At the end of that time, if nothing was said about other terms, it would be presumed that the next year's hire was on the same terms

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and so on of every succeeding one. *In 1821 and 1822, Mr. Driggers lived with the deceased, and he states that he told him, that he had promised his aunt as much hire for the negroes as they were worth in Mississippi. I presume that this conversation was in one or the other of these years, and if so, it proves that the contract of hiring, on its original terms, was continued down to the time of his death. Regarding the contract of hiring as originally made for the year 1817, and its continuance as a new contract, made every year on the terms of the preceding one, the case in this respect is not at all affected by the provisions of the 4th section of the Statute of Frauds. But considering it as an entire contract made in Mississippi and applying to the whole time for which the deceased had the services of the

slaves, there was a complete performance of it on the part of the defendant with the consent of intestate, and to such a case the Statute is inapplicable. The reasons which I have given for my judgment on the first branch of this case, apply with equal force to this, and need not be again repeated. I am, therefore, satisfied that the Commissioner was correct in allowing Mississippi hire for the slaves; and that the exception of the complainants, to this part of his report, ought to have been overruled.

3. The defendant and her family, at the request of the deceased, became part of his family. He treated her as his mother, Vernon C. Hicks as his brother, and the daughters as his sisters. He considered them as the heirs of his estate. Under such circumstances, did he intend to charge for maintainance, or education? It is obvious that he did not. That which was originally intended as a gratuity can never afterwards be turned into a charge. I am, therefore, satisfied with the Chancellor's decision in this respect.

4. The defendant was entitled to commissions, unless it was shewn that she had failed to make regular annual returns to the Ordinary. In such years as she failed to make returns, she was entitled to no commissions. On returns regularly made, she was entitled to commissions. So, if she had not made a single return, she was entitled to commis-

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sions for paying *over the balance found in her hands and decreed to be paid to the complainants. The proof of her failure to make regular returns ought to have been made by the complainants. The Ordinary's office was accessible to them, and it would have furnished conclusive evidence how the fact was. In the absence of such proof, it was to be presumed that she had done her duty, and the Commissioner ought to have allowed her commissions on the whole estate. This exception of the defendant ought, therefore, to have been sustained.

On all the other questions discussed in the decree, we concur with the Chancellor, except as to the competency of Vernon C. Hicks, and, as connected therewith, the subject matter of the defendant's 10th exception. He had not the slightest legal interest in relation to the crop of 1822, with which his mother was charged, and to show the amount and disposition of which he was offered. His testimony ought, therefore, to have been heard on this point. It is, therefore, ordered and decreed, that the decree of the Chancellor be modified according to the principles laid down in this opinion, and that the costs of this suit be paid out of the estate.

JOHNSON and HARPER, JJ., concurred.

Decree modified.

Rich. Eq. Cas. 23

RICHARD YOUNG et al. v. LARKIN DINKINS et al.

(Columbia. May Term, 1831.)

[*Wills* ⟹855.]

The testator bequeathed slaves to his wife for life, and at her death directed them to be set free: the Act of 1820 prevented this from being done: the slaves at the death of the tenant for life reverted to the testator's estate, and for the want of a residuary clause, under which they could pass, were held to be distributable under the act of 1791.

[Ed. Note.—Cited in Roberson v. McCauley, 61 S. C. 423, 39 S. E. 570.

For other cases, see Wills, Cent. Dig. § 2171; Dec. Dig. ⟹855.]

Before Johnston, Ch. at Sumter, February, 1831.

Johnston, Ch. The only question submit-

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ted in this case *arises on the following facts. Wm. Wright, on the 5th of January, 1808, made his will and died the same year. By that will he lent his wife his whole estate during her natural life, and attempted an emancipation of certain slaves in the following words: after the death of my wife (Martha) "I give Leah, Esther and Letty their freedom." Martha Wright, about the year 1813, under the advice of counsel, seized all the slaves and their issue under the Act of 1800, with the view of vesting the property in herself, which seizure the Court of Appeals has declared vested no property in her. There is no residuary clause in the will. Martha Wright, the widow, died the 8th October, 1829, having conveyed all her interest in the said slaves to the complainants. The distributees of Wm. Wright, under the Act of 1791, would be Martha Wright, his widow, and four nephews and one niece, whose representatives are defendants in this case, and Mrs. Low, another niece, who is also a defendant. The executor of William Wright never emancipated said slaves, and since the Act of 1820 they cannot be legally emancipated. If Mrs. Martha Wright was entitled to a distributive share of these slaves, then they must be divided, and one-half be assigned to complainants and the other half to the defendants; but if she could not take as distributee, then the whole of the slaves should be divided among the defendants according to their several interests.

The case is submitted, without argument, and I am of opinion that the complainants are entitled. It is, therefore, ordered and decreed, that the slaves be divided equally between the complainants and defendants, the complainants taking one-half and the defendants the other half; but it appearing from the statement of the parties, all of whom are adults, that there will be great difficulty in making a division, by the consent of the said parties, it is ordered, that the said slaves be sold by the Commissioner

of this Court on a credit of one year and the proceeds be divided among the parties according to their respective rights.

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*The defendants appealed on the ground that complainants were not entitled to a part of the estate.

Preston, for appellants.
Blanding, contra.

The opinion of the Court was delivered by

O'NEALL, J. In this case we concur in the decision of the Chancellor.

In the cases of Young and Lenoir v. Sylvester (1 Bail. 632), it was decided that the executory devise of freedom to the slaves now in dispute after the death of Mrs. Wright was void, and that they reverted to the estate of the testator at her death. This interest in the testator, or rather in his executors, or administrators, might have passed under the residuary clause of his will, if there had been any, sufficiently comprehensive to pass it. In the absence of any such clause, he must be regarded as having died intestate as to it, and it is distributable under the Act of distributions. It is perfectly immaterial in this point of view, whether at the death of the testator, the devise of freedom might have been executed, and subsequently became unlawful, and therefore, impossible to be executed. It was contingent, and might or might not take effect, and until the actual emancipation took place, the right of property remained in the legal representatives of the testator. The remainder or reversion after the death of his wife, was part of his estate, and upon the executory devise over becoming impossible, that remainder or reversion was undisposed of by his will, and was distributable among his distributees entitled to distribution at his death.

It is, therefore, ordered and decreed, that the decree of Chancellor Johnston be affirmed.

JOHNSON and HARPER, JJ., concurred.

Decree affirmed.

Rich. Eq. Cas. *26

*MARGARET PRIESTER v. WILLIAM PRIESTER and Others.

(Columbia. May Term, 1831.)

[*Descent and Distribution* ⟸99.]

A parent having advanced some of his children in his life time, executed promissory notes to the others, payable after his death, with a view to equalize them: *Held*, that the notes were void for want of consideration.

[Ed. Note.—Cited in Carter v. King, 11 Rich. 132.

For other cases, see Descent and Distribution, Cent. Dig. §§ 404–410; Dec. Dig. ⟸99.]

[*Gifts* ⟸67.]

A promissory note given by a parent to a child by way of advancement, to be paid after the death of the parent, cannot be supported as donatio causa mortis.(*a*)

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 145; Dec. Dig. ⟸67.]

Before De Saussure, Ch., at Barnwell, February, 1831.

The circuit decree is as follows:

De Saussure, Ch. The bill states that Nicholas Priester, senr., died intestate, leaving as distributees his widow (the complainant), three sons (William, John and Nicholas), and two daughters, married to W. R. Thomas and James Ulmer. In his lifetime the intestate drew four promissory notes for different amounts, payable at different times in favor of his sons William and Nicholas, and of his sons-in-law W. R. Thomas and James Ulmer, one for each, without any consideration save natural affection,—no note was drawn in favor of intestate's son John, or the complainant, now his widow.

The said promissory notes were left in the hands of the defendant, Ulmer, by intestate, to be delivered to the payees respectively on the intestate's death, and are now in Ulmer's hands. The aggregate amount of said notes is about $1,200.

Previously to drawing said notes, intestate had made unequal advancements to his children. For his son John he had paid large sums of money; he left a small real and personal estate.

The objects of the bill are (1) to procure an order for the sale of the real estate in consideration of the difficulty and inconvenience of a division. To this the parties consent. (2) To compel the administrators to account with complainant. They are willing to account. (3) To have said promissory notes given up and cancelled, and to have

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the sum of money *which would be requisite to satisfy them, considered as subject to distribution. Defendants insist that the payees shall receive the respective sums which their notes call for as not being any longer assets in the administrators' hands.

In answer, the defendants admit that N. Priester, senr., being seized and possessed of a small real and personal estate, departed this life intestate, leaving the complainant his widow, and the several children named in the bill, entitled by law to his estate. That the said defendants have administered on the personal estate, possessed themselves thereof, by permission of the Ordinary sold the same, and are ready to account therefor.

They admit that the intestate not long before his death made four promissory notes for different amounts, payable to his sons and sons-in-law, amounting in all to $1,200.-20; the defendants insist that said notes were intended as advancements to the pay-

(*a*) Hall v. Howard, Rice, 310, [33 Am. Dec. 115.]

ees, and were left in the hands of James Ulmer to be delivered to the payees respectively on the intestate's death. That the intestate in his lifetime, and previous to the making of said promissory notes, had at different times made advancements to his children, but in unequal proportions, and defendants believe that his object in making the said notes, was to equalize his children in the distribution of his estate. That the said notes are for different amounts, and that no note was given to the intestate's son John, for whom the intestate in his lifetime had paid large sums of money.

That the said notes were made on a good and valuable consideration, viz.: the love and affection which the intestate bore to his children, the payees; and the defendants submit whether these notes ought not to be paid out of the intestate's estate. The defendants deny that they have refused to account, also all combination, &c.

The exhibit is as follows:

On, or before the fifth day of January, 1827, I promise to pay Nicholas Priester, jr., or bearer, the sum of two hundred and fifty dollars, it being for value received of him this first day of January, 1826.

(Signed) Nicholas Priester.

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*On, or before the first day of September, 1828, I promise to pay William Priester, or bearer, the sum of three hundred and fifty dollars, it being for value received of him this 20th day of March, 1826.

(Signed) Nicholas Priester.

On, or before the first day of October, 1827, I promise to pay William R. Thomas, or bearer, the sum of two hundred and seventy dollars, it being for value received of him this 25th day of April, 1826.

(Signed) Nicholas Priester.

On, or before the first day of July, 1827, I promise to pay James Ulmer, or bearer, the sum of three hundred and thirty dollars, it being for value received of him this 5th day of May, 1826.

(Signed) Nicholas Priester.

This is a singular case. It is one of those mixed cases which the inclination or the caprices of parties have led them to form, out of the usual course. Nicholas Priester made and signed four different notes of hand at four different times, (January, March, April, and May, 1826) for different sums of money payable to two of his sons and two of his sons-in-law at different periods, for valuable consideration. They were delivered by N. Priester to his son-in-law, James Ulmer, to be kept till the death of the said Nicholas, and then to be delivered to the payees, respectively. It is admitted that there was no consideration for these notes but the love and affection which the signer bore to his chidren, the payees, and it was believed his intention was to equalize his children, he having made unequal advancements to them, and particularly by having paid considerable debts for his son John. It was admitted that the intestate left a small real and personal estate, and that if these notes are set up as debts against the estate, there will be very little left for the widow.

The only question arising out of these facts is, whether these notes ought to be considered as debts against the estate of N.

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*Priester or not? Mr. Bellinger, in his learned and ingenious argument for the complainant, the widow, contended that this was a case of nudum pactum, there being no valuable consideration for them. But it does not appear to me that this is tenable. The notes import a consideration on the face of them, and even if considered as given merely for love and affection, that is a sufficient consideration to support them, for natural love and affection is sufficient to support a deed to stand seized to uses, even of land.

The next objection was that, as the notes were not to be delivered to the payees by Ulmer, to whom they were intrusted, until after the death of the maker of the notes, they could be considered merely as testamentary, and that the testator not being in extremis, they could not be considered as gifts donatio causa mortis.

Undoubtedly these notes cannot be considered as donatio causa mortis, for the reason assigned. But I am yet to learn why a person, owning property, may not place it in the hands of a third person, confidentially, to be delivered to a particular individual at his death. The act was perfect. He had signed the notes, and delivered them to a third person for the benefit of the payees. That person became a trustee for them. Deeds of gift of particular property to particular children have been found in the desk of a deceased person, and have been sustained. In the case of Duke v. Dyches, 2 Strob. Eq. 353, [note.] decided by the Circuit Court of Equity, and affirmed by the Court of Appeals, it was established that a deed of gift, to take effect after the death of the donor, is good; or, in other words, that it was a gift reserving a life estate to himself, a donation to A for life, remainder to B, after his death.

The cases on this subject are somewhat contradictory, or at least, very difficult to distinguish, and the difficulty is increased by some of the cases coming within the principle of donatio causa mortis, and others not.

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*In Drury v. Smith, 1 P. Wms. 405, where a man by parol disposed of a note of £100 to one to deliver over to his nephew: it was held a good donatio causa mortis if the testator died of that sickness. In Lawson v. Lawson, 1 P. Wms. 441, it was decided that a bill drawn by testator on his banker in favor of his wife, and delivered to her on his death bed, operated as an appointment of so much to her, to take effect after his death.

In Snelgrove v. Bailey, 3 Atk. 214, Lord Hardwicke decided that the delivery of a bond amounted to a gift of the debt causa mortis.

In Ward v. Turner, 2 Ves. sen. 443, Lord Hardwicke distinguished the case of a note from a bond, and decided that the delivery of receipts for South-Sea Annuities did not amount to a gift of the annuities themselves. The diversities of the cases appear from comparing Bibby v. Coulter (1791.) Ca. Temp. Hardw. 208, with Hill v. Chapman, 2 Bro. C. C. 612. In the former, notes of hand, not due, given by a man on his death bed, were held not to be a good donatio. In the latter case, a packet directed to the donee enclosing bank notes, to be delivered after death, was held a good delivery.

It was held in Tate v. Hilbert, 2 Ves. jun. 111, that donatio (causa mortis) may be good for a particular purpose. It was decided that an absolute gift of a check on a banker for £200: "Pay to self or bearer £200 (Signed) M. Bell," being to take effect immediately, cannot be considered as donatio causa mortis, and bill dismissed; as to a note of hand, delivered by the donor, it being doubted if an action would lie at law against the executor for want of consideration, the Court retained the bill. In the course of the case Lord Rosslyn considered the check on the banker and note of hand as immediate gifts —therefore, could not be sued for as legacies, and this Court could not give relief.

In Bryson v. Brownrig, 9 Ves. 1, the Master of the Rolls, Sir W. Grant, decided that a gift of two sums of money due on a mortgage, and on a bond, to a daughter, could not be sustained. This was a case of a gift inter

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vivos. But the gift *was not completed. It was merely a declaration of intention, and a separating the bond and the mortgage from the other papers of the donor, but no actual delivery to the daughter, or to any person for her. The Master of the Rolls said, it depended all on the mental intention, and this mere separation of the papers was not sufficient evidence. In Antrobus v. Smith, 12 Ves. 39, the master of the Rolls decided that a receipt for a subscription to a navigation, with an endorsement signed by the owner of it, declaring that he thereby assigned to his daughter A, all his interest, which paper was found among the papers of the executrix of the owner, could not be sustained as a gift inter vivos. There was no actual delivery nor any proof of any intention to part with the paper. He reserved it in his own hands during his whole life. The master of the Rolls said that where a voluntary conveyance kept by the party until his death, has been sustained, (against his last will and testament), it has been because the transaction was complete. It was meant as a gift but not complete, the property was not transferred by the act. There is no case where a party has been compelled to perfect a gift which in the mode of making it he left imperfect. There is a locus penitentiæ, as long as it is incomplete, and the donor in that case did repent and changed his mind on a sufficient motive. Where the gift is not testamentary, but is to operate inter vivos, executors cannot be called upon to do any act to perfect it.

In Cattein v. Missing, 1 Mad. R. 176, the Vice Chancellor, Sir Thomas Plumer, decided that a letter to executors expressing a consent by the testator that a sum of £500 was proper to be given to the daughter of a deceased husband, should not be considered a gift of so much in the hands of the executors, the gift not being perfected. It was a mere intention to give. In Baker v. Avant, 1 N. & McC. 218, it was decided that a parol gift is not a valid gift without delivery; and in McDowell ads. Murdock, 1 N. & McC. 237, [9 Am. Dec. 684,] it was decided that there is no difference in the delivery required in cases of donatio causa mortis, and other cas-

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es of parol gifts. In all such cases the *real question is whether the donor has parted with his dominion over the property or not.

To apply the doctrines and decisions to the case we are considering.

The father having made advances to one son, (John), was disposed to make advances to other children, and to effect this purpose he wrote and signed the notes of hand stated above. He delivered them to a third person for the benefit of the children, to whom he had made them payable, to be delivered to them after his death. It is not the case of a donatio causa mortis; for it was not a transaction in immediate expectation of death. It was a gift, but a gift to take effect at a future time. There was no condition attached —no control reserved over the notes, or the person to whom they were delivered. It was an absolute, unqualified gift, for the benefit of children, founded on a proper motive, to equalize all his children. Nothing remains to be perfected. Suits could be brought at law against the executors; but an account is also wanted to settle the estate. It appears to me that the gift was sufficiently perfected, though the enjoyment of the thing given was postponed, not indeed on the face of the notes, which have fixed times of payment, but from the admission of the parties. Creditors are not in question. It falls hard on the widow, for she has no benefit of advancements to children, brought into common stock, but she will have her dower.

It is ordered that the defendants do account for the estate of the intestate, and that in doing so, they pay and satisfy these notes, or give credit to the payees. Costs to be paid out of the estate.

The complainant appealed.

Bellinger, for appellant.

Patterson, contra.

Curia, per JOHNSON, J. The case stated in the decree of the Circuit Court, from which this is an appeal, is concisely this. The intestate, Nicholas Priester, having ad-

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vanced his children *in unequal portions, with the intention to equalize them after his death, made promissory notes to four of his children, differing in amount and in the time of payment, and delivered them to the defendant, James Ulmer, with directions that he should deliver them to the persons to whom they were made payable, after his (the intestate's) death. Ulmer retained the notes in his possession; and upon a bill for partition of his (the intestate's) estate, the questions discussed upon the argument here, are 1st. Whether the notes are binding as debts due by the intestate? And 2d. Whether they are valid as donatio causa mortis?

There is no rule better established than that a promise to pay money without consideration is nudum pactum, and void. There must be the do ut des, the facio ut facias, the facio ut des, or the do ut facias, of the civilians, to make a promise binding; nor is it helped by being in writing, unless by specialty, which itself imports a consideration. In Singleton vs. Bremar, Harp. 211, Judge Nott says, that "as between the original parties, a note without consideration is no more than a parol promise to pay money as a gift, which is not a ground of action; it is a nude pact, and void as between the original parties;" and he is sustained by the whole current of authorities. These positions are not directly questioned, but, it is said, that a pecuniary consideration is not necessary, and that a moral obligation is sufficient to support a promise: that the intestate was under a moral obligation to provide equally for all his children, and having made these notes with a view to that object, they are obligatory on his representatives. The general rule is, that the consideration to make a contract binding, must be either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. (Com. Dig. Action on the case upon Assumpsit, B. 1.) And on referring to the cases in which it has been held that a promise founded on a moral consideration has been sustained, it will be found that they have been founded on some right withheld, or wrong done to the party to whom the promise was made, and for which the rules

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of law did not provide a remedy; *as where one promises to pay a just debt barred by the statute of limitations; or a debt contracted during infancy; or a certificated bankrupt, who afterwards becomes able to pay a pre-existing debt: Ld. Ray. 389; Str. 690; 1 T. R. 648; or where a woman, after the death of her husband, promises to pay a bond given by her whilst covert, for money lent to a third person at her request. Lee vs. Muggeridge, 1 Eng. C. L. R. 14. But I have not been able to find any case or doctrine which maintains the position that the consideration of love and affection will support a promise. On the contrary, Comyn, in his treatise on contracts, vol. 1, page 16, says that it is not sufficient; and he remarks, with great reason, that although a gratuitous undertaking, seriously made, is certainly sufficient to form the basis of a moral or honorary engagement, and ought not to be receded from without adequate reasons, yet, in general, a person making such a promise, does not thereby intend to subject himself to legal responsibility, and the object of the law is rather to give effect to contracts founded on the exigencies of society, than to compel the execution of a voluntary engagement of a mere donation.

Perhaps no case could have occurred which would better illustrate the correctness of the rule than that now under consideration. The moral obligation to provide for the support and subsistence of a wife, is at least equal to that of providing equally for children. The law, in most cases which occur, makes a difference in her favor, by giving her one-third of the husband's estate after his death, whatever may be the number of his children; and it so happens, in this case, that if the amount of their notes are subtracted from this estate, it will leave a mere pittance to be distributed between the widow and the children; and the effect of the position attempted to be maintained, is to violate one rule of morality to preserve another. If, after the distribution of one-third of the estate to the widow, the estate had been sufficient to make up the shares of those not advanced, equal to those children who had been, the law would have done precisely what the intestate intended,

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by so *distributing the estate as to make them all equal, and it cannot be regarded as a breach of morality not to pay that which cannot be paid for want of assets, without violating a rule of morality as well as of law.

It is equally clear that these notes are not good as donatio causa mortis. To substantiate such a gift, it must be made, 1st. In the last illness of the donor, in apprehension of the approach of death. 2d. It must be a thing capable of delivery and which passes by it. 3d. There must be such a delivery as to transfer the possession. And 4th. It reverts to the donor if he survives. (Tol. Law of Ex'ors. 233). And it may be safely affirmed that no one of these circumstances enters into the gifts now claimed.

It does not appear that the intestate was sick at the time, nor did any other circumstance enter into the transaction, which shows that it was made in contemplation of approaching death within the meaning of the rule. The subject of the gift was a void

promise to pay after the death of the donor,—a thing having neither form, shape, or legal existence, incapable of actual delivery, or passing by delivery. It could not revert to the donor because the gift was, by the terms, not to take effect until after his death.

It is therefore ordered, adjudged and decreed, that so much of the decree of the Circuit Court as directs that the notes in question be paid out of the funds of the estate of the intestate, be reversed, and that the said notes be delivered up to be cancelled. In all other respects the said decree is affirmed.

O'NEALL and HARPER, JJ., concurred.

Decree modified.

Rich. Eq. Cas. *36

*POLLY CALHOUN, by Her Next Friend v. JAMES J. CALHOUN and DIXON THOMPSON.

(Columbia. May Term, 1831.)

[*Husband and Wife* ⇐179.]

A feme covert in relation to her separate estate is not to be regarded as a feme sole: she cannot, even with the consent of her trustee, alienate it, unless it be in pursuance of a power given to her by the deed or will creating it, or after an examination in Equity.(*a*)

[Ed. Note.—Cited in Dunn v. Dunn, 1 S. C. 354.

For other cases, see Husband and Wife, Cent. Dig. §§ 711, 939; Dec. Dig. ⇐179.]

[*Husband and Wife* ⇐179.]

The deed creating the wife's separate estate in this case contained the restriction, that it shall not be "subject to any alienation whatever in case of her marriage, and excluding forever, every claim or pretence of claim, by her husband to the said slaves:" which prevents her alienation under any circumstances from being legal.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 711; Dec. Dig. ⇐179.]

Before De Saussure, Ch., at Barnwell, February, 1831.

The original bill states that one Gideon Hagood, on the 10th December, 1804, by a deed duly executed, for certain considerations therein expressed, bargained, sold and delivered certain negro slaves in the said deed named, unto one Daniel Miller upon the following trusts, viz.: as to two of the said slaves, namely, Dinah and Mary, with their future issue, in trust for the complainant, then Polly McLewrath, and the heirs of her body, "but not subject to any alienation whatever in case of her marriage, and excluding forever every claim or pretence of claim by her husband to the said slaves."

That the complainant subsequently intermarried with the defendant James J. Calhoun; and the said slave Mary having had issue, a daughter, called Jemimah, worth about $325, her husband, the said James J. Calhoun, on the 29th November, 1827, combining with the defendant Dixon Thompson, and others, bargained and delivered the said last mentioned slave to the said Thompson, who had notice of the aforesaid deed, and who gives out that he will shortly go out of the State, whereby the complainant will be deprived of her interest in the said slave, who was conveyed to her own separate use as

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aforesaid. *That the said Daniel Miller has departed this life, and the complainant has no person to attend to her interest in the premises.

The prayer of the bill is that the defendants may answer: that the slave Jemimah may be declared to be the separate property of the complainant, and secured to her as such, &c., &c.

The answer of Dixon Thompson admits the execution of the deed from Gideon Hagood to Miller, in trust for the complainant, but states that he is informed and believes and hopes to prove that the same was fraudulent. The defendant also admits the purchase of the girl Jemimah for $275, and that he received for her the bill of sale of James J. and Polly Calhoun; that the purchase money was paid by him, and, as he has understood, was applied to debts contracted for the support of the complainant and her children. This defendant denies notice of the deed at the time he made the purchase, &c.

On the 31st December, 1829, William H. Hewlett, William H. Peyton, John Aaron, Matthew Beck and Wm. Kenady filed a cross bill against James B. Calhoun and wife, charging that at various times the complainants were induced to credit Jas. J. Calhoun and wife with different articles amounting to $; that subsequently they applied to Calhoun and wife for payment, who, for the purpose of paying of the amounts due to the complainants, contracted with and sold to one Dixon Thompson, on the 29th November, 1827, a negro girl named Jemimah, for $275, which, by the consent of Calhoun and wife, was applied to the payment of the complainants. That afterwards, the said Polly Calhoun, by her next friend, filed a bill against the said Dixon Thompson, and her husband, James J. Calhoun, setting forth that the said girl Jemimah was not liable to the payment of the said debts, but was part of a separate estate secured to the said Polly Calhoun by deed. That Polly Calhoun sued out a writ of ne exeat against Dixon Thompson; and the complainants, to secure their demands, became his sureties. That Dixon Thompson has since removed from

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this *State taking the girl Jemimah with him. The bill charges a confederacy between Calhoun and wife to defraud the complainants; that the articles furnished by the

(*a*) Reid v. Lamar, 1 Strob. Eq. 27.

complainants were absolutely necessary to support of Polly Calhoun and her children, without which they must have suffered, if not perished: that the separate estate of Polly Calhoun is liable for the payment of all such debts as were contracted for the support of those for whose benefit the said estate was created; that the defendants have no property except the separate property. The prayer of the bill is that the defendants may answer, and be compelled to pay the complainants their demands, &c.

Polly Calhoun, in her answer, to this bill, says, that she never did apply to either of the complainants for credit, either on her own responsibility, or on the faith of her separate estate: that being ignorant of the complainants' demands she cannot say whether they are just, or not, but insists that if the said accounts are just, they were contracted with her husband, and on his credit, and the complainants have no claim in justice for payment out of her separate property. This defendant admits, that she was prevailed on to sign the bill of sale of the girl Jemimah to Dixon Thompson under the following circumstances:—on the evening of the day on which the bill of sale was executed, Dixon Thompson, and the complainant, Matthew Beck, came to this defendant's house, and after a long conversation with her husband, at which she was not present, they came into the house, when Beck observed to this defendant, that he had brought Mr. Thompson to buy the girl Jemimah. This defendant objected on the ground that $275, the price proposed, was not a fair price, remarking that he, Mr. Beck himself had previously agreed to give $350 for the girl: Mr. Beck replied that he had then with him executions against her husband, and unless she signed the bill of sale, he would in the morning levy on the corn and other provisions on the place, and that nothing would be left for her and her family to live on: this defendant hesitated several hours, but seeing no alternative but to sign the bill of sale, or see herself and children

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*destitute, she at length, under the influence of the urgent entreaties of her husband, and the repeated threats of the complainant, Beck, that he would not leave her any thing to live on, was prevailed on to put her signature to the instrument: that at the time she signed the bill of sale, she told Mr. Thompson that his title to the negro would not be good, and she swears that had she been left to consult and exercise her own reason and judgment, she would not have signed the bill of sale: that she did not, in fact, agree to the sale: that she did not think the price a fair one: nor did she believe that in justice and equity the said girl ought to have been sold to pay the demands of the complainants. This defendant denies fraud, combination, &c.

The answer of James J. Calhoun to the said cross bill admits that he believes the accounts of the complainants are true, and were contracted by this defendant on his own credit without consulting his wife, and without any reference to her or to her separate property, and he does not believe that in the original entries, or other evidence of the said demands, the name of his wife is mentioned, and if it was, it was without his knowledge. This defendant also admits that he sold the girl Jemimah to Dixon Thompson, at the instance of the complainant, Beck; although he then thought and still thinks that the price stipulated was much below her real value: but believing that he was in the power of the complainants, in order to prevent his family from being stript and left destitute, he agreed to the sale, and prevailed on his wife to sign the bill of sale. This defendant further says that the complainant, Beck, and Dixon Thompson, were well apprized of the separate rights which the defendant's wife had to the negro both before and after the sale, and he believes that they calculated on avoiding all difficulties on that ground by carrying the girl out of the State, as Thompson was about to remove from the State. This defendant denies that it ever was his intention to commit a fraud on the complainants, either by imposing property on them to which he had not a title, or by contracting debts which he

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did not *mean to pay: that the complainants, before they trusted him, were well acquainted with his circumstances, and the sale of the girl was made on the urgent importunity and repeated threats of the complainant Beck; that when these debts were contracted he expected to have been allowed time to make payment, and he believes that he would have been able to have done so, without interfering with his wife's separate estate, further than hiring out the negroes. This defendant denies fraud, &c.

The case was heard before his honor Chancellor Harper, (February, 1830,) who ordered and decreed that so far as the defendant Dixon Thompson in his answer (to the original bill,) by way of pleading, relies on his being a purchaser for valuable consideration, without notice, the plea be over ruled. "And it is further ordered, that it be referred to the Commissioner to enquire and report, whether the sale of the slave mentioned, to the defendant, was the act of the complainant without the control of her husband; whether the said sale of the said slave was necessary to the support of the complainant and her children, and whether the proceeds of the sale, or what part of them were applied to such necessary support: reserving the equities that may arise on the coming in of such report."

Under this decree, evidence was taken before the Commissioner, who reported, "that he was inclined to believe that the complainant was in some measure influenced by her

husband to sign the bill of sale to Thompson for the negro in question, though she was placed under no actual restraint, but notwithstanding her unwillingness to sign the bill of sale, that he (the Commissioner,) was induced to think that the sale of the slave was necessary to the support of the complainant and her children, as it appeared they managed badly, and she and her children must have suffered, if they had not sold some of the property. That the evidence was satisfactory to him that they had no other property which could have been sold without selling their provisions. That the evidence went strongly, but not positively, to prove that a considerable portion of the

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*proceeds of the sale were applied to the payment of debts contracted for necessaries, to wit:—To Mr. Hewlett for 50 bushels corn, $50; to Mr. Beck for 50 bushels corn, $50; shoes, a saddle, &c., the amount of which did not appear; that $49 was borrowed by Polly Calhoun from Beck, but it did not appear how it was applied;—it was proved by one witness that Mrs. Calhoun said that she always intended that Mr. Kennedy should be paid."

To this report exceptions were filed on the part of Mrs. Calhoun, in substance negativing the report.

The case was heard before Chancellor De Saussure: whereupon his Honor ordered and decreed, that the bill of the complainant, Polly Calhoun, be dismissed. The Chancellor made no order on the cross bill.

From this decree the complainant, Polly Calhoun, appealed, and moved the Court of Appeals to reverse or reform the same on the following grounds:

1. Because the complainant, Mrs. Calhoun, had no power to sell the slave in question.

2d. Because the sale to Thompson was not the voluntary act of Mrs. Calhoun.

3d. Because the sale of the slave was not necessary to the support of Mrs. Calhoun and her children.

4th. Because the proceeds of the sale were not applied to such necessary report.

5th. Because the decree is contrary to evidence, law, equity, and good conscience.

Patterson, for appellant.

Bonsall, contra.

The opinion of the Court was delivered by

O'NEALL, J. At common law a feme covert was regarded as legally incapable of making any contract which would bind her. This disability was intended to be her protection. It was founded on the notion that her existence was legally merged in her husband.

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They were regarded in law as one *person. She was supposed to have no will of her own, and hence was incapable of charging herself by contract. Neither could she have a personal estate which did not vest in the husband jure mariti: from her real estate, he was during coverture entitled to the receipt of the rents, issues, and profits, and after her death he was entitled, if there was issue of the marriage born alive, to hold during his life, by the curtesy, the whole of her land, of which he had actual possession during the coverture. In the progress of time, and out of the refinements, and perhaps the necessities of society, it was permitted in Equity that the wife should have both real and personal estate separate from her husband. Incidental to this right of property, it was held, with different modifications at different times, that she was as to it, a feme sole, with power to charge or dispose of it. Fettiplace vs. Gorges, 1 Ves. jun. 48. From the English cases, it may be deduced, as a general rule, that a feme covert, unless restrained by the deed of settlement, had the right to dispose of, or charge her separate personal estate, as a feme sole; for in Pybus vs. Smith, 1 Ves. Jun. 193, Lord Chancellor Thurlow states the rule to be that "she (a feme covert,) is sole, so far as she has a power of appointment, but with any limitations in the deed giving her that power." In Jackson vs. Hobhouse, 2 Meriv. 483, where, by a settlement, the interest of a sum of money was to be received to the separate use of the wife, with a proviso against the wife's assigning or otherwise disposing of the interest in anticipation; the wife and her husband in order to obtain an annuity, assigned the future interest, and the Lord Chancellor Eldon held that the clause against an assignment in anticipation was good, and restricted the power of the wife over her separate estate. He says "it is now too late to contend against the validity of a clause in restraint of anticipation." In Jacques vs. The Methodist Episcopal Church, 17 Johns. R. 548, the Court of Errors of the State of New-York, held that a feme covert, with respect to her separate property, was to be regarded in a Court of Equity as a feme sole, and might

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dispose of it without the *assent and concurrence of her trustee, unless she was specially restrained by the instrument under which she acquired her separate estate. In the same case, 3 Johns. Ch. 113, Chancellor Kent, after a full review, and elaborate examination of all the cases, comes to the conclusion, that a feme covert, in Equity, as to her separate estate, is to be regarded as a feme sole, sub modo, or to the extent of the power clearly given by the settlement. In Ewing vs. Smith, 3 Des. 417, [5 Am. Dec. 557,] a majority of the Court of Appeals in Equity in this State held, "that a married woman who has a separate estate cannot part with it in any way without an examination; that as by marriage she loses all the powers of a feme sole, a separate estate does not confer all those powers on her; and that therefore, the power

of appointing such estate, must be expressly given, and the mode prescribed, be strictly pursued." Since this decision, the rule has been considered settled as laid down in it, and if I was disposed to doubt its correctness, I should not feel at liberty to lay down another. But I concur fully in its wisdom. To permit any other, would be to defeat every separate estate; for, to the kindness, force, or a necessity created by the acts of an improvident husband, most women would at some period be compelled to yield up the property which the kind and prudent care of parents or friends, had intended as a permanent provision for herself. The rule laid down in Ewing vs. Smith, would dispose of this case; for the wife in the deed from which her separate estate is derived, has no power of disposition, and her alienation has been without examination in the Court of Equity. If the deed had merely given her a separate estate without restriction, and she had voluntarily alienated for the necessary support of herself and her children, her sale might have been sustained, for in that case, the Court of Equity would have permitted the sale to have been made, if it had been applied to for that purpose; and acting upon the Equity maxim, that it considers that as done which ought to have been done, the sale would have been confirmed. In the deed in this case, there is, however, an express re-

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striction upon the power of the wife; *after conveying the property in trust for the complainant, and the heirs of her body, the deed provides that it shall not be "subject to any alienation whatever, in case of her marriage, and excluding forever every claim, or pretence of claim, by her husband to the said slaves." This, according to the English cases, and the decision of the New-York Court of Errors in the case of Jaques vs. The Methodist Episcopal Church, is such a restraint upon the power of the wife over her separate property as would prevent her alienation from taking effect. If this restraint had been imposed on a donee not laboring under any legal disability, it would, even then, prevent an alienation; for unless contrary to some rule of law, a donor has the right to impose such limitations and restrictions on his gift as he may think proper. In the case of a feme covert, who, at common law, is considered as incompetent to do any legal act of alienation, it cannot be that she would have greater powers than one who is under no legal disability. But it is said, that the sale was necessary to her support, and hence it ought to be sustained. The Court of Equity has no power either to make or confirm a sale of a separate estate, which, by the deed creating it, is expressly prohibited from being sold. On the facts, however, I should be disposed to think (if this restriction in the deed did not exist) that the sale could not be sustained. In such a case, the sale must have been the voluntary act of the wife, and for such purposes as the Court, on examination, would have ordered to be made. In this instance it appears that the wife, by the persuasions of the husband and the threats of Beck, did sign the bill of sale. It is true the Commissioner and Chancellor both conclude she was under no actual constraint—by which I understand there was no legal duress. This, however, was not necessary to be shown, to avoid her acts. In law she is always, in the presence of her husband, supposed to act by his compulsion, and her act is, therefore, considered as his. It was for those undertaking to sustain the sale to show it to be the result of her own will. If it arose from the persuasion of the husband, who has been pronounced by the Chancellor

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to be of *that class "who are described as worse than an heathen," it was his sale, and not hers; but when we add to this that the officer of the law was saying to her, "If you do not sign the bill of sale, I will levy executions on your cow and horse," it would surely be asking a great deal to require a Court to pronounce a sale so made by a feme covert to be her own voluntary act. The propriety of the sale, too, has not been made out: for all the debts, to pay which the slave was sold, were debts contracted by the husband. It is possible that they were for supplies for his family; but the credit was given to him, and not to his wife, and in such a case it would be in vain to ask an order for the sale of the wife's separate estate from the Court of Equity. The report of the Commissioner is no answer to the inquiries which Chancellor Harper directed him to make. It was his business to examine as to the points submitted to him, and give the Chancellor the benfit of his judgment upon them. If his report can be regarded as deciding any thing, it must, instead of being against the complainant, be considered in her favour: 1st. In deciding that the bill of sale was executed unwillingly by her; 2d. That the proceeds of the sale were applied to the payment of debts contracted by the husband before the sale; and 3d. That a part of those debts were not necessary to the support of the complainant.

In every point of view, I think the sale of James J. Calhoun and wife, of the slave Jemimah, to Dixon Thompson, the defendant, cannot be sustained. It is, therefore, ordered and decreed, that the decree of Chancellor De Saussure be reversed: that the defendant, Dixon Thompson, do deliver up the slave Jemimah, and her child or children (if any), and account for her hire to such trustee as may be appointed by the Court of Equity for Barnwell District, for the complainant, and that the said Dixon Thompson do pay the costs of this suit.

JOHNSON and HARPER, JJ., concurred.

Decree reversed.

Rich. Eq. Cas. *46

*THOMAS PATTON v. ELIZABETH DAVIS.

(Columbia. May Term, 1831.)

[*Judgment* ⟸405.]

Equity will not relieve against a judgment at law on an administration bond founded on a decree of the Ordinary, when the administrator might have availed himself of the grounds for relief before the Ordinary, or on an appeal to the common pleas, but neglected to do so.(*a*)

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 767; Dec. Dig. ⟸405.]

[*Executors and Administrators* ⟸513.]

The plea of plene administravit will not avail an administrator when he has notice of the existence of the demand.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2267–2291; Dec. Dig. ⟸513.]

Halstead Davis died intestate, and administration of his estate was granted to John Patton, who entered into a verbal agreement with the defendant, the widow of the intestate, to let her have a small tract of land, part of a larger, at a fixed price per acre, in satisfaction of a balance due to her on account of her distributive share of the estate, and she gave him a receipt, in which she acknowledged to have received in full the balance due her. In pursuance of this agreement, she built a dwelling-house convenient to a spring within the boundaries designated by the agreement. John Patton, died, however without having made her titles, and administration of his estate, as well as administration de bonis non of Halstead Davis's estate, was granted to the complainant. To ascertain the precise metes and bounds, and quantity of land, the complainant procured a survey, when it was found to contain seventy-six acres, and upon his accounting before the Ordinary for John Patton's administration of Davis's estate, (for none of the assets of that estate had come into his hands,) it was ascertained that the balance due to the defendant was only $165.-40, about one-half of the value of the land, estimated at the price agreed on per acre. The complainant, thereupon, procured another survey to be made, by which he laid off to the defendant thirty-seven acres, excluding entirely the house and the spring. She declined accepting this, and summoned the

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complainant to appear *before the Ordinary, who neglected to attend the final hearing, and she obtained a decree against him for the balance due—the Ordinary, notwithstanding he had fully administered the assets of John Patton's estate, refusing to credit him with the value of the land. From this decree the complainant did not appeal, and defendant, some time after, brought an action at law on his administration bond, and obtained a judgment for the amount. The object of this bill was to restrain the defendant from proceeding on her judgment at law, and to enforce the specific performance of the agreement for the sale of the land. The Circuit Court dismissed the complainant's bill, and from that judgment he appealed.

Mills, Gregg, for appellant.

Williams, contra.

The opinion of the Court was delivered by

JOHNSON, J. The judgment of the Law Court is decisive of the legal liability of the complainant for the demand of the defendant, from which he now seeks to be relieved here, on the grounds:

1st. Because John Patton was, by mistake, omitted to be credited, in the account before the Ordinary, with the defendant's receipt for the full amount due her in land.

2d. Because the complainant himself is charged, in the account before the Ordinary, as administrator de bonis non of Halstead Davis, with the funds of the estate which went into the hands of John Davis, and having fully administered John Davis's estate, it is unjust that he should pay it out of his own pocket.

It may be remarked of both these grounds, that the facts out of which they arise existed, and were known to the complainant, and in his power, at and before the account before the Ordinary, and were matters properly appertaining to the account. He might have availed himself of them then, and if the Ordinary had disregarded them, it was his privilege to have appealed from his judgment to the Court of Law. It is said, in

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*the argument, that complainant had no right to appeal from his judgment to the Court of Law, and that Equity alone could relieve; and the case of Wallis v. Gill, 3 McC. 475, is relied on, in support of this position. In the case of Burns v. Ford, (1 Bail., 507,) I had occasion to remark that the rule was laid down too broadly in Wallis v. Gill, and that the Court of Law was bound to entertain appeals from the Ordinary, on all questions of common law cognizance which could be presented in such form that the Law Court could determine them in the ordinary forms. The grounds of Equity now raised grow out of the questions of fact: 1st. Whether John Patton or complainant received the funds of the estate of Halstead Davis, and 2d. Whether they were paid over to defendant? And surely there is nothing so complex in these matters as to prevent their being reduced to the forms of issues at common law. Taking the case, as made by the defendant, his liability has grown out of his own negligence, in not attending the final account before the Ordinary, and appealing

(*a*) By the Act of 1839, the appeal, on matters of account, is to the Court of Equity, Clarke v. West, 2 Rich. 314.

from his judgment to the Law Court: and Equity will not relieve against it. The facts show, I think, very clearly, that the funds of the estate of Halstead Davis went into the hands of John Patton, and not the complainant, and upon the first view of the case I was disposed to think it one of great hardship, as the estate of John Patton is said to be insolvent. But on more reflection that impression is in a good degree removed. The defendant was perfectly satisfied with the arrangement she had made with John Patton, by which she was to obtain the whole amount due her in land, and the complainant himself prevented that from taking effect, by taking away the house she had built and the land she had cleared, and his subsequent offer to let her have it, after she had been obliged to purchase elsewhere, was a mockery of justice. As the administrator de bonis non of the estate of Halstead Davis, and the administrator of John Patton, the first administrator, he was bound to know the state of the accounts between the two estates, and when he had determined to unsettle the arrangement by which she was to get the land,

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he *ought to have provided for the payment of the debt due the defendant. But for the negligence of the complainant, the case might have assumed a different form. I incline to think, however, that substantial justice has been done. The motion to reverse the decree of the Circuit Court is dismissed, and the same is affirmed.

O'NEALL and HARPER, JJ., concurred.

Decree affirmed.

Rich. Eq. Cas. 49

CLEMENT D. WALLACE and Others v. E. A. ELLERBE and M. A. ELLERBE.

(Columbia. May Term, 1831.)

[*Executors and Administrators* ⟸497.]

An administrator who has neglected to make annual returns, and thereby forfeited his commissions allowed in ordinary cases, cannot maintain an action to recover compensation for extraordinary trouble in the course of his administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2117; Dec. Dig. ⟸497.]

Before Johnston, Ch., at Cheraw, February, 1831.

Clement D. Wallace, the complainant, was the administrator of Thomas F. Ellerbe, deceased, and filed this bill to have a settlement of the affairs of the estate, against the distributees of it. He had made no regular returns to the Ordinary, and had thereby forfeited his commissions. But he had had extraordinary trouble in the management of the estate, and defending it during a course of protracted litigation. Mr Blanding, therefore, submitted a motion, to be allowed to bring an action, by way of issue, in the Court of Common Pleas, for such services. The Chancellor refused the motion, on the ground that the forfeiture of his regular commissions, for not accounting to the Ordinary, included the forfeiture of any extra compensation to be assessed by a jury. From this decision the complainant

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*appealed, and moved for a reversal of the decision, and for an order directing such issue at law, on the grounds, that the forfeiture only extends to the regular commissions of five per cent., and that, if the administrator can show before the jury that he is entitled to any compensation for his care, trouble and pains, beyond that sum, he should be permitted to show it and recover it, although he may have made no returns before the Court of Ordinary.

Blanding for motion.

——— contra.

The opinion of the Court was delivered by

JOHNSON, J. Upon the first impression of this case, I was very much inclined to think that the plaintiff was entitled to sue under the Act of 1745, P. L., 202, (3 Stat. 668,) for the additional compensation for extraordinary care and trouble in the management of the intestate's estate, notwithstanding he had forfeited his ordinary commissions by neglecting to make regular annual returns to the Ordinary, of his receipts and disbursements; but upon more reflection I am satisfied that the forfeiture extends to both.

The Act before referred to provides, that if an executor or administrator shall have had extraordinary trouble in the management of estates under their care, and shall not be satisfied with the commissions allowed by that Act, (which, by reference to 1 Brev. Dig. 392, Guardian and Ward, sec. 2, will be found to be five per cent, on monies received and paid away, for their care, trouble, and attendance in the discharge of their duties,) that they should be at liberty to bring an action in the Court of Common Pleas for their said services, in which they are entitled to recover a sum not exceeding five per cent., in addition to the sums allowed by that Act. The Act of 1789, P. L. 495, (5 Stat. 112,) re-enacts so much of the clause of the Act of 1745 as allows the 5 per cent., (2½ for receiving and 2½ for paying away money,) in the terms of that Act; and it

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*provides, that if the executor or administrator shall neglect to make regular annual returns to the Ordinary, of his receipts and disbursements, "he shall not be entitled to any commissions for his trouble in the management of the said estate;" and upon look-

ing through both acts, it will be found that the term commissions is not used in any instance as designating the character of the compensation. In ordinary cases, the executor or administrator, for his care, trouble and attendance in the management of the estate, is entitled, in the words of the Act, to receive or retain in his hands 2½ per cent. on all monies received, and 2½ per cent. for paying away the same. When he has had extraordinary trouble, and is not satisfied with this allowance, he is entitled to bring his action in the Common Pleas, and may recover a sum not exceeding five per cent., in addition to the sum allowed in ordinary cases. The nature of the services in both instances are the same, differing only in the degree; the terms used to designate them are substantially the same, the mode of compensation (a per centage on the amount received and paid away) is the same, and all the reasons which operate in the application of the term commissions in the clause imposing the forfeiture, apply as forcibly in the one case as the other. According to the Acts, therefore, the compensation for extraordinary trouble, as well as ordinary, is embraced in the forfeiture for neglecting to make the returns.

I think, too, that it falls within the policy of the law. Every one who has had anything to do with the settlement of the accounts of executors and administrators must appreciate the importance and necessity of regular returns and accounts, and the great want of attention to it, notwithstanding this forfeiture; and but for this, the probability is that no accounts ever would be rendered until a final settlement, when many or all other means of detecting error would be lost, and it was fit that it should be enforced by some sanction. That provided by the Act is a loss of compensation for services, and there is no reason why it should not extend

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to extraordinary, as well as ordinary *cases; for the more extraordinary and complicated the affairs of an estate are, the greater necessity for regular returns.

The motion is therefore refused, and the order of the Circuit Court affirmed.

O'NEALL and HARPER, JJ., concurred.

Order affirmed.

Rich. Eq. Cas. 52

WM. P. CORBIN and Wife v. A. D. JONES et al.

(Columbia, May Term, 1831.)

[*Executors and Administrators* ⟸500.]

By making a return to the Ordinary within one year after the granting of administration, the administrator of an administrator may entitle his intestate's estate to commissions for the transactions of one year preceding the intestate's death.

[Ed. Note.—Cited in Lay v. Lay, 10 S. C. 221. For other cases, see Executors and Administrators, Cent. Dig. § 2135; Dec. Dig. ⟸500.]

This case will be sufficiently understood from the opinion delivered in the Court of Appeals, which is as follows:

HARPER, J. We agree with the Chancellor on the principles of his decree, which are the subject of appeal. The Act of 1789 declares that executors and administrators shall annually, "at the first Court to be held after the first day of January, render to the Court of the County, or Ordinary of the District," an account, on oath, and if he "shall neglect to render such annual accounts, he shall not be entitled to any commissions." A distinct clause gives to executors and administrators a compensation, not exceeding fifty shillings in the hundred pounds, on all monies received and paid away. It is not a condition precedent to the allowing of commissions, that accounts shall be rendered: they are allowed on all sums received and paid away, subject only to be forfeited if he shall neglect to render accounts. In the case supposed by the Chancellor, where "an executor or administrator conducts large pecuniary concerns of an estate, receives and pays

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away considerable sums of money, *enters them regularly in his book, and dies at or near the end of the year," it cannot be said that he has neglected to return his account. The time for rendering the annual account had not arrived, and there was no neglect. From the necessity of the thing, the account can then be only rendered by his personal representative. As County Courts are no longer in existence, and as there are no stated times for holding the Court of Ordinary, the direction of the Act, that the account shall be rendered at the first Court to be held after the first day of January, can no longer have any effect; and it has long been settled in practice, that returns may be made at any time of the year. It has been also settled by repeated decisions, that if an executor or administrator makes returns for some years, and neglects to do so for others, he shall be allowed commissions for the years for which he makes returns, and for those only. It follows, that however long he may have neglected to render accounts, if he thinks proper at last to do so, he will be allowed commissions on the amounts received and paid away for one year preceding the rendering of such account. Up to the time of his death, if John Howell had thought proper to make a return, he would have had commissions for one year preceding. And what John Howell, at the time of his death, might do, his administrator, representing him, had a right to do. As to the

length of time within which an administrator of an administrator may, by making a return, entitle his intestate's estate to commissions, that I think must be determined by the clause of the Act which provides that executors and administrators "shall be allowed twelve months to ascertain the debts due to and from the intestate, to be computed from the probate of the will or granting of letters of administration." Of necessity, some time must be allowed, and there is no other limit than this. We think, then, that by making a return within one year after the probate or the granting of administration, the administrator of an administrator may entitle his intestate's estate to commissions for the transactions of one year preceding the intestate's death. It does not appear to us at what time administration

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*was granted to the defendant, Jesse M. Howell. The return was made by him within one year and one month after his intestate's death; the decree states the intestate to have died in October, 1825, and the return to have been made in November, 1826. It is very improbable, and barely possible, that administration may have been taken out in less than a month after his death. I must suppose this matter to have appeared to the Chancellor. The motion is, therefore, dismissed.

JOHNSON and O'NEALL, JJ., concurred.

Appeal dismissed.

Rich. Eq. Cas. 54

JOHN S. EDWARDS v. SUSAN SPEARMAN and Others.

(Columbia. May Term, 1831.)

[*Guardian and Ward* ⇐71.]

Husband and wife were appointed guardians of two infant children by the Court of Equity:—*Held*, that after the death of the husband, the wife could not be made answerable for the money of the wards which came into the husband's hands, and was wasted by him during the coverture. Such an appointment was in effect an appointment of the husband during the coverture, and of the wife, if she should survive him.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 317; Dec. Dig. ⇐71.]

Before De Saussure, Ch., at Newberry, July, 1829.

The case came before the Court on the report of the Commissioner and exceptions thereto.

De Saussure, Ch. The bill was filed on the ground of quia timet.

The complainant, who was surety in the guardianship bond of Edmund Spearman and Susan his wife, guardians of Isabella and Ann Abney, filed his bill in December, 1827, for an account of the estate of the wards, and of the application of the proceeds by the guardians, and he seeks to be indemnified and protected against his liability. The defend-

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ant, Mrs. Spearman, *widow of John Abney, and afterwards of Edmund Spearman, in her answer, admits the guardianship and the bond to the Commissioner, as charged in the bill. She admits that her husband, Edmund Spearman, received considerable sums of money as guardian of Isabella and Ann Abney, but she does not know the amount. She, the defendant, also denies, that during the life of Edmund Spearman she received any money on account of the said minors: but that since his death, an agent of hers received the sum of $1050 from the Sheriff on account of the minors, and has paid her only one-third part thereof, refusing to pay her more, as her letters of guardianship were revoked. The answer states, that on the death of Edmund Spearman, in the year 1827, Robert Floyd administered on his estate. She relies on her being a married woman when she signed the bond of guardianship. That she had been appointed testamentary guardian of her daughters Isabella and Ann Abney, by the will of their father, John Abney; and that she is not liable to account till they come of age. Defendant intended to have removed out of the State, but has changed her intention since she learnt that the complainant sought to make her liable for monies received by Edmund Spearman in his life time. It appears that a short time prior to the filing the bill, Robert Floyd, the administrator of Edmund Spearman, had filed a petition, praying that the letters of guardianship granted to Mrs. Susan Spearman, of the minors Isabel and Ann Abney, should be revoked, which, it is stated to the Court, was ordered; and that the Commissioner should examine the accounts of the guardianship, and report upon the same to the Court. In pursuance of this order, the Commissioner made a very full and clear report, on the 14th July, 1828, by which he stated the amount due by the estate of Mr. Edmund Spearman, to his wards, Isabella and Ann Abney, which report was confirmed at the same Court; but as it was uncertain whether the estate of Edmund Spearman was sufficient to pay the bond debts, it was ordered that the case be referred to the Commissioner to ascertain and report the amount

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of assets in the hands of the *administrator, and what proportion thereof should be applied, in the due course of administration, to the payment of the amount which said Edmund was in arrear to the said wards after payment of costs. In pursuance of this order, the Commissioner made a full and able report in February, 1829, in which he stated that the estate of Edmund Spearman was insolvent, and the simple contract debts could not be paid at all, nor the creditors of high

degree only partially. The whole amount of the assets in the hands of the administrator, to be applied to the payment of the bond debts, was $7,929.72. That there was due to Isabella and Ann Abney, $5,280.68, and that their dividend of the assets would amount to $4,388.70. The Commissioner also submitted several questions for the decision of the Court. 1st. As to the debt due to Catlet Conner, in which the Court agrees with the Commissioner in the view he takes, and confirms the report. 2d. As to the bond creditors who did not attend the reference, but sent their demands, the Court agrees with the Commissioner on this point, and confirms the report. 3d. The liability of Mrs. Spearman, one of the defendants, to whose guardianship bond the complainant Edwards was surety. As Mr. Spearman's estate was unable to pay the full amount due the wards, the complainant, who was one of the sureties in the guardianship bond of Mr. and Mrs. Spearman, contends that Mrs. Spearman's property is to be the first resorted to, to make up the defect before he is called on.

The question is, whether the mother of the wards being a married woman at the time of the assumption of the guardianship, and signing the bond, is liable on that bond. The Commissioner did not consider this question as one submitted to him by the order of reference, and declined deciding on it. But he reported, that if the Court should be of the opinion, that Mrs. Spearman was liable, then the sum in which she would be responsible would be $891.97, with interest from 14th February, 1829. But if she was not liable, then the same amount with interest from the same time would be due, and payable by the complainant, John S. Edwards, and his co-

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security, Robert Plant. *On the petition filed ex parte Robert Floyd, which was referred to the Commissioner, he made a similar Report, as in Edwards v. Spearman, to which he refers. To the above mentioned report, as to Mr. Spearman's estate, there were filed three exceptions. The first of these was withdrawn at the hearing of the case. The second exception the Commissioner overruled, because the subject of it had never been before him, in which he was correct. The third exception of Floyd, administrator, v. Spearman, was "because the Commissioner had not allowed Robert Floyd, (as a deduction payable to the Miss Abneys,) the sum of $209, already paid for them by him to Landrum, as appeared by the evidence annexed to the report, ex parte Robert Floyd." The Commissioner examined the grounds of this exception, and reports very fully on it. He sustains this exception to his report, and I think has given satisfactory reasons for doing so. I, therefore, concur with him. There was another exception of Robert Floyd as to interest, which was abandoned. The only point which remains for the consideration of the Court, is whether Mrs. Spearman is liable, on her guardianship bond, for the balance due to her daughters, the Miss Abneys, as above stated. It will be remembered that she and her second husband, Mr. Spearman, became, on their own application, guardians of her daughters by the order of the Court, (from whom it was kept out of view that she was guardian under the will of her first husband.) and that she joined in the guardian ship bond with her husband. It has been clearly ascertained by the report of the Commissioner, that the guardians are liable on the bond in a certain sum of money. Mr. Spearman's estate is reported to be sufficient to pay all the debts, except a certain reported balance; which must be paid either by Mrs. Spearman, the other guardian, or by the solvent surety in the bond.

There is no doubt where the justice lies. The guardians ought to be made liable before the surety is called upon to pay his or her defaults. An objection, however, is made on her behalf, that she was a feme covert at the

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time she signed the *bond, and therefore is not bound thereby. The point was well and warmly argued by the counsel, and I acknowledge that I have hesitated a good deal on the subject; the strong leaning is to make this lady liable in preference to the surety of herself and her late husband. But I fear the rule of law is too strong—she was under coverture, and the law presumes that she is under the coercion of her husband, and therefore will not allow her to bind herself by a bond, or to make contracts. This will be a good reason for not appointing a mother guardian of her children, who has married a second time. But I do not perceive that she can be made liable according to the legal doctrine. The mind is somewhat relieved from its reluctance to make the surety liable, because it does not appear that the defendant, Mrs. Spearman, received any of the funds of the estate of Abney. It appears that her husband, Mr. Spearman, received them, and the surety, Edwards, is clearly liable for his default, which has been established. The money in the hands of the agent of Mrs. Spearman, must however be first collected.

It is, therefore, ordered and decreed, that the Commissioner's report be confirmed, except so far as the same has been modified by this decree, and that so much of the debt due to the Miss Abneys be paid as they are entitled to proportionably with the other creditors out of the estate of Edmund Spearman as reported by the Commissioner; and that John S. Edwards, the surety who came into this Court by his bill, do pay the balance due to the Miss Abneys, as reported, and not otherwise provided for, and that the costs of suit be paid by Mrs. Spearman and Mr. Robert Floyd.

The complainant appealed on the following grounds, viz:

1. Because the amounts paid to Landrum ought not to have been allowed against the estate.

2. Because Mrs. Spearman ought to have been decreed to be liable on the guardianship bond before any resort could be had against the sureties.

Caldwell, for appellant.

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*The opinion of the Court was delivered by

HARPER, J. The only point argued on the appeal respected the liability of the defendant, Mrs. Spearman, for the acts of her husband, during the coverture, in wasting the property of their wards. It is certain that her guardianship bond, signed by her, together with her husband and the sureties, as was observed by Lord Redesdale, in the case of Adair v. Shaw, 1 Sch. and Lef., 284, with respect to an administration bond of a feme covert, was nothing. It was void at law, and a Court of Equity would charge her no farther than she would be chargeable on its own principles without it. I have found no authority directly applicable to the subject. It is settled, that if a feme executrix, or administratrix, marry, she is liable for any devastavit the husband may afterwards commit; it is said, because it was her folly to take a husband who would so misconduct himself. So, I suppose, it would be, upon like reason, if a woman, being guardian, should marry, and thus put into the husband's hands power to waste the ward's estate. In the case of Beynon v. Gollins, as reported 2 Bro. Ch. Rep., 323, it was held, that where administration had been granted to the wife during the marriage, she was not liable for the devastavit of the husband, after his death. Lord Thurlow lays it down, that the action for devastavit would not lie at law, where the executorship was taken in the name of the wife, during the coverture, if she renounced upon her husband's death. In the case of Adair v. Shaw, before referred to, however, Lord Redesdale declares the case of Beynon v. Gollins to have been wrongly reported, and that the point represented to have been decided in Brown did not arise in the case. In that case, administration was taken out in the name of the wife, during the coverture. The principal question in the case was, whether the representatives of the husband were liable in equity for his devastavit, no action having been brought against him in his life time, and being gone at law upon his death. Another question was, whether the wife was liable for the husband's devastavit, and she was held to be so liable

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to creditors, inas*much as the action at law remained against her, in favour of creditors. The Chancellor intimates an opinion that she would be liable also to legatees, but determined nothing on that point, the claim not being pressed. The capacity of the wife to take administration, apart from her husband, seems to have been borrowed by the ecclesiastical Courts from the civil, contrary to the general rule of the common law, which merges the separate existence of the wife in that of the husband. I have met with no decision respecting the wife's liability, in the case of a joint administration of herself and her husband: but in such case it may be supposed that she would be liable, at least to creditors, as the action at law would survive against her. The rules respecting guardians, however, are not taken from the ecclesiastical Courts. I am not aware how the ward could have any proceeding at law, against the wife surviving in such case, for the waste of the husband during the coverture. She was not capable of committing waste, or rendering herself responsible to an action. The bond, as I before observed, is a nullity, so far as she is concerned. Equity does, for some purposes, regard the wife as a separate person, and guardianship has been committed to the wife alone. But in such case the Court will restrain the husband from interfering, and will protect the wife in disposing of the person and the property of the ward. It will order money to be paid her on her own separate receipt. Wallis v. Campbell, 13 Ves., 516. In such case Equity would charge her for her own waste. But in the case of a joint appointment with her husband, she can exercise no power of disposition. Here her separate existence must be merged in the husband. I can conceive of no purpose or effect of such an appointment but to give the guardianship to the husband during the marriage, and to the wife if she shall survive him. And so I think the undertaking of the sureties must be regarded. They undertake for the conduct of the husband during his life, and for that of the wife if she shall survive. Apart from the hardship which seems to be imposed on the sureties in the present case, it would be plainly inequita-

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ble, on general principles, *to make the wife liable for mismanagement to which she did not contribute, and could not have controlled. It may be said that it was her folly to join her husband in applying for the appointment. But the presumption of the law will be found fact in many instances, that she acted under the influence and control of her husband.

It was argued that Mrs. Spearman was appointed testamentary guardian of her children, by the will of her former husband, and that the rule applies to her which would apply to a feme executrix or administratrix marrying. This fact is mentioned by the defendant in her answer, and is made no part of the complainant's case. It does not appear from the decree that the point was made to the Court below. It does not appear that she ever acted under the appointment of the will. I give no opinion as to what her liability would have been, if she had assumed

and acted under the appointment of the will, which she put it into his power to do by marrying. The appointment was made by the Court, without reference to the will, which, it appears by the decree, was not brought to the view of the Court. The guardianship has since been revoked, and the estate put out of the defendant's power. For these reasons, we must regard it as an original appointment by the Court, and leave out of question the appointment of the will. The decree must, therefore, be affirmed, and the motion dismissed.

JOHNSON and O'NEALL, JJ., concurred.

Appeal dismissed.

Rich. Eq. Cas. *62

*ELIZABETH OLIVER v. BROWN et al., Administrators of McDonald.

(Columbia. May Term, 1831.)

[*Bills and Notes* ⇐423.]

Indorser of a promissory note bound by his promise to pay it, notwithstanding no demand had been made on the maker, if he knew at the time that no such demand had been made.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1213; Dec. Dig. ⇐423.]

On a bill filed to marshal the assets of the estate of the defendant's intestate, to which his creditors were made parties, the complainant, on a reference before the Commissioner, exhibited, as a demand against the estate, a promissory note, drawn by one Elijah Perry, payable to the intestate, for $300. The intestate had indorsed the note to one C. Morgan, before it became due, who transferred it to one Cloud, and he to the complainant, by delivery after it became due. No demand had been made on Perry, the maker, who was in doubtful circumstances; but Cloud, in whose possession the complainant had left it for collection, mentioned to the intestate that it was in his hands. Intestate said "that the note would be good, and that he would lift it and give his own in the place of it at any time, and intimated that he could save himself out of the maker." In consequence of this promise, no other steps were then taken, and intestate died shortly after, and never gave another note.

The Commissioner rejected this demand, on the ground of the neglect to demand payment of the maker and give notice to the intestate, and an exception to his report was dismissed by the Circuit Court, and from that judgment the complainant appealed, on the ground that the intestate was bound by his promise to pay the note.

The opinion of the Court was delivered by

JOHNSON, J. In order to charge the indorser of a promissory note, at the suit of the indorsee, the latter is bound to demand payment of the maker, on its falling due, if it is within his power, and within a reasona-

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ble time, controlled in some degree *by circumstances, to give notice of the non-payment to the indorser. This obligation is not imposed by any express stipulation between the parties, but arises, by legal implication, out of the contract of indorsement. Hence it is clear that the parties may, by express contract, vary or dispense with it, as they think fit. Thus the indorser may stipulate that the indorsee shall not demand payment within a year after the note falls due, and that he will be bound, if notice is given him within a year thereafter. In short, he may prescribe to the indorsee what degree of diligence shall be sufficient to charge himself, and it is only in the absence of any express agreement of this sort, that the law steps in to prescribe a rule of conduct. He may also, by agreement, waive the laches of the indorsee or holder. This is strongly exemplified in the case of Hall v. Freeman, 2 N. and McC., 479, [10 Am. Dec. 621,] which in other respects very much resembles the present. There no demand had been made on the maker, nor was the demand made on the indorser until the day after the note fell due; but the defendant knew that the drawer was insolvent, and the Court held him bound by his subsequent promise to pay. The rule is broadly laid down in Duryee v. Dennison, 5 Johns. R., 249, that a subsequent promise, with a knowledge of the laches of the holder, is a waiver of the want of diligence, and will bind the indorser. Here it is uncertain whether the demand was made on the defendant's intestate, the endorser, before or after the note fell due; nor is it very material. His promise to pay was unequivocal. It was that the note would be good, and he would lift it and give his own in the place of it at any time. The circumstances raise, too, in my mind, an irresistible presumption that McDonald knew that the demand had not been made on Perry the maker, and that he was in doubtful circumstances. Indeed, there is but little doubt that his proposition to substitute his own note was founded in the belief that his chances of indemnity from Perry would be increased by having the note under his own control and management; and according to the rule he must be bound.

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*It is, therefore, ordered and decreed, that the decree of the Circuit Court be, and the same is, hereby reversed, and that the amount of the note, and the interest thereon, stand as a charge against the funds of the estate of the said McDonald.

O'NEALL and HARPER, JJ., concurred.

Decree reversed.

Rich. Eq. Cas. 64

DAVID MONTGOMERY v. WM. MONTGOMERY.

(Columbia. May Term. 1831.)

[*Limitation of Actions* ⇐102.]

Plaintiff and defendant had been copartners; at the dissolution of the firm defendant undertook to collect the debts due. After some time they came to a settlement, and the defendant paid over to the plaintiff his share of so much of the partnership funds as he (the defendant) admitted to be in his hands: at that time the plaintiff claimed to charge the defendant with the sums of which this bill seeks to recover his share. From the time of the settlement to the filing of the bill more than four years having elapsed, *held*, that defendant was protected by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 499; Dec. Dig. ⇐102.]

[*Partnership* ⇐138.]

[Cited in Huffman v. Huffman, 63 S. C. 20, 40 S. E. 963, to the point that a partnership may not be sold by a member thereof.]

[Ed. Note.—For other cases, see Partnership, Dec. Dig. ⇐138.]

The bill in this case was filed the 24th December, 1825. The facts will be sufficiently understood from the decrees and the Commissioner's report.

DeSaussure, Ch. The bill of complainant seeks a settlement of the affairs of a co-partnership in trade, which was entered into by the complainant and defendant, who were brothers. The complainant alleges, and it is not denied, that on the dissolution of the co-partnership in December, 1817, the defendant took possession of the books of account, notes, and other credits of the firm, and made collections thereon, and is accountable.

The defendant admits the allegations of the bill, but states that about December, 1819, a misunderstanding arose between the complainant and defendant, in relation to two entries in the books, to wit, a charge against

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the complainant, on 16th June, *1818, of $1,104.56, and another on the same day of $652.18; that the complainant admitted every thing else in the books to be correct. The defendant averred that those two entries are also correct, and were made in the presence of, and with the approbation of complainant, though the defendant admits some irregularity or impropriety as to the mode of the entries, but which did not affect the truth or justice of them. The defendant states, further, that on the misunderstanding arising respecting those two entries, all matters were submitted, in the year 1819, to the arbitrament of Wm. Holmes and Charles Bell, who made a final settlement and division between complainant and defendant, upwards of five years before the filing of the bill of complainant, and defendant pleads the statute of limitations.

At the hearing of the cause in the Circuit Court, witnesses were examined on both sides. The evidence is so material that I have considered it best to transcribe it from my notes. It is proper, first, to premise that there was no agreement in writing, nor bond, to refer the cause to arbitration, nor was any award made in writing, nor signed by the arbitrators. William Holmes was called by the defendant, William Montgomery, and testifies as follows:

There was a difference between Wm. and David Montgomery, which was referred to arbitration, to witness and to Mr. Charles Bell. There were some objections by David Montgomery, but the arbitrators were informed that the objections were removed. David Montgomery objected to the arbitrators taking into consideration certain items. This objection was withdrawn. The arbitrators then examined the books, and considered the whole business, (including the two disputed items,) and made their final decision and division of the notes, &c. &c. The arbitrators intended it to be a final settlement. The arbitrators delivered to William Montgomery his share of the notes. David was gone, but left Mr. Bell to receive his share of the notes, &c., and they were delivered to him. It was distinctly stated to William

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Montgomery, that it was a full and final *decision on all the books, and included the two disputed items; and witness believed that David Montgomery was informed that it was the opinion of the arbitrators as to those disputed items. David Montgomery furnished no evidence to prove impropriety in the disputed items. On being cross-examined, witness says he thinks David Montgomery was satisfied with the books in all respects, except the two items now disputed. He understood the objection was removed, but cannot say whether he was informed so by David Montgomery or by Mr. Bell. Mr. Holmes cannot say whether David Montgomery considered the settlement awarded as to those items. David Montgomery asked for proofs of the two items, none were produced; but David Montgomery not producing evidence against them, arbitrators did not feel themselves at liberty to set them aside. The witness being re-examined, says no objections were made. He inferred that David Montgomery was satisfied, and he inferred that he agreed the arbitration should be gone into and include all the matters in dispute, that is, the present disputed items. On being examined by the Court, witness says there was no submission to arbitration in writing, nor award in writing; but witness thinks they made entries in the books of the allotments to each, not signed by the arbitrators. He thinks that after the meeting, David Montgomery demanded proofs of the two disputed entries. Wm. Montgomery did not furnish any; but the arbitrators being satisfied with

the fairness of Wm. Montgomery's character and conduct, allowed the entries as made. The arbitrators acted upon every thing apparent on the face of the books. Arbitrators had no means to judge of the fairness of the entries, they had no evidence for or against them; they, therefore, concluded that they were all fair, and awarded according to them.

Mr. Charles Bell, witness for complainant, testifies as follows:—The arbitrators met to settle difference between the Montgomeries; they were mutually chosen; they understood there were particular entries in dispute. David Montgomery said he was not satisfied

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with the correctness of the entries; *he said he was needy, and would be glad to receive what might be due him, but that this should not take away his right to an examination. The arbitrators acted on the entries without proof for or against them. Witness did not consider the arbitrators as deciding the disputed items. David expressed dissatisfaction at these items, and made a reservation that the arbitrators should not act or decide on them, to which Wm. Montgomery assented.

On being cross-examined, witness says, that Wm. Montgomery claimed the benefit of those items, and the settlement made included the two items. He believes that these two items were expressly reserved—is sure this was so, by David Montgomery in the presence of Wm. Montgomery. David went away shortly after the arbitrators began to act and make division of the notes. The only thing done was a division of the funds. The arbitrators made the entries in the books dividing the funds. Witness proves a letter of Wm. Montgomery to David Montgomery, in Sept., 1823, stating that his brother must sue in equity. Wm. Bell, being examined, said, in the spring of 1823, David Montgomery requested him to call on his brother, Wm. Montgomery, for the books of the partnership, with a message, that if Wm. Montgomery would prove the account before a magistrate, he, David, would be satisfied; but Wm. Montgomery said he would not settle till his brother David came into a Court of Justice. Wm. Montgomery always insisted that the entries were right.

Mr. Charles Montgomery, being examined, said the litigants were his brothers. He heard them speaking of arbitration; but they split, on the ground, that David Montgomery objected to Wm. Montgomery's proving the books—he required other proof. Wm. Montgomery was willing to prove them himself, and insisted they were correct. David Montgomery said they were not correct. David Montgomery has since said he was satisfied with all except the two disputed items. Heard Wm. Montgomery say the disputed items were settled by the arbitrators.

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*The letter referred to in the evidence, is one by Wm. Montgomery, dated 10th Sept., 1823, and directed to David Montgomery. In this letter he informs his brother that he had consulted Mr. Gregg, and had given him a statement of the matters in dispute between them, and that there could be no decision of the Court of Common Pleas on it; so that he, David, would have to bring his suit in the Court of Equity.

On the argument of the cause, the counsel for the defendant stated that the decision by arbitrators, on all the disputed points, is a bar. That he did not rely on the ground of the award in this case, as there was doubt from the evidence whether all the matters in dispute were referred to the arbitrators or decided by them, but that the statute of limitations applied to the demand, for Wm. Montgomery had always stated that he did not owe David any thing more.

That, substantially, the transactions in this cause made out a case of stated account subsequent to the termination of the co-partnership to which the statute of limitations applied, and he urged that taking the evidence of the award and the statute of limitations together, they made out a case against the demand of complainant.

In examining this case, it appears that nothing could have been conducted more loosely. There is no written reference to arbitration, nor is there any clear parol evidence of what disputed points were left or intended to be left to arbitration, nor is there any award in writing stating the points in dispute and deciding on them. The parol evidence is also contradictory as to what was done or decided on by the arbitrators. The witnesses, two of whom were arbitrators, are entirely at variance as to what took place. Under all these circumstances, I see nothing which can sustain the plea of an award, which was in a great measure abandoned at the hearing by the counsel for the defendant.

With respect to the plea of the statute of limitations, I do not think it can be applied to such a case. It was a co-partnership, in mercantile transactions. At the expiration

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of the co-part*nership, the books and notes and papers of the concern were all left in the hands of the defendant to collect, and he was bound to account, and he cannot protect himself against such an account by the statute of limitations. Besides, in his letter of the 10th Sept., 1823, he recognizes the existence of an unsettled dispute between them in relation to the concern, and informs him that by the advice of counsel he must file a bill in equity to settle it. I am, therefore, of opinion, that these pleas cannot be sustained and must be overruled.

It is, therefore, ordered and decreed, that the defendant do account with the complainant, before the Commissioner, on the subject of the two disputed items stated in the pleadings, and which formed the only subject of difference between the parties.

The defendant moved the Court of Appeals to reverse Chancellor De Saussure's decree upon the following grounds:

1st. Because the complainant was concluded by the award and settlement.

2nd. Because the complainant was barred by a stated or settled account.

3d. Because the complainant was barred by the statute of limitations.

The Court of Appeals suspended the cause until the whole case should be brought up.

On the order of reference made by De Saussure, Ch., the Commissioner made the following Report:

"Complainant and defendant entered into co-partnership as merchants, in March, 1816, and dissolved that connection in Dec., 1817. The defendant took the books, &c., and became the collector for the firm. In June, 1818, after the dissolution of the firm, it appears that defendant paid complainant the sum of $1104 56, and made the entry in the books of the late firm, in the words, 'Cash on settlement, $1104 56.' Upon the same day defendant credits himself with the further sum of $652 18, and entered that credit in the books of the late firm in these words: 'By settlement, $652 18.' Both of these entries

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are in *the hand writing of defendant; no complaint seems to have been made of these entries until 1819, when some fruitless efforts were made to settle the dispute between the parties. These gentlemen are brothers, and it gives me pleasure to add, that from the commencement of the partnership to the end of the reference, they entertained for each other the highest respect and most unlimited confidence in each other's integrity. This is probably the reason why their transactions have been so irregularly conducted and are now so utterly inexplicable. The complainant seems to have some vague suspicion of a sheer mistake, and calls upon defendant for a general account of all the transactions of the concern. This general account the defendant has rendered upon oath, and swears that it is as full and complete an account as the transaction is susceptible of at this time.

"The parties and their solicitors attended before me and examined several witnesses, and, to my utter surprise, upon reviewing carefully and repeatedly the testimony, not one of the witnesses testified to a single fact which explains in the most distant degree the matters in dispute. In this state of things I see no alternative but to let the subject remain, where I found it, in perfect darkness. The whole business has been so loosely managed by both parties—both parties have had free access to the books, placing unlimited confidence in each other, and neither of them skilled in the science of book-keeping—neither of them ought to be permitted upon a bare surmise of mistake, without even making a charge of fraud, to compel the other, after this lapse of time, to render an account of the transactions in a more perspicuous and merchant-like manner than the books furnish, which were kept with the knowledge and approbation of both parties. Submitted."

On exceptions to the above Report, the following decree was made by

Harper, Ch. The complainant and defendant were partners in trade. The partnership

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began in March, 1816, and was *dissolved in December, 1817. The present bill was filed for an account, charging that after the dissolution of the firm, the defendant retained possession of the books of the firm, and collected debts. The defendant filed an account with his answer, but pleaded an award and the statute of limitations; which pleas were overruled by the decree of Chancellor De Saussure, made in February, 1823. The account filed was taken from the books of the firm, and it appeared that there were but two disputed items, to wit: a charge made on the books against complainant, in the hand writing of defendant, of the date of the 16th January, 1818, of $1104.56, "Cash on settlement," and a credit, on the same day, to defendant, in his own hand writing, of $652.-18, "by settlement." These items were referred to the Commissioner by the order of Chancellor De Saussure, who has reported certain evidence, and added, that he cannot come to any satisfactory conclusion: to this report the complainant has excepted—

"1st. Because he has allowed the entry of $1104.56, made in the books of William Montgomery, without any evidence that such payment was made by him.

"2d. Because he has allowed the entry of $662.18, also made by Wm. Montgomery, without any evidence that he paid the same.

"3d. Because the Commissioner has not reported in favor of complainant the balance due to him."

The question made was, whether the defendant was bound to prove the charge made against the complainant, by other evidence than that of his answer and the entries in the books. On this point I do not see any reason to doubt—the bill is for an account generally, and the decree of Chancellor De Saussure, is, that the defendant is bound to account—though all the other items were admitted besides those in question.

It is perfectly well settled that an answer is no evidence, except in reply to the charges of the bill, and the bill makes no specific charge as to these items. This is not like the case of the defendant charging and discharg-

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ing himself in giving an *account of one connected transaction. It is by the other and undisputed particulars of the account that the defendant is charged; his alleged payment to complainant is quite a distinct affair. It is the familiar practice of every day, that the

defendant who is called upon for an account, must vouch or prove in some manner the credits given to himself, or the charges made against complainant.

Nor do I think there is more room to doubt with respect to the entries in the books, even if these had been made during the continuance of the partnership. I should doubt whether they ought to be admitted as evidence. Original entries are made evidence from necessity, to show the ordinary daily transactions of the firm—but the necessity hardly exists of admitting them to shew a settlement between the partners of the firm. Bu they were made after the dissolution of the firm. They were no longer the books of the partnership, and the entries were but the memoranda of the individual. It was urged, that the defendant was the agent of the late firm, and of the complainant. He was the agent for the purpose of making collections, and settling with the debtors of the firm. Though the acts of an agent will bind the principal as to third persons, it would be a novelty that his own statements should be taken as evidence in his own favor in settling with his principal. The evidence, so far as it goes, gives room to suppose that there may have been some mistake with respect to these entries. The testimony of Mr. Young is pretty distinct as to defendant's admissions, the day before these entries purport to have been made, of his being personally indebted to the complainant on account of cotton sold to about the amount charged by the entry of $1104.56. If he paid that sum, "as he was an unskilful merchant and accountant," he is not unlikely to have made a memorandum of it on the partnership books.

Do the credit given defendant for $652, and the charge of $1104 against complainant, relate to the same transaction or distinct ones? If they relate to the same transaction, there must certainly be some mistake. Defendant

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states in his *answer, that the charge of $1104 was inartificially made—that but half the amount was actually paid, but that this ought to have been charged against complainant, and separately credited to himself in account with the firm, and that instead of this, he made a double charge. If this be so, the transaction cannot have authorized the credit of $652. Yet it is difficult to conceive that they were distinct transactions. Can the parties have made two separate settlements on the same day? This can hardly be imagined. Can a new transaction have arisen between the first and second settlement? It was attempted to be explained in argument, by supposing that the credit of $652 "by settlement," may have referred to an aggregate of payments by defendant on account of the firm, but I suppose all the payments so made are specified in detail in the account now rendered—so the account purports, and if so they ought not to be again charged in the aggregate. It is ordered and decreed, that the exceptions be sustained, and that the defendant pay to the complainant the amount that shall be found due on the foot of the account rendered, after striking out the items in question, and that it be referred to the Commissioner to reform the account accordingly.

The defendant renewed his motion, to reverse Chancellor DeSaussure's decree upon the grounds above stated.

He also moved to reverse Chancellor Harper's decree, upon the following grounds:

1st. Because the Chancellor erred in sustaining the complainant's exceptions to the Commissioner's Report, and decided contrary to the evidence, in striking out the two items in question.

2d. Because the Chancellor erred in deciding that the defendant was bound to prove those two items by other evidence than his answer and the books.

3d. Because the Chancellor erred in deciding that the defendant could not insist on the same defence by way of answer, after his plea had been overruled.

Blanding, Gregg, for appellant.

DeSaussure, contra.

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*The opinion of the Court was delivered by

O'NEALL, J. In the view which we have taken of this case, it will only be necessary to consider, whether the complainant's claim is barred by the statute of limitations.

It is perfectly obvious that, so long as a partnership continues, the possession of one is the possession of both, and consequently the statute of limitations cannot be interposed by either. So soon as the partnership is dissolved, this joint tenancy is ended, and the partners then stand as other individuals in society, each claiming for himself. At the dissolution a new relation may be, as was in this case, created between them. If one undertakes to collect the partnership funds and account to his copartner for his share, this creates a direct trust, and so long as it continues the statute could not be a bar. But whenever it is ended by an account and actual division of the partnership funds, as far as the collecting partner admits them to be so, this is an end of the trust; and as to any matters which one claims and the other denies to be his right, the statute then begins to run. Starke v. Starke, (3 Rich., 438.) Moore v. Porcher, (Bail. Eq., 195.)

On the 25th Dec., 1817, the copartnership between the complainant and defendant was dissolved. The defendant undertook to collect the funds of the copartnership, and continued to do so until Dec., 1819, at which time a division of the partnership effects took place. The whole concern was then set-

tled, except the two items which are now in dispute, and of which the complainant insisted he was entitled to the one-half, and which the defendant denied. In 1817 the relation of partners ceased between them, and the defendant for the complainant's moiety, became his trustee. In December, 1819, this trust was ended, and each stood in his own right, the one claiming and the other denying a right to participate in a specific fund. From this time the statute of limitations commenced to run in favor of the defendant. It is, however, said that the statute can have no application to accounts between merchant and merchant, and that this is a case

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of that kind. I have always understood *the saving of the statute in this respect to apply to cases of mutual accounts of debit and credit between merchant and merchant. So long as this mutuality of account continues, of course the statute does not apply; but the moment the mutuality of the account ceases, there is no longer anything to prevent the attaching of the statute. The one has the right to demand from the other the balance due, and in assumpsit, or debt, to sue for and recover it. Against each of these actions, the lapse of four years from the accrual of the cause of action is a bar. The accrual of the cause of action, and the time to bar the prosecution of it, is to be computed from the date of the last item in the account. This saving of the statute has, however, no application to the case now before us. So long as they were merchants they were partners and no action at law could be maintained by either against the other. They were, in law, one person, and in Equity, where their accounts must be settled, each is considered as holding for both. Hence the statute could not, in this saving, have had any reference to accounts between partners, for there was no necessity for any such saving to prevent the statute from affecting them. But if the case was in other respects within the saving, the settlement in 1819 ended the mutuality of the account, and from that time the statute, in this point of view, would also commence to run. Before a debt is barred by the statute, a slight acknowledgment will be sufficient to prevent its operation. But the acknowledgment, in that case, must be in words, or in effect, an admission of a subsisting debt, which the party is liable to pay. If a party, without qualification, proposes to refer a case to arbitration, it has been held to be enough to take a case out of the statute. This proceeds on the notion that it is an admission that something may be due. So, if one admits that a debt is just, it will be enough to prevent the operation of the statute. But if a proposition to refer to arbitration, or a recognition of a demand claimed by one against another, is accompanied by an explicit denial that any thing is due, it will not take the case out of the statute, for the law cannot imply a promise against the

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express words of *the party. 11 Eng. C. L. R., 134. The rule is, I think, correctly stated in a note to 2 Stark. on Ev., 895, referring to Clementson v. Williams, 8 Cranch, 72, [3 L. Ed. 491.] "It is not sufficient to take a case out of the statute, that the claim should be proved, or acknowledged to have been originally just: the acknowledgment must go to the fact that it is still due." In Brown v. Campbell, 1 Serg. and R., 176, Tilghman C. J., says "I never can agree that a letter, which denies that the defendant was ever liable to the plaintiff's demand, will avoid the act of limitations, merely because it is not denied that payment has been made." See 2, Stark. on Ev., 895, note 1.

The defendant, in his proposition to arbitrate, in his conversations about the dispute between himself and his brother, and in his letter of the 10th September, 1823, uniformly denies that there was any mistake in the entries complained of, or that he was, in that respect, at all indebted to the complainant. None of these are, therefore, sufficient to prevent the operation of the statute, which had run out more than two years before the filing of the bill.

I regret that between brothers, and two honorable and just men, it should have been thought necessary by one of them to rely on this legal defence, more especially when, from the examination which the cases have received on the Circuit, I am satisfied that the justice of it is with the complainant. But it is our duty to shut our eyes to all the facts, except such as relate to the statute of limitations, and being satisfied that they are not enough to prevent its operation, we are bound to allow to the defendant the protection of its bar. It is, therefore, ordered and decreed, that the Circuit decrees be reversed, and the complainant's bill be dismissed without costs.

JOHNSON and HARPER, JJ., concurred.

Decrees reversed.

Rich. Eq. Cas. *77

*WILKS CASTON v. E. K. DUNLAP.

(Columbia. May Term, 1831.)

[*Principal and Surety* ⟸126.]

Mere delay to enforce the demand, and indulgence by a creditor to a principal debtor, without any binding alteration of the contract, will not discharge the surety; and this notwithstanding a positive request from the surety that he will enforce the demand against the principal debtor.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 329; Dec. Dig. ⟸ 126.]

[*Principal and Surety* ⇐105.]

[The fact that a nonresident creditor intrusted the management of the indebtedness to his relatives, and received from them remittances on the debt, was not sufficient to establish an agency on the part of the relatives, with authority to extend the time of payment of the debt which would discharge the sureties.]

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 202; Dec. Dig. ⇐105.]

Before De Saussure, Ch., at Lancaster, July, 1830.

The bill stated that Jason Hicklin, being indebted to E. K. Dunlap, in the sum of $1006.72, on the purchase of a house and lot in Lancaster, gave his note of hand for that amount, with the complainant as his surety thereto. After the note fell due—to wit, in the autumn of 1824—she brought suit thereon against Jason Hicklin and the complainant, Wilks Caston, and obtained judgment against both, and lodged her execution in the sheriff's office, 14th March, 1825, and has renewed the same, and sold, under the said execution, real estate of the said Jason Hicklin, to more than twelve hundred dollars, and that a renewed execution is in the hands of the sheriff, to be levied on the property of the complainant, the surety on said note. It appeared that Jason Hicklin departed this life in February, 1825, leaving considerable real and personal estate; that A. Perry administered on his estate, and that the judgment had not been renewed against him; that the said administrator, on the 6th January, 1826, sold the estate of Jason Hicklin. The bill charged that the brothers of the defendant attended to the sale and the collection of the money on the execution. The bill further charged, that the complainant told them and the sheriff, at the time of the sale of the property by the administrator, that if the execution was not satisfied, then they should levy on the slaves of Hicklin's estate, as he wished to be discharged from any liability on the judgment and execution. Notwithstanding which, the brothers of the said Miss Dunlap, acting as her agent since her removal to Georgia, refused to enforce the execution, and indulged the administrator of

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the *said Jason Hicklin with farther time for the payment of the debt, and it was attempted to enforce the said judgment and execution against the complainant, the surety, without even crediting the sales actually made of the estate of Hicklin. That the whole of the estate of Hicklin had been sold, and had not been applied, as it should have been, to satisfy said debt, nor accounted for, or it might appear that there were funds of Hicklin's estate sufficient to pay the balance of the debt. The bill prayed for relief and an injunction.

The defendant admitted that the complainant joined with Jason Hicklin as his surety, on the note in question, and that suit was brought thereon, and judgment obtained, and execution lodged, and that the sheriff had made on the said execution upwards of $1200.00, out of the sale of Hicklin's estate, of which, however, the sheriff had paid five hundred dollars on older executions in his hands, as appeared by returns on the executions; that the balance was paid to her execution.

Defendant admitted that Hicklin was dead, leaving a large estate, and that Perry had administered on his estate. The defendant did not know if any sci. fa. to revive the judgment against Hicklin's estate had been issued; nor was it necessary, as her right to pursue the complainant was unimpaired; and the sheriff might have attempted to levy on the estate and effects of the complainant for the balance of the debt. The defendant admitted that Perry, the administrator of Hicklin, sold the personal estate of Hicklin; but she denied that she was present at the sale (having removed to Georgia in December, 1824,) or that she had ever been in this State since, except in February, 1826. She denied that she had any agent here, authorized to give any direction relating to the case, but such as were directed by her brother, with whom she resided in Georgia. She denied that she got any notice from the complainant, either before the sale, at the sale, or at any other time, all the business having been transacted by her brother, with whom she resided in Georgia. And she was satisfied that her brother received no notice, as he came with her to this State after the sale;

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and that she *believed that her brothers in South-Carolina received no notice. That her brothers here had no authority to do anything in the matter; and as to the sheriff refusing to levy on Hicklin's personal property she knew nothing; she had no authorized agent other than her attorney in Court, and asserted that she had been constantly desirous to get her money, and trying to do so, without effect. The defendant did not know whether any credit had been put upon her execution, as renewed; but she admitted that she had received $709.75 at different times, which she believed the complainant knew was entered on the sheriff's books, and if omitted on the fi. fa., the omission could have been corrected in the Court of Law. The defendant admitted that she did not sue on the note for some time after it became due, as the principal debtor was considered perfectly safe, and she denied that the complainant ever required her to do so, either directly or indirectly. She denied that, since the judgment, she had extended the time of payment, either to Hicklin or his administrator, but had been always anxious to have her money collected, and she thought there must have been some improper conduct between the complainant, Perry the adminis-

trator, and the sheriff, or she would have received her money before; and defendant was informed, and believed, that the complainant used his influence with her friends in Lancaster to get indulgence, under a promise to pay in a short time. Defendant did not know if Hicklin's estate was insolvent, but she believed it was in hands which knew how to manage it without payment of the debt, and she insisted that complainant should be compelled to take upon himself the trouble of getting the money from the administrator of Hicklin.

De Saussure, Ch. The complainant claims relief, on the ground that indulgence was given to the principal debtor, to the prejudice of the surety. The defendant contended that Miss Dunlap, the creditor, never gave any indulgence to the principal debtor, and that her brothers, James and Samuel Dunlap, were not her authorized agents, and that if

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they were, they never *gave indulgence to the prejudice of the surety, and that the estate of Jason Hicklin has not been shown to be insolvent, and complainant should have recourse to that estate for indemnity.

It appears, by the evidence, that Miss Dunlap was not in this State, and never did personally give indulgence to the debtor, to the prejudice of the surety. It does not appear that there was any written authority given by her to her brother, to act for her in respect to this debt. But it does appear that, on her leaving this State, she directed her two brothers, who remained, to see to her business and collect her money, and they did so, and remitted the money which they had received. There certainly seems not to have been any regular authority, even to collect the money, much less to give indulgence to the debtor. Yet the brothers acted as her agents, pressed the execution on her behalf, received the money from the sheriff, and remitted it, and their sister received it, and thus recognized their acts, as done by her agents.

The evidence, as to the indulgence given by the two brothers of Miss Dunlap, is somewhat at variance; but the weight of the affirmative evidence, derived from Col. Sims, the sheriff, and Mr. Perry, and in part acknowledged by James Dunlap, does establish that indulgence was given by these brothers, acting as agents of Miss Dunlap, which has eventuated to the prejudice of the surety, or may probably do so. The indulgence was to Perry, the administrator of Hicklin, and afterwards to Caston, the surety. Of the last the surety has no grounds of complaint. The indulgence to the estate of Hicklin prevented the sale of the slaves of that estate, under the execution of Miss Dunlap. This indulgence was made contrary to the express request of Caston, the surety; and the administrator having since sold the slaves, and the money not being forthcoming, the surety is put in jeopardy by the act of these agents of the creditor. What effect this should have on his claim to be relieved remains now to be considered. This is a very mixed case. There is some difficulty as to the authority given by Miss Dunlap to her brothers, and

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some as to their acts, and her *recognition of them. But, taking the whole of it, there does not appear to be such a case clearly made out, as falls within the well settled doctrine, that a creditor agreeing to enlarge the time of payment by his principal debtor, releases the surety. Nevertheless, the evidence does disclose that the brothers of Miss Dunlap, acting as her agents, and their agency acknowledged after the acts done, did expressly indulge the administrator of the estate of the principal debtor, and postpone the sale of the slaves, when the enforcement of the execution on a small part of the slaves would have secured the payment of the balance of the debt, and that the administrator, availing himself of the opportunity of this indulgence, sold the slaves, and the funds are not forthcoming to protect the surety. Now, the object of the equitable rule is to protect sureties against ill-judged indulgences to debtors, at their risk, and the circumstances of this case come within the spirit of the rule: for the indulgence was against the wishes of the surety, and has put in jeopardy the payment of the debt, out of the funds of the principal debtor. I do not, however, feel at liberty to say that the surety is absolutely discharged. But I do think that the act of the agent of the creditor, in permitting the property of the principal debtor (which was the proper primary fund for the payment of the debt) to be disposed of, was such as entitles the surety to some protection, so that he should not, at any rate, be called upon to pay the debt, till the creditor should diligently pursue the fund put in jeopardy by that act. Without, therefore, giving any opinion as to the ultimate liability of the surety, until that be necessary, and the injury and its causes ascertained, I will make a provisional order.

It is ordered and decreed, that credit be given on the surety debt of the complainant, Caston, for the amount actually paid to Miss Dunlap, the defendant, or her brothers, who received the same as her agents; also, that the injunction be continued for the balance until the further order of the Court, and that, in the mean time, she do pursue her remedy against the administrator on the estate of

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Jason Hicklin, gene*rally, but more especially as to the proceeds of the sale of the slaves of that estate, made by the administrator, under the indulgence and with the approbation of the creditor, through her agent.

The defendant appealed on the ground; That, from all the facts and circumstances, as they appear in the case, the bill ought to have been dismissed, with costs.

Mills, for appellant.
Williams, contra.

The opinion of the Court was delivered by

HARPER, J. The doctrine of equity seems to be very well settled, that mere indulgence given by a creditor to the principal debtor, mere delay to collect his debt, even if there has been negligence, does not discharge the surety. The doctrine has been recognized by this Court in the case of Hampton v. Levy, 1 M'C. Ch. 107. The subject was very fully considered by Chancellor Kent, in the case of King v. Baldwin, 2 Johns. Ch. 554. He declared the established doctrine to be, that mere delay in calling on the principal, will not discharge the surety, provided that delay be unaccompanied with any settled or binding contract for that purpose. The English cases on which the doctrine has been settled, are all of this sort—there has been some stipulation, putting it out of the creditor's power to proceed against the principal debtor. Nesbit v. Smith, 2 Bro. C. C. 579; Rees v. Berrington, 2 Ves. jun. 540; Boulbee v. Stubbs, 18 Ves. 20. The case of the Trent Navigation Company v. Harley, 10 East, 34, was one in which there had been great neglect and delay, and yet the surety was not held to be discharged. The principle seems to be, that the creditor has no right to make for the surety, without his privity, a different contract from that which he entered into. It is an equity of the surety to compel the creditor to proceed at law, and enforce his demand against the principal. But if the creditor has put it out of his power to proceed, the surety

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is deprived of *the benefit of this equity. Perhaps it is more correct to say, as expressed by Sir Wm. Grant, in Antobrus v. Davidson, 3 Meriv., 578, that a surety may come into equity to compel the principal to relieve him of his liability, by paying off the debt. So in Kanelaugh v. Hayes, 1 Ver. 190, it is said, although the surety is not troubled nor molested for the debt, yet at any time after the money becomes payable, the Court will decree the principal to discharge the debt, it being unreasonable that a man should always have such a cloud hanging over him. The Court, however, would not compel the principal to pay to a creditor who had stipulated by a binding contract, for further forbearance. In the present case, supposing the brothers of defendant in this State, to have been her legally authorized agents, it is not pretended that they agreed to indulge the administrator of Hicklin by any binding contract, which would have put it out of defendant's power at any time to enforce her execution.

Another rule was contended for, viz: that if the surety applies to the creditor, and makes a positive request that he will enforce his demand against the principal, and he neglect to do so, and gives indulgence, the surety will be discharged. The only authorities I have found to this effect, are the cases of Pain v. Packard, 13 Johns. R. 174, and King v. Baldwin, 17 Johns. R. 384. Chancellor Kent examines the case of Pain v. Packard, in King v. Baldwin, 2 Johns. Ch., 554, and dissents from the doctrines established by it; and though his opinion was afterwards overruled upon appeal, yet I cannot but think it better supported by principle and authority. Contrary decisions are said to have been made in Dehuff v. Turbett, 3 Yates, 157, and in Commonwealth v. Wolbert, 6 Binn. 292. The English decisions go upon some alteration of the contract made between the creditor and principal, or some positive act injurious to the surety. It is said by Lord Eldon, in Wright v. Simpson, 6 Ves., 734, that the surety is a guarantor, and it is his business to see whether the principal pays, and not that of the creditor. There certainly is

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no rule that a creditor shall *exhaust his remedy against the principal, before proceeding against the surety; yet this would seem almost a necessary consequence of determining that he was bound at any time to proceed against the principal at the surety's request. The truth is, that, with respect to the creditor, both are principals; he has the option to proceed against either. There is no difference between the rules of law and equity in this respect, only the creditor must not alter the terms of the contract, or do any act which may operate a fraud on the surety. Such would be the releasing of a mortgage which he had taken of the principal debtor, to the benefit of which, the surety would be entitled, in the event of his being compelled to pay off the debt. In this case, the defendant might have enforced her execution against the complainant alone, refusing altogether to proceed against the estate of Hicklin; how then can it be said that she was bound to proceed against the estate of Hicklin, at his request? If complainant had paid off the judgment, he would have been entitled to the control of it for the purpose of reimbursing himself.

With respect to the authority of the brothers of defendant in this State, to control the execution, or give indulgence, there is no evidence that any direct authority was given for such purpose. The defendant denies it in her answer, and one of the brothers in his testimony. I suppose, that in consequence of the nearness of their relationship, they took upon themselves to interfere as they supposed might be to her advantage; but this would not bind her, if in fact she gave no authority. The Chancellor, in his decree, puts it upon her recognition of their acts, by receiving the money they remitted her; but I would suggest, with deference, that this could hardly amount to the recognition of any authority in them. I suppose she would have received the money through whatever hands transmitted. But on the principle of law, we are satisfied that the motion must be granted, and the Bill dismissed. Bill dismissed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA, JANUARY TERM, 1832.

JUDGES PRESENT.

HON. DAVID JOHNSON,
" JOHN B. O'NEALL,

HON. WILLIAM HARPER, [in whose place MARTIN, J., sat during the greater part of the term.]

Rich. Eq. Cas. *85

*REASON FRYER et al. v. JONATHAN FRYER et al.

(Columbia. Jan. Term, 1832.)

The law of marriage in South-Carolina; what the contract of marriage is; how it may be entered into; the distinction between the contract itself, and the evidence of it.

[Ed. Note.—Cited in Davenport v. Caldwell, 10 S. C. 336, 337.]

[*Marriage* ⇐20.]

An engagement to marry, per verba de futuro, copula sequente, held to be no marriage, the parties, at the time, looking to a future celebration, and not themselves regarding the copula as consummation.

[Ed. Note.—Cited in State v. Whaley, 10 S. C. 503; Cave v. Cave, 101 S. C. 45, 85 S. E. 246.

For other cases, see Marriage, Cent. Dig. §§ 12–14; Dec. Dig. ⇐20.]

[*Equity* ⇐182.]

[Some of the defendants in an action in equity answered separately and with regard to a certain matter they referred to, and adopted the answer of their mother, the other defendant, as information which they had heard and believed. The death of the mother being suggested, plaintiffs objected to the reading of her answer. *Held* that, having referred to and adopted her answer, it was as much the answer of the other defendants as though they had exhibited it.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 413, 418–421; Dec. Dig. ⇐182.]

[*Marriage* ⇐22.]

[R. and B. agreed to get married, and friends arranged an entertainment for the occasion. The couple, with some young friends, went to the residence of a justice to have the ceremony performed, but he was not at home, and it was agreed that they should go back and pretend to the company, including the girl's mother, that they were married, and that they would actually get married later. They went back, told the story as agreed, and cohabited together for several years, but there was no proof of any actual marriage, though it was supposed by most people that they were married. At a certain gathering they were asked as to their being married, one woman saying that, if they were not married, she did not want them around, and they both claimed to be married, but referred to no particulars. The alleged husband stated on one occasion that he had no wife. After the couple ceased to live together the woman married F., and B. threatened F.'s life for taking his wife, but did nothing more about it. *Held*, that R. was not the wife of B., and her marriage to F. was legal.]

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 16; Dec. Dig. ⇐22.]

[*Partition* ⇐55.]

[A testator left a life estate to his wife R. and the remainder to his children. A bill was filed by the children by a first wife for the recovery of three-fourths of the estate on the ground that R. was not the testator's legal wife. R. died before the conclusion of the trial, but no supplemental petition was filed. On appeal after decree for defendants, it was claimed by plaintiffs that the bill should have been sustained for partition of the remainder. *Held*, that partition of the remainder could not be granted, since no case was made in the pleadings for that relief.]

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 148–159, 182; Dec. Dig. ⇐55.]

Before Johnston, Ch., at Spartanburg, June, 1831.

The bill was filed by Reason Fryer and others, claiming to be the only lawful distributees of Richard Fryer, deceased.

Their bill stated that the said Richard died in 1821, leaving an estate, real and personal, which, after directing his debts to be paid, he disposed of, by will, as follows:

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*"First. I give to my son, Jonathan Fryer, one negro boy, Lewis, one horse, named Star, and one feather bed and furniture.

"Second. I give to my daughter, Nelly, one negro girl, Maria, one colt, and one feather bed and furniture.

"Third. I give to my daughter, Mary, one negro girl, Matilda, one colt, and one feather bed and furniture.

"Fourth. I give to my daughter, Fanny, one negro boy, Sam, and the black mare, and one feather bed and furniture.

"Fifth. I give to my son, David, one negro boy, Daniel, the colt with which the black mare is now in foal, and one feather bed and furniture.

"Sixth. After paying out the above legacies, and my just debts, I give my beloved wife, Rachel, the balance of my estate, real and personal, to be hers during her life or widowhood; and, after her death or marriage, I desire that the whole of my lands be divided, according to quantity and quality, between my two sons, Jonathan and David; then I desire my executors to sell all the balance of my estate, at twelve months credit; and, after collecting the money, I desire that it be equally divided among all my children, both by my first wife, and my present wife, Rachel."

The bill stated, that the testator's son, Jonathan, was appointed executor of said will; that he had assumed the execution thereof, and had possessed himself of the whole estate, by virtue of his appointment.

The bill further stated, that at the time the said testator pretended to have intermarried with the said Rachel, she was the lawful wife of one William Black, who was then living, and continued to live until after the birth of all the children, (to wit, Jonathan, Nelly, Mary, Fanny and Daniel, named in said will,) whom she bore to the said testator—in consequence of which, the said five children were, by the law of the land, bastards.

That the said five children, and their said mother, were, by the said will, to receive

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more, among them, than one-fourth of *the clear nett value of the testator's estate, contrary to the Act of assembly, in such cases provided.

The plaintiffs, claiming to be the lawful children of the testator, by his first, and only valid marriage, charged that all the legacies in favor of the said Rachel, and her five children aforesaid, were void, so far as they exceeded one-fourth of the clear nett value of the testator's estate, and prayed that the testator should be declared to have died intestate as to such excess, and that the same be partitioned off and divided among the plaintiffs.

The widow, Rachel Fryer, and her five children, were made defendants.

The separate answer of Rachel Fryer admitted that the plaintiffs were the lawful children of the testator, by his first marriage; that the testator died, leaving a will, which was truly described in the bill; and that her son, Jonathan, by the testator, had qualified as executor thereof.

She denied that she had ever been married, either to William Black, or to any other person, except the testator; that to him she was married between twenty and thirty years before his death, which took place in 1821; that she constantly lived with him, from their marriage to his death, during all which time, to the best of her information and belief, they were regarded by the whole community as man and wife.

She stated, that during the revolution, the British and Tories being very troublesome, one William Black persuaded her to accompany him to the house of her uncle, Josiah East, under the assurance that there she would be safe from the enemy; that, after her arrival at East's, she, being then fourteen years of age, agreed to marry the said Black; that, in pursuance of said agreement, she accompanied him to the residence of one Edgehill, a justice, in order to have the marriage ceremony performed: but that Edgehill was from home, and they were disappointed; that she, with Black and other persons, who had accompanied them to Edgehill's, returned to East's, where, being quite inexperienc-

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ed, she was induced, by the persuasion *of Black and the said company, to state that they had been married at Edgehill's, which was not true; that thereupon she and Black began a cohabitation, which lasted about three years; that, acquiring experience, she became sensible of the impropriety of living in an unmarried state with Black, and thereupon left him, and returned to her mother's, where she resided several years, during which time she frequently heard that Black, who had gone to Georgia, was dead; that she had not seen him for several years before her marriage to the testator, but, on the contrary, had heard and believed he was dead; she knew that the testator had also heard of his absence and death in Georgia.

The five children of Rachel answered separately, and, touching their mother's alleged marriage with Black, referred to and adopted her answer, as information which they had heard and believed.

On April 29th, 1831, after her answer was put in, and before the trial, Rachel Fryer died, which fact was suggested on the bill.

The cause was heard, June 20th and 22d, on the pleadings and proofs.

In the course of reading the pleadings, the plaintiffs objected against the reading of Rachel Fryer's answer: that it could not be used for her, she being dead and no longer a party; and that the other defendants were not entitled to use it as evidence for them.

The Chancellor. The other defendants refer to her answer, and adopt it. It is, therefore, their answer, and they must read it as such. It is as much their answer as if they had exhibited it—in which case there could have been no doubt on the matter.

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*Evidence for Plaintiffs.

William Neil testified, that, some time during the revolution, William Black brought Rachel Nichols, quite a young girl, from Spartanburgh, to Josiah East's, in Newberry. They made up a match. East was to provide an entertainment for the occasion. A small party of young people proceeded with the young couple from East's to the house of one Edgehill, a justice, who lived at Hayes-Station, to get him to perform the marriage ceremony. Witness was one of the party. Edgehill was from home, and they were disappointed. But the company, being all young and inconsiderate, persuaded Black and Rachel, that, rather than interrupt the festivities of the day, it would be better to deceive Rachel's mother, (who was there,) by stating that they had got married at Edgehill's; that they could take the first occasion to remedy the matter, by getting actually married. They agreed to this. Their young friends pledged themselves to keep their secret. On their return to East's, the statement agreed on was made, the usual festivities took place, and at the proper hour the young pair were put to bed.

It was, ever after, reported that Black and Rachel went back to Edgehill's, next morning, and were married. They lived and passed as man and wife. She was the same woman who afterwards became the wife of Richard Fryer.

William Glenn knew Black and Rachel when they lived, from four to seven years, as man and wife, on the lands of one Hannah. It had been doubted, by some of the neighbors, whether they were married; but they, themselves, said they were, and it was generally believed. At length they parted, and some years afterwards, (perhaps three or four years,) she married Richard Fryer.

Black remained in the neighborhood seven or eight years after her marriage to Fryer, but had no fixed abode. He then went to Georgia. This was, perhaps, forty years ago. Witness was quite young—a small boy.

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*After they parted, witness heard Rachel say she would have a divorce from Black, but that Black refused it; that she had gone to one Montgomery, (a justice,) for a divorce, but had failed.

She had no children by Black. When witness first saw her living with Black, at Hannah's, she appeared to be about fourteen or fifteen.

Several of the neighbors talked about their having gone to the justice, and failing to get married. Several said that they did not know how about it; and doubted whether they were man and wife.

Aaron Starns stayed at Black's one night, when he lived on Hannah's land. Rachel was there. She was young, and exceedingly beautiful. They were all in high glee, and witness, after paying some compliments to Rachel, (whom he had not seen before,) on her beauty, asked them if she was Black's wife. They said yes. They went to bed together.

Afterwards heard they had parted.

After Fryer's marriage to her, Black returned from Georgia, and threatened to sue Fryer for his wife. Witness has not seen Black for thirty years. All that time Fryer and Rachel lived reputably, as man and wife, and reared a respectable family.

Robert Hannah.—Black called Rachel his wife, and she said so. All the old settlers said, and believed they were married. They lived at Hannah's place six or seven years, and then were apart. Witness knew Black afterwards. He was frost-bitten when drunk, and was a year or so under a physician for cure. He was, for a few years afterwards, from place to place, making garden fences, and such work. This was about 1800. About 1801, he thinks, he heard of his living at East's; and that he saw him about thirty years ago, at Adair's. Fryer and Rachel have been living as man and wife ever since.

About twenty or twenty-five years ago witness heard that Black had died some years before.

The only doubt he ever, until lately, heard expressed of Black's marriage to Rachel, was

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once at a gathering at one *Larme's, while they lived together. Old Mrs. Glenn (William Glenn's mother) told Rachel, that, if she was not married, she wanted no such people about her. Rachel cried, and said, "we are married." In the same conversation, one Holland put the question to Black, and he, also, replied that he and Rachel were married.

James Hannah.—First knew Black and Rachel when they resided at his father's plantation. They were talked of as man and wife. Never heard it doubted till lately. Can't tell how long they lived at that place. They parted there, and, four or five years afterwards, it was said Fryer married her. Afterwards Black was said to have gone to Georgia. He used to threaten Fryer's life, for taking his wife.

Mrs. Burwell Bobo.—Has heard Mrs. Fryer (Rachel) express her regret that her children by Fryer would not be heirs. Understood her to allude to an impediment arising from her previous connexion with Black. She often expressed this regret; but witness does not recollect her words.

Moses Casey testified, that Richard Fryer and Rachel were married in the end of 1794,

or beginning of 1795. The oldest child died. Thinks Nelly was the next child, then Jonathan, whose age, he thinks, is about twenty-eight. Does not know the ages of the others, except that of David, who is the youngest, and came of age in 1830.

About twenty-five or thirty years ago, Mr. Fryer told witness that Black was coming to claim Rachel as his wife, and asked his advice. Witness, who was a constable, looked into the law, and gave an opinion. Fryer said Black had better stay away. Next morning Mrs. Fryer spoke of it also.

For the last year or two, Mrs. Fryer's understanding was, with her body, occasionally enfeebled by disease. How it was when she put in her answer, witness does not know.

Evidence for Defendants.

James Tinsley.—About the close of the revolutionary war, witness served with Black,

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in an expedition against the Indians. *In crossing the Savannah, Black was nearly drowned. After he got out, one of the company asked, what his wife (for it had been reported he was married to Rachel) would have done, if he had been drowned? He replied, he had no wife.

Wm. Wilder.—Rachel was a baptist, and very pious, for many years. When she was about joining the church, twenty-five years ago, a member was appointed to inquire about her having a former husband, and on his report she was received.

Witness was also a member. She and Fryer were excellent characters, and raised a respectable family.

Witness conversed with her on the business, when she filed her answer. Her mind was as good as ever; and witness would unhesitatingly believe her.

Randolph Casey.—Mrs. Fryer's mind was quite sound when she filed her answer; and witness has no doubt of her veracity.

The cause was extensively argued by Henry and Bobo, for the plaintiffs, and by Tho. Williams, jun., for the defendants.

JOHNSTON, Ch. The main question is, whether Mrs. Fryer was ever married to Black. If she was, it is clear that Black was alive at her marriage to Fryer.

Marriage, with us, so far as the law is concerned, has ever been regarded as a mere civil contract. Our law prescribes no ceremony. It requires nothing but the agreement of the parties, with an intention that that agreement shall, per se, constitute the marriage. They may express the agreement by parol, they may signify it by whatever ceremony their whim, or their taste, or their religious belief, may select: it is the agreement itself, and not the form in which it is couched, which constitutes the contract. The words used, or the ceremony performed, are mere evidence of a present intention and agreement of the parties.

Marriage is always an executed, never an executory contract. It is not what the parties intend to do hereafter, but what they intentionally do now, that constitutes the

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tie, and renders it *indissoluble. Therefore, an engagement that the parties will marry, is not marriage: but an engagement, whereby they do take each other, in præsenti, for man and wife, is marriage.

The contract of marriage, when completely entered into, is a fact. Like every other fact, it is susceptible of an infinite variety of proof. It may be proved by those who witnessed it when it took place. It may be proved by the subsequent declarations or acknowledgements of the parties. It may be evidenced by their conduct, and the attitude they maintain towards each other and the world. But there is a clear distinction between the fact, itself, of marriage, and the evidence of that fact.

As a witness who swears that he saw the marriage take place, may, or may not, be believed, so the acknowledgements of parties, that they have been married, like acknowledgements of any other past transactions or facts, may be true or false, and should be believed or disbelieved accordingly. The acknowledgement of a marriage does not constitute the marriage, any more than the acknowledgement of any other fact constitutes that fact. It is evidence only. Nor is it conclusive evidence, even on the parties themselves. It puts the burden on them of shewing the contrary: but if they can shew the contrary—if they can shew that what they have acknowledged did not, or could not exist, they are at liberty to do so. They have not this privilege where the false declaration has deceived, and the retraction would defraud some third person: as, where a man, by holding out a woman as his wife, has ensnared a creditor. But where the question is confined to the parties, as between themselves, or concerns third persons who have not been defrauded, there is full scope for every kind of proof which tends to disclose the real truth of the matter.

Hilton's case (3 Rich. 434 [45 Am. Dec. 783]) has been relied on to shew, that acknowledgements of marriage are conclusive on the parties, even in criminal cases. This was a case of great importance, and decided upon an enlightened view of the law. The prisoner was indicted for bigamy, and the Circuit

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Court admitted his acknow*ledgements of marriage; and upon this, with evidence of cohabitation, habit and repute, the jury found him guilty. The question for the Supreme Court was not, whether the acknowledgements were conclusive, but whether they were admissible. It was held, that they were admissible; but so far from considering them

conclusive, the Court declared, that "the circumstances opposed to them were properly submitted to the jury."

What is meant by "conclusive?" I understand it to refer to estoppels, a doctrine intended to crush frauds, to promote social repose, or to put an end to litigation,—a doctrine not so much of justice in the particular case, as of general policy. As where one makes a deed, he shall not aver, and, of course, shall not make proof, against it. It would be fraud if he did. Where one suffers a judgment to pass, he shall not collaterally re-examine the matter adjudicated. He has had his opportunity: and there would be no security of rights, no rest to society, no end to litigation, if he were allowed another. But where the question is as to a particular fact,—whether it ever or never existed,—where there is no one to be defrauded,—where there is no previous adjudication to be overturned,—no vested right to be divested,—I cannot understand what is meant by "conclusive." I know nothing in the nature of evidence that is so conclusive, as to shut out or disparage other evidence. To say otherwise would amount to fostering falsehood under the pretence of searching for truth,—which is the end of all rules of evidence.

An acknowledgement of marriage is no more marriage, or conclusive evidence of it, than an acknowledgement of murder is murder, or conclusive evidence of it. Now, suppose, that one, desirous, (for ease of conscience,) of committing suicide under the sanction of judicial process, should acknowledge to the malicious slaying and concealment of some person who had suddenly disappeared. No doubt this would fully justify his conviction and execution. But suppose, that before the evidence was closed, the supposed deceased should appear in open Court to dispel the imposture, would it not be the

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death of all justice *to say, that any rule exists which would bind the tribunal to spurn away the truth, and cleave to the falsehood?

It is too much the practice to convert mere matters of evidence into rules of law: and, under the specious names of badges and presumptions, compel courts and juries to draw inferences, according to artificial rules, against their real belief. But there are some reflections so natural and just, that although they do not amount to rules, they must be applied to evidence by every sound mind; some of which, as applicable to the evidence here, I will barely mention.

In the absence of proof of actual marriage the mind will rely on acknowledgements, more or less, according to the circumstances under which they were made. If they have been wrung from parties under a sense of shame or extorted by a fear of ill-treatment, or odium, a sound judgment will depend less upon them than if they were made spontaneously, or arose naturally.

I need hardly observe, that cohabitation and repute, which are also only evidence of marriage, will be more or less convincing, according as the cohabitation has been more or less interrupted, or the repute more or less general; and will not influence the judgment at all, if explained away or rebutted by clear proof that the parties were never married.

Having thus laid down the law of marriage, distinguished between the contract and the evidence of the contract, and suggested what weight should be allowed to that evidence, let us now examine the facts of the case.

Taking the testimony of the witnesses together, I think it is clear that no marriage had taken place when the parties entered into their intercourse, nor for some time afterwards.

No contract of marriage took place at Edgehill's. The very fact, that the parties agreed there to marry afterwards, repels the idea, that there was in the mind of either, any apprehension of a present contract. Their agreement was to misrepresent the facts; enter into an illicit intercourse for the present; and postpone their marriage to a more convenient occasion.

Their declaration upon their return to

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East's, that they had *been married, was untrue. It was untrue in their own judgments, and according to their own apprehension of what had taken place: and surely it would be absurd to hold that parties had contracted who had never united in any present intention to do so.

That declaration was not intended to constitute a contract, per se. It was intended to refer to what had taken place at Edgehill's; which, coupled with an intention to marry at a future time, clearly took from it every thing like a present contracting intention.

Suppose, after that declaration was made, and before the parties came together, Rachel, seeing her conduct and her duty in a better light, had refused to proceed further, and had disclosed to her friends the true state of the case: can there be any doubt, that, notwithstanding her declaration, she would have been regarded, in every forum, as still a single woman? How, then, can it be contended that the declaration constituted a contract of marriage?

When the parties, therefore, came together, they were not married. The intercourse began illicitly. There is no way of avoiding this conclusion, unless, as was contended, the future intention to marry was ripened, by the copula, into marriage. But I apprehend that such a doctrine, applied to the facts before us, would lead us from the truth of the case.

An actual agreement of marriage, fully perfected as an agreement, constitutes the parties man and wife, although never followed with

copula.(a) On the other hand, copula, without such agreement, is clearly illicit. The only difficulty is where there are mutual promises in futuro, followed by copula. Does the copula, ipso facto, perfect the previous agreement, so as to constitute marriage? This, in my opinion, depends entirely upon the intention and apprehension of the parties. If an agreement be made by words in futuro, that the parties will marry; and that the act of

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their coming together, shall, per se, *signify that they have thereby concluded their contract: there the copula is a performance of the contract, and by perfecting reduces it from an executory into an executed agreement. So where there was no express stipulation that the copula should perfect the previous executory agreement, yet if it be evident, that the parties understood, and intended that act to perfect it, I suppose it must have that effect. But it is of the essence of every contract that the parties shall have a present contracting intention, at the time of perfecting their contract: they must understand that they are making a contract; otherwise no contract is made. I do not say, that they must have a full understanding of the legal consequences of the contract they are forming. The contract once made, the consequences are matter of legal obligation, and they must abide them. But where such is the penalty, it is but reasonable that parties shall not be held to have made a contract, unless where they had knowledge that they were contracting, and intended to contract.

The proposition, contended for, that copula following promises to marry, is marriage, without regard to the present intention of the parties, seems to me unfounded in principle. If it were true, there could be no such thing as an action for seduction. The doctrine of that action is, that where a man promises a woman, that if she will be his prostitute now, he will make her his wife hereafter,—to which she assents, and so there are mutual promises, and a mutual agreement,—this does not constitute marriage. The doctrine contended for, here, is that it is marriage—that the woman becomes a wife, and is so merged in her husband as to be incapable of suing him; nay, that the act was not wrongful, and, of course, could lay no ground for damages.

It seems to me, that where, as in the present case, the parties do not understand the copula to be lawful,—do not intend that it shall, per se, constitute the marriage relation,—but, on the contrary, stipulate that the marriage shall, instead of preceding or accompanying the act, follow it, it would never do to pronounce that copula to be any thing else than unlawful.

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*Where principles are plain, as I think this which I insist on is, it is unnecessary to look into the general policy; but if it were, I think it would be easy to shew, that the doctrine contended for by counsel, might by artful women, such as the most abandoned often are, be turned to the worst of purposes; since if by extorting promises of marriage form the unwary youth, whom they too often inveigle into their snares, they can bind them to themselves, and sink them to their own infamous condition, nothing can be imagined better calculated to blast the hopes and happiness of individuals and families, or to corrupt the morals of society.

The intercourse of these parties was, therefore, illicit in its origin.

I take it to be an indubitable principle, that where the character of the intercourse, in its beginning is ascertained, the presumption is, that the intercourse is carried on in the same character, unless the contrary is made to appear. Where parties are shewn to have been married, and live together, it shall not be presumed, that at any time their commerce became unlawful, unless (where that is allowed,) it be proved that they were legally divorced. On the other hand, where, as in this case, it is established, that the parties came together unlawfully, their continuing together, must be considered unlawful, until they shew a subsequent marriage.

Neil says, these parties agreed to return to Edgehill's the next day, and get married. Who proves that they did so?

Neil says, it was reported, they went back next morning and got married. I doubt the competency of this evidence. Report and repute are very different things. Repute is report believed. Even if the report spoken of was believed, so as to become repute, it is still objectionable: it refers to a particular fact, by circumstances of time and place; and I doubt, whether a particular fact, and its circumstances, can be proved by reputation. It is said that a report that parties were married, is evidence of the marriage: which is a particular fact. I do not remember any instance where repute, pointing particularly

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to the fact of *marriage, so as to establish that fact directly, has been received. The repute which has been allowed, so far as I know, has been a general repute of the status of the parties—that they were considered man and wife. It must be allowed, that the reputation of status is admitted for the purpose of inferring the fact of marriage from it. But then the ground of receiving such testimony must be remembered. It is received from necessity, where there is no trace of the marriage itself. But where the report points out the fact itself distinctly, by time and place, it guides you to higher and more certain testimony, which ought to be produced. To allow the reputation of such circumstances to stand for proof of them, would establish a principle legitimately leading, in

(a) McAdam v. Walker, 1 Dow, 148.

my judgment, to the substitution of reputation, for actual proof of any particular fact. Upon the same principle, how could you refuse evidence, that it was generally reported and believed, that a debtor paid off a particular demand, on a particular day?

But, waiving this objection, the report referred to is but evidence; and, in my opinion, is fully rebutted by Black's unbiassed declaration spoken of by Tinsley; by the divided opinion which afterwards prevailed as to the legitimacy of the connexion; by the fact, that when the parties were afterwards challenged for their intercourse, they did not venture to refer to this, or any other particular time, or place, as that on which they were married, nor to Edgehill, or any one else, as witnesses of their marriage; by their subsequent separation; finally, it is rebutted by the fact, that when Black was most anxious to punish Fryer for crim. con., he neither specifically referred to this alleged marriage, nor used the evidence which it would have afforded.

If the parties had separated within a short time, neither what had taken place at East's, nor this report would have convinced any sound mind, that they were man and wife.

So far, the intercourse was illicit. We have their subsequent declarations, on two occasions; while they lived at Hannah's, once to Mrs. Glenn and Holland—for the witnesses

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refer to the *same time—and once to Starns. What do these prove? When Mrs. Glenn and Holland attacked them, did they say we went back to Edgehill's and got married? Did they refer to Edgehill, who lived but a few miles off, or to any one who was present at their marriage? Did they state any other occasion on which they were married, or mention any other witness? Surely when they were informed that their marriage was doubted, and knew the grounds of that doubt, this would have been a natural course. But they contented themselves with a repetition of their false declarations at East's. This they evidently did to escape the odium of their situation. The declarations to Starns were not seriously made, but were intended to obviate his uncouth gallantries.

These declarations are subject to the observation made on the declaration at East's, that they were not intended to constitute marriage, per se, but simply to refer to previous occurrences, and as we have seen that such occurrences never took place, these declarations were untrue.

The only other ground upon which a marriage between Black and Rachel Nichols can be put, is cohabitation and repute.

If parties be found living together as man and wife, without any account or knowledge of the origin of their commerce, the presumption is in favor of their having been married. This principle, which prevails in England and in Scotland, is more essential here, where thousands upon thousands of our population consist of European emigrant families, and where transmigration in families, from State to State, are of daily occurrence. To require evidence of actual marriage, in all cases, would unsettle all the domestic relations, and render the distributary rights of property uncertain. But when we know the origin of the connexion to have been unlawful, the continuance of that connexion can never become lawful.

In Cunningham vs. Cunningham, (2 Dow, 501,) a Scotch case, tried in the House of Lords in 1814, the intercourse began illicitly, and consisted of a protracted cohabitation, with some repute. Lord Eldon said, "This

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case must be looked at as one *originating in an illicit connexion, said to have become lawful at some period, no one knew when. And if the marriage depended on the evidence as to cohabitation with habit and repute, among the circles in which they lived, he desired to know at what precise period was the nature of the connexion changed, and when did they thereafter begin to live together as man and wife?" And, again he asks, "at what time did this become a lawful connexion between man and wife?"

Lord Redesdale, in the same case, after laying down the doctrine that "cohabitation, with habit and repute, was presumptive evidence of marriage," and that "the presumption might be rebutted by contrary evidence," remarks, "the cohabitation, by itself, was nothing at all, here, as it was known to have been, in its origin, illicit."

The Scotch law, with regard to what constitutes marriage, is precisely like our own. The effect of the marriage tie is different. In Scotland, marriage legitimates all the ante nati children of the parties, except such as were begotten or born while either of the putative parents were united to some other person in wedlock. In this state, the ante nati children are not legitimated by the marriage.

In Scotland, the difficulty in permitting an illicit connexion to ripen into marriage, by cohabitation and repute, must be infinitely less than in this State, since, in that kingdom, the precise period at which the connexion was changed, cannot have the effect of drawing a distinction between the different children of the parties. All become legitimate, without regard to the time when the repute became so intense as to constitute the parties man and wife. It is otherwise with us.

Yet Lord Eldon says, in Cunningham v. Cunningham, "The difficulty was this—which, as far as he had heard or read, neither learned nor unlearned had grappled with—was it during the residence in the Cannongate, or Cowgate, or at Balbougie, or at what time, did this become a lawful connexion between man and wife?"

Now, if that difficulty was so great under
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the Scotch law, *must it not be insuperable here, where the time of the marriage draws a line between children of the same connexion? Suppose Rachel Nichols had had a child by Black, before they settled at Hannah's, another upon settling there, and three while residing at that place, which of the five would have been legitimate, and which bastards? Would the first have been a lawful child? That was born before the repute. The second? There is no proof of repute between the first and second births. If you legitimate this child, you must do the same by the first. If you cannot legitimate either, what will you do with the three others? At what time did the repute become so concentrated, as to make these parties husband and wife? When, on what day, at what instant of time, was the nature of their connexion changed? Was it the day before, or the day after, the third child was born? or the fourth? or the fifth? If the day before either of these children was born, that, and all the younger children, were lawful children. If the day after, that child was a bastard, and you have to go over the same difficult inquiry as to the next.

In the case of an intercourse originally illicit, when you attempt to carry back the presumption arising from cohabitation and repute, you must, at some point of time, come in conflict with the illicit connexion—and the difficulty is in fixing where the one ends and the other begins. The difficulty is very great, in any view. But it is insurmountable, when it is recollected that the intensity of the repute diminishes, just in proportion as you return towards the origin of the connexion, where it is manifestly unlawful; whereas, what is demanded is, that, at some period after the beginning of the connexion, the mind should suddenly encounter presumptive evidence, of such force, as to convince it that, precisely at that period, a marriage took place.

But, supposing that cohabitation and repute can be applied to the case of an originally illicit connexion, so as to raise a presumption of marriage, the repute, in this case, will not raise it. A divided opinion will not raise
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the presumption, even in *cases where the origin of the connexion is not traced: although, in that case, the mind would incline to raise the presumption on any reasonable degree of evidence.

Is it to be believed that, in the same neighbourhood in which the parties went together unlawfully, within the knowledge of a large party of their young associates, doubts would not get afloat, even if the pledge of secrecy was kept better than such things usually are? There is evidence that doubts arose shortly after the assemblage at East's, and followed the parties. Glenn says, their marriage was doubted shortly after that assemblage. Several of the neighbours spoke doubtingly on the subject, and even descended to the particular of their having failed to get married at Edgehill's. Mrs. Glenn and Holland attacked them in a public company. Can it be believed that, under such circumstances, there was such uniform, and uninterrupted, and undoubting belief, as to warrant the presumption of marriage? Both Glenn and Robert Hannah show that public opinion was divided; and although they seem to think it was not generally divided, the facts stated by them show there was much division. Indeed, I observed in their examination, (what I have often observed,) that, having questions put to them, to which they gave categorical answers, a meaning was given to the words "general opinion," different to their import, or the understanding of the witnesses. Some thought the parties were married; others that they were not. The majority thought they were married. This was the amount of their testimony, and I cannot, on my understanding of the witnesses, decree that these parties were reputed to be man and wife.

In Cunningham v. Cunningham, Lord Redesdale said, that where the testimony was contradictory, "he had always understood that they ought to look at what were the collateral circumstances, in which there could be no error, and which were not liable to that impression, one way or the other, to which witnesses were often subject." Let us look at the collateral circumstances here:

First. What weight should be given to the
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declarations to *Mrs. Glenn and Holland, and to Starns, in aid of what repute existed in the community. We see that these persons could reconcile themselves to an illicit connexion: for they entered into it with the knowledge and privity of others. We see that they were capable of misstatements, with a view to deceive: for they did this on their return to East's. When, therefore, they were afterwards directly charged, in one case, under circumstances which might impress them with a fear of being cast out of society, and perhaps ejected from their home, the temptation to repeat their former false representation was very urgent. And, as to Starns, it appears he had put his question with such directness as to leave them no alternative but to admit, face to face, that they were living unlawfully together, or to assert, as I think falsely, that they were married. But what I look at is, that in the conversation with Mrs. Glenn and Holland, when so much was at stake, they did not venture any particulars, susceptible of confirmation or refutation, but contented themselves with a general assertion. Now, is it to be believed, that when they had made so many persons privy to the illegal connexion began by them, they would afterwards choose to contract a mar-

riage in so private a manner as not to be able to name a single witness to prove it?

Another collateral circumstance. When these persons, while living at Hannah's, had once been subjected to suspicions, the very fact that they had been so called in question, (especially as they then asserted a previous marriage,) renders it improbable that they would confirm the suspicions, and convict themselves of an untruth, by afterwards getting married, while they lived in that neighborhood.

Another collateral circumstance is their separation. They came together unlawfully; and we find them apart again, and no account given of the separation. Did they part as man and wife? On what account? Was there any ill-treatment to occasion the separation? No account is given. The reasonable inference is, that, as there was no tie to bind them together, they voluntarily abandoned each other, and gave up their

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sinful *connexion. She was betrayed into it at very tender years, and, from her after conduct, it is presumable that when her mind became more matured, and imbued with religion, (which she afterwards happily cultivated, it appears, to her dying day,) her degraded condition became insupportable, and by a strong association (such is a law of the heart) she lost her guilty attachment to her partner in crime. They parted, and continued apart for years. She was taken and accepted as a single woman, and in that condition married by a respectable man. These are strong facts against a general repute. They are strong against an actual marriage to Black.

Another collateral fact I have two or three times touched on before. When Black claimed her from Fryer, and was so excited that he threatened bloodshed, he shrunk from putting his claim to the test; he mentioned no particulars; he named no witnesses. This happened when the circumstances of his marriage, if one existed, were comparatively recent, and susceptible of proof. And if he, at that time, shrunk from the investigation, is it unreasonable to infer that he had no proof to make, or that the counter proof was too strong for him? And if he, at that day, could not sustain his marriage by proof, how do the plaintiffs expect to establish it now?

On the whole, I feel satisfied that Mrs. Fryer never was the wife of Black and must dismiss the bill.

If I had come to the conclusion that Black was married to Rachel Nichols, and that he was alive (as he undoubtedly was) at her marriage to Mr. Fryer, it might still have led to the same result. For, as Black's marriage could only have been established by cohabitation and repute, the same doctrine would, as soon as Black died, (which was, I think, about 1801,) have applied to Fryer, and constituted him and Rachel man and wife, from that time forward. The effect of that would have been to take the legacies to Mrs. Fryer out of the Act of 1795. It would, also, have taken out of the Act so much of the remainder as was limited to her children, who were born after the time I have referred to. If

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the remainders, limited to her *or r (and in that case natural) children, should not, on valuation, be found to exceed the one-fourth of the clear value of the whole estate, consisting of the mother's life estate, and the other remainders, the legacies were good. And according to the case of Tinney v. Tinney, decided by the old Court of Appeals in Equity, at Columbia, in 1822, the valuation must be made at the time the legacies were given, and not after the remainders actually fell in. The probability is, that under this rule, the plaintiffs must still have failed.

As it is, I decree that the bill be dismissed.

The plaintiffs appealed, and moved to reverse the decree:

1. Because the answer of Mrs. Fryer was incompetent evidence for the other defendants.

2. Because the declaration of Black, sworn to by Tinsley, was not evidence.

3. Because the evidence did, by the laws of this State, establish a marriage between Black and Rachel Nichols.

4. Because the Chancellor should have decided in favor of the plaintiffs, for an account and partition of three-fourths of the testator's estate, mentioned in the will.

5. Because the bill should have been sustained for partition of the remainders willed to plaintiffs and defendants, upon the death of Mrs. Fryer.

The appeal was argued, January 17th, 1832, by Bobo and Henry for plaintiffs, and by T. Williams for defendants.

MARTIN, J., sitting for HARPER, J., delivered the opinion of the Court:

That whatever a defendant refers to in his answer, as a part of it, was to be received as evidence, (so far as the answer itself could be so considered.) I had supposed too well established to admit of a doubt. Yet that question is made in the first ground of appeal, and has been insisted on in the argument.

The plaintiffs charge the marriage of the defendants' mother to one Black, many years

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before their birth, and call on them *to answer as to that fact. In answering, the defendants say they cannot be supposed to know any thing in relation to this subject, except what they have heard; and, having seen and read their mother's answer, they refer to that and adopt it as their own, "as containing information they have heard and believe." Their mother's answer, then, was a part of their own for they adopt it, and ask

leave to refer to it, as their own. If they had not been allowed to do so, it would seem that a defendant could never give in answer an exhibit, unless it was incorporated, in hæc verba, in his answer. It will not be pretended, I presume, if the defendants had set out Mrs. Fryer's answer in their own, and averred their belief of its truth, and adopted it as their own, that it would have been irrelevant, impertinent or objectionable. There is no difference between that course and the one they adopted.

The rule contended for, that the answer of one defendant is not evidence for another defendant, is obviously inapplicable to the case. Mrs. Fryer's answer was not, in fact, read as her answer, but as part of the answer of the other defendants.

I cannot suppose it necessary to investigate the competency of Black's declarations. The plaintiffs gave his declarations in evidence repeatedly; and it was, surely, competent for the defendants to disprove his assertions by his own contradictions.

The third ground maintains the marriage of Rachel Nichols to Black, and that he was alive at her marriage to Fryer. The Chancellor who heard, and had the most favorable opportunity to estimate the testimony, thought it did not establish the marriage contended for, and we concur with him. I will add, that it would seem to me, his analysis of the testimony must lead any dispassionate mind to the same conclusion.

For my own part, I should, under the very extraordinary facts of the case, have been satisfied with less than the defendants have proved. For more than thirty years, Fryer and their mother have lived together as man and wife, under what they supposed, and under what I now believe, to have been a lawful marriage. During all this time, it is

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admitted, they were exem*plary and respected members of society. They reared a family, who are also respectable, and whose legitimacy was not questioned until about the time of the filing of this bill, although the youngest is the mother of a family. Who, then, would bastardize this whole family, unless forced, by indubitable testimony, to do so? No one, I am sure, but the plaintiffs, who are so far influenced by pecuniary considerations as to forget what is due to the memory of their father, and rendered willing to bring odium upon those who are allied to them in blood. And who would not, in this case, seize on every fair and rational doubt, to shield all concerned from the imputations which the plaintiffs are endeavoring to fix on them indelibly? All, I am sure, who appreciate domestic tranquility.

But the Chancellor's decree, as I conceive does not rest, for support on these views. The evidence, on a careful analysis, not only does not support the case made by the bill, but, in point of fact, establishes the legitimacy of the defendants.

If it were not so, a question of much difficulty might arise if it be taken as proved (and I think it clearly established) that the testator supposed his marriage to Rachel lawful and valid. Did the Legislature, by the Act of 1795, intend to embrace such a case? I am glad that it is not necessary to express an opinion on a question of such difficulty.

The view I have taken of the third and principal ground relied on, renders it unnecessary to say any thing on the fourth.

The last ground supposes a case not made by the pleadings. It is true that, by the testator's will, the residuum of his estate is divisible between the plaintiffs and defendants, after the death of the widow, and it is true she has died since the filing of the bill. But the bill did not seek distribution of that residuum, nor were the plaintiffs entitled to it when the bill was filed. They have not filed a supplemental bill. They had other objects in view, and, for aught that appears, this matter is suggested for the first time in the appeal. If a proper case was not made, that is not the fault of the Court.

It is doubtful whether a Chancellor would

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have allowed the *plaintiffs, in such a case, to have availed themselves of the accidental death of Mrs. Fryer, to have amended their claim. I incline to the opinion that such permission would have been granted, if granted at all, only upon payment of costs. But I do not think the plaintiffs have any claim upon the discretion of this Court: as they made no application on the Circuit, it must be refused here.

The decree is affirmed, and the appeal dismissed.

JOHNSON and O'NEALL, JJ., concurred.

Appeal dismissed.

NOTE.

[STRINGFELLOW v. SCOTT.]

[*Husband and Wife* ⇐34.]

[Cited in Davenport v. Caldwell, 10 S. C. 337, to the point that a marriage agreement is a fact to be proved as other contracts are proved.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 204, 205; Dec. Dig. ⇐34.]

[*Marriage* ⇐1.]

[Cited in Davenport v. Caldwell, 10 S. C. 336, to the point that marriage is merely a civil contract, requires no formality, and may be made by private agreement.]

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 1; Dec. Dig. ⇐1.]

[*Marriage* ⇐20.]

[Cited in North v. Valk, Dud. Eq. 221, to the point that a promise of marriage per verba de futuro, followed by copulation, does not constitute marriage.]

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 12-14; Dec. Dig. ⇐20.]

[*Marriage* ⇐50.]

[Cited in North v. Valk, Dud. Eq. 219, to the point that the mere fact that parties call them-

selves husband and wife does not establish a marriage relationship.]

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-89; Dec. Dig. ⟸50.]

In Stringfellow v. Scott, at Barnwell, February, 1833, the following interesting circuit opinion, on the law of marriage, was delivered by

HARPER, Ch. The complainants charge that they are the lawful children of Richard Stringfellow, deceased, by his first wife; that the defendant was living in adultery with him for some time previously, and at the time of his death; and that, by his will, he bequeathed to her his whole estate, for life, and after her death, to his children by her, in violation of the Act of the Legislature, forbidding any person, having a lawful wife or legitimate children, from giving more than one-fourth of his estate to a mistress or illegitimate children. The answer of the defendant admits that she did cohabit with the deceased, during the life time of his second wife; but states that, after the second wife's death, she was regularly married to him. There was no direct proof of the death of the second wife. It was proved that she was in the neighborhood of her deceased husband and defendant some fourteen or fifteen years ago; that she went to Tennessee, and was in a state of derangement, and it does not appear that she has been heard of for the last ten or eleven years. One witness stated that he heard of her death, eight or nine years ago. Under these circumstances, the law infers the death of the second wife, during the period she has not been heard of. There was no proof of the defendant's having been married to Stringfellow, except that, during the period mentioned, they cohabited, and recognized and treated each other as man and wife. In his will, also, he speaks of her as his wife. These circumstances, it was argued, are sufficient to raise the presumption of a marriage between them. Under the English law, as it exists at present, in all cases except prosecutions for bigamy and actions for criminal conversation, marriage may be proved by circumstances such as these. I should consider these rebutted, however, by the admitted fact of their cohabitation having been adulterous in its commencement; and this would throw on defendant the burden of proving a formal(*b*) marriage. I agree, however, with the defendant's counsel, that, under our laws, marriage is regarded as merely a civil contract, requiring no particular formality, which may be made by a private agreement between the parties, and which is capable of being proved by circumstances, as any other contract may be proved. The English statute, 26 Geo. 2, c. 33, which is that by which restrictions in relation to the forms of marriage have been im-

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*posed in that country, has never been adopted in this State. Blackstone (1 Com., 433–4,) says, "Our law considers marriage in no other light than as a civil contract. And, taking it in this civil light, the law treats it as it does all other contracts: allowing it to be good and valid, in all cases where the parties, at the time of making it, were, in the first place, willing to contract, secondly, able to contract, and lastly, actually did contract, in the proper forms and solemnities required by law;" and (at p. 439) "lastly, the parties must not only be willing and able to contract, but must actually contract themselves, in due form of law, to make it a good civil marriage. Any contract made per verba de præsenti, or in words of the present tense, or, in case of cohabitation, per verba de futuro, also between persons able to contract, was, before the late act, deemed a valid marriage, for many purposes, and the parties might be compelled, in the spiritual courts, to celebrate it in facie ecclesiæ." So, in Bunting's case, Moore, 170; 4 Co., 29, Agnes Addingshall was contracted to Bunting, (per verba de præsenti, as is stated in the report in Coke, though this does not appear from the report in Moore.) She afterwards married Twine. Being sued in the spiritual court by Bunting, the marriage with Twine was declared void, and the sentence was, that she should marry and cohabit with Bunting, which she did. They had a son, and the question in the Civil Court was of his legitimacy. It was argued, that having been married to Twine in facie ecclesiæ, this was valid until a regular divorce in a proceeding to which Twine should have been a party. But it was held that the marriage with Twine was void, and the issue with Bunting legitimate. Moore says, the first cause was for this, that Agnes was first contracted to Bunting: in which case, she was his lawful wife in the civil law, for it is said, that if they have carnal copulation, after the contract, they shall not be punished for adultery or fornication, but only for contempt against an edict of the Church. It is also said, that if a legacy be given to a woman when she shall become a wife, if she contracts herself, she may demand her legacy in the Spiritual Court before espousals celebrated: by which it appears, in construction of the civil law, the woman is uxor before the espousals, and so, if she be married, after the contract, and before the espousals, to a stranger, those espousals are void. It is said that before the time of Pope Innocent the Third there was no solemnization of marriage in the Church; but the man came to the house which the woman inhabited, and led her home to his house, which was the only ceremony then used. So the law is laid down by Lord Holt, in Collins v. Jesson, 6 Mod., 155, 2 Salk., 437, and Widmore's case, 2 Salk., 438, that a contract per verba de præsenti, "I marry you," and "I and you are man and wife," constitutes an actual marriage; only that, if they cohabit before solemnization in facie ecclesiæ, they are punishable by ecclesiastical censure. If the contract be per verba de futuro, "I promise to marry you," this will be a marriage, if it be followed by actual consummation. The subject is fully considered by Sir William Scott, in the great case of Dalrymple v. Dalrymple, (2 Hagg. Cons. R. 62; Car. L. J., 384), respecting a Scotch marriage, in which he treats it not only as a question of Scotch law, but of the general law of all Europe, founded on the canon law. Before the Council of Trent, he says, "the consent of the two parties, expressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name, sponsalia per verba de præsenti." "In the promise, or sponsalia de futuro, nothing was presumed to be complete or consummate, either in substance or ceremony. Mutual consent might release the parties from their engagement, and one party, without the consent of the other, might contract a valid marriage, regularly or irregularly, with another person; but if the parties, who had exchanged the promise, had carnal intercourse with each other, the effect of the carnal intercourse was to interpose a presumption of present consent,

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at the *time of the intercourse, to convert the engagement into a regular marriage, and to produce all the consequences attributable to that species of matrimonial connexion." He refers to Brower and to Swinburn, on Spousals, where the subject is fully treated.

It is said, 4 Bac. Abr. 536, Tit. Marriage and Divorce, O., to have been, by a constitution of Archbishop Reynolds, directed, that marriage shall be solemnized reverently, and in the

(*b*) That is, actual, positive proof, but not in facie ecclesiæ.

face of the Church. But it is unnecessary to multiply authorities on this subject.

There is no doubt at all but that, by the law of England, independently of the Statute 26, Geo. 2, a contract per verba de præsenti (or per verba de futuro,) consummated by carnal intercourse, constitutes a valid marriage, indissoluble by the parties, and rendering the subsequent marriage of one of the parties absolutely void. The only difficulty arises from what is said in some of the authorities, that, "in order to make the marriage complete, so as to entitle the wife to dower, the children to inherit, etc., the same must be celebrated in facie ecclesiæ." 4 Bac. Abr. 531. The author refers to Roll. Abr. 357, and to the case before quoted from Moore. I have not the means of referring to Rolle. In the case in Moore, it is said, that the children born after the contract, and before the espousals, are legitimate, provided espousals succeed: for if espousals never succeed, the issue is bastard. I do not find this, however, said by Coke, (a higher authority,) in reporting the same case, under the title of Bunting v. Lepingwell, (4 Co., 29.) Co. Lit., 34, a, has been sometimes referred to as an authority, that, to entitle the wife to dower, the marriage must be solemnized in facie ecclesiæ. But he only says, that "this dower (ad ostium ecclesiæ,) is ever after marriage solemnized," as, from the very nature and definition of it, it must have been. "Et sciendum est, quod hæc constitutio fieri debet in facie ecclesiæ, et ad ostium ecclesiæ; non enim valet facta in lecto mortali, vel in camera, vel alibi ubi clandestina fuere conjugia." He leaves it rather to be inferred, that the solemnization was not necessary to the other species of dower treated of. In Vin. Abr. Tit. Marriage, it is said, "if F. be divorced from her Baron, causa præ contractus, made with another per verba de præsenti, immediately by the sentence given in the Court, the marriage shall be consummated between the said F. and her first Baron, without any rites to be in facie ecclesiæ. Otherwise, in contracts per verba de futuro." In Haydon v. Gould, Salk. 119, where the parties had been married by a layman, it was held, that the husband was not entitled, in the Spiritual Court, to administration of the estate of his deceased wife: "for he, demanding a right due to him as husband, by the ecclesiastical law, must prove himself husband, according to that law, to entitle himself, in this case; and though, perhaps, it should be so, that the wife, who is the weaker sex, or the issue of the marriage, who are in no fault, might entitle themselves, by such marriage, to a temporal right, yet the husband himself, who is in fault, shall never entitle himself, by the mere reputation of marriage, without right." Indeed, however natural it may be to suppose that the ecclesiastical tribunals would refuse their aid to one who had acted in contempt of an edict of the Church, yet if, as all the authorities agree, the civil contract of marriage was complete and perfect, without celebration in facie ecclesiæ, it seems something absurd and inconsistent, that one claiming a mere civil right, in a civil tribunal, should be repelled on the ground of his ecclesiastical irregularity. I am confirmed in this opinion, as all the other authorities, except those I have mentioned, which treat of the subject generally, seem to regard the marriage as complete, for all civil purposes, without celebration, and say nothing of any such disability of the wife, or issue of such marriage. So it is treated by Chief Baron Comyn, (a much higher authority than Bacon.) Tit. Baron and Feme, B. By quoting from Salkeld, that where there is a marriage in fact, only the wife or her children, who were not in fault, may be entitled to a temporal right, he seems to adopt that opinion.

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*Jews are excepted out of the English marriage Act; and in the case of Lindo and Belisario, 1 Hagg. Cons. R. 231, in which the validity of a Jewish marriage was elaborately investigated, the inquiry was, whether it was a marriage according to their usages. Not, of course, on the ground of any sanctity or authority in those usages, but to determine whether it was what they regarded as a valid contract. The English Court could only have regarded it as a civil contract.

But whatever the case may be in England, yet it is clear that, with us, the marriage is complete, for every purpose, by the contract, without celebration. We have no Church, recognized by law, in the face of which the spousals might be celebrated. There is no Spiritual Court to compel parties to solemnize them, or to inflict spiritual censure if they refuse. We have retained the name of ordinary; but that, of necessity, must be regarded as a mere temporal Court, for the transaction of testamentary matters. Our present constitution has put an end to all connection between Church and State. To say the celebration in facie ecclesiæ was necessary, would be to invalidate the numerous marriages made by justices of the peace, and, indeed, most of those made by the clergy: for, by the laws of England, all the Protestant dissenting clergy are regarded as laymen, and we have not adopted the English statutes, giving them validity on certain conditions. Indeed, it appears, that before our revolution, and while the Church of England was established in the State, it was common to celebrate marriages before justices of the peace. By the Act of 1706, commonly called the Church Act, penalties are imposed on any justice of the peace who shall celebrate a marriage: but the marriage itself is not declared void. The custom was no doubt derived from the practice, during the time of the English commonwealth, of celebrating marriages before justices of the peace. Regarding marriage merely as a civil contract, this was adopted as a convenient method of authenticating it. And though, afterwards, in the time of Charles the Second, it was thought advisable to pass an Act for confirming those marriages; yet I find no authority for supposing that they would have been regarded as invalid, without the statute.

The circumstances which tend to establish a matrimonial contract, in this case, I have already mentioned. For a long time, they recognized and treated each other as man and wife. In general, this would be sufficient of itself. It would amount to an admission of the matrimonial contract. But, for aught that appears, they treated each other in the same manner during the life time of Richard Stringfellow's second wife, when no matrimonial connexion could exist between them. Then, in his will, he calls her his wife, and gives to her his whole estate. This is very strong, and seems to amount to an acknowledgment that she was his wife. I do not think, however, that I am the proper tribunal to decide on the effect of these circumstances. The case of Fenton v. Reed, 4 Johns. R. 52, was very much like the present. A woman married a second time, during the life of her first husband, which marriage was of course void. She continued to reside with the person to whom she was the second time married, for a long time after the death of her husband. They treated each other as husband and wife. The circumstances were left to the jury, to presume a contract of marriage after the death of the first husband, the Court holding a contract, per verba de presenti, to be as valid a marriage as if made in facie ecclesiæ. A jury I think the proper tribunal for the determination of the question, and to a jury I

shall send it. There is an infinity of circumstances, familiar to the vicinage, but unknown to me, which would have a bearing on the determination. The parties might call each other husband and wife, as a sacrifice to decency, and treat each other as such, it being well known to themselves, and to every one else, that they did not consider each other as standing in that relation. I think, to warrant the jury in finding a marriage, they ought to be satisfied that there was actually an agreement or understanding between them, after the death of Stringfellow's second wife, to stand together in the relation of husband and wife.

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*As the subject is an important one, and there has been no legal determination upon it, so far as I know, I think it important that the principles of this opinion should be carried before the Court of Appeals. Not that I consider the law doubtful, but it concerns the public that it should be definitely settled and made known.

JEWELL v. MAGWOOD.

[*Marriage* ⊂⊃50.]

[Cited in Davenport v. Caldwell, 10 S. C. 337, to the point that marriage like other contracts may be proven by circumstances.]

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-89; Dec. Dig. ⊂⊃50.]

[*Marriage* ⊂⊃50.]

[Cited in State v. Whaley, 10 S. C. 503, to the point that a marriage contract may be inferred from recognition of marriage relationship by parties, but such recognition cannot have the effect of changing a state of unlawful cohabitation to a legal state of marriage.]

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-89; Dec. Dig. ⊂⊃50.]

[*Marriage* ⊂⊃58.]

[Cited in North v. Valk, Dud. Eq. 220, to the point that a marriage, once completed, cannot thereafter be invalidated by acts of the parties.]

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 115-123; Dec. Dig. ⊂⊃58.]

Before MARTIN, J., at Charleston, May, 1833. This was an appeal from the decision of the Ordinary, revoking letters of administration, which he had granted to plaintiff, on the estate of Benjamin Jewell, on the ground that plaintiff was an illegitimate son of said Jewell, and granting administration to defendant, Col. Magwood, as agent, or attorney, of Mrs. S. J. Jewell, who claimed it, as being the lawful widow of said Benjamin Jewell.

The witness produced, on behalf of plaintiff, was his own mother, Mrs. Storms, to prove her marriage and his own legitimacy. She was objected to, as being incompetent, as she would be interested in the distribution of the estate, and as she could not be admitted to prove her own marriage and his legitimacy. She executed a release, and his Honor allowed her to be examined. She stated her marriage to Jewell about thirty-four or five years before, at Savannah; that it was not solemnized either by a priest or public officer; that a ring was presented her by Jewell, as a token sufficient, and that there were several persons present; that she was a Roman Catholic, born at Cape Francois, and Mr. Jewell a Jew; that they removed afterwards to Barnwell, in this State, and thence to Charleston; that they had eight children, of whom plaintiff was one, born in December, 1798; that their births were mentioned in a Bible.

On her cross-examination, she stated that she married Storms about fourteen years ago, in the life time of Jewell, who died in 1828; that she and Jewell separated, and lived apart; that she took a conveyance of a house and lot in King-street from him, which she paid for to him, and that she knew of his marriage, in Virginia, to Mrs. Jewell, who now claims to be his widow. She recognized her handwriting to a paper, dated Savannah, March 10th, 1796, by which she, by her then name, Sophie Prevost, released B. Jewell, for the sum of $500, from all responsibility, on account of a promise of marriage alleged to have been made to her, and for which she had sued him, etc.

Mr. Barbott testified, that he was clerk for Jewell in 1806, and that plaintiff's mother passed as Jewell's wife.

Mr. Cattonnet knew Jewell from 1796: plaintiff's mother was treated by him as his wife.

Mr. Manks, for defendant, testified, that Jewell was married, in Virginia, during the late war, to his present widow, who now lives in Louisiana.

Defendant's counsel contended, that there was no evidence of the alleged marriage of the intestate to S. Prevost; that she herself was incompetent to prove it; that the release of her interest in the estate was insufficient, as her husband, Storms, did not join in it; that her subsequent marriage with him showed her opinion of the connexion with Jewell being only a common cohabitation; and that, on the whole, she was not entitled to be believed, under the circumstances in evidence.

His Honor charged the jury, that if they believed her testimony, as to the marriage in Savannah, no subsequent acts between her and Jewell, or of either of them, could invalidate the contract.

The jury found a verdict for the plaintiff, and the defendant appealed, and moved for a new trial.

Lance, Petigru, for appellant.
Thompson, contra.

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*The opinion of the Court was delivered by

HARPER, J. The first question relates to the competency of the witness, Mrs. Storms, to prove her own marriage, and the legitimacy of her son. I do not perceive that she was incompetent, within the rules which the law has fixed for ascertaining a witness's interest. The interest which will disqualify must be direct: the witness must gain or lose by the event of the suit, or the verdict must be evidence for or against him, in some other suit which may arise. It is not enough, that the witness may have an interest in the same question, which may hereafter come to be determined in another cause. Now, certainly Mrs. Storms gains nothing directly by the event of this litigation, or the granting of administration to the plaintiff. If she should hereafter claim a distributive share of the intestate's estate, as his widow, either in the Court of Ordinary or of Equity, this verdict will not be evidence for or against her, though, to be sure, the same question, the fact of marriage, will be in issue. If the administrator should pay over to her a distributive share of the estate, it will be at his own risk, and that of the sureties, if another person should afterwards show herself entitled as widow. This renders it unnecessary to consider the question of the sufficiency of the release.

The remaining grounds of appeal relate merely to the evidence, and were matter for the jury. In a decree delivered by me, sitting for the Chancellor at Barnwell, in 1833, I had occasion to consider the subject fully, of what will constitute marriage in this State. Certainly, by our law, marriage is regarded only as a civil contract, and whatever is sufficient evidence of the assent of the parties' minds to enter into that relation, establishes a marriage. This may be either per verba de præsenti, "I take you for my wife," etc., or per verba de futuro, an agree-

ment to marry in future, with subsequent cohabitation. Where parties agree to marry in future, and afterwards cohabit, the law infers that this cohabitation was an execution of the previous agreement. Like other contracts, it may be proved by circumstances, as by the parties living together, and speaking of, or treating each other as husband and wife. Certainly, it is one of the most important engagements into which human beings can enter, and ought not to be established on light or uncertain evidence. But in the case before us, leaving out of question the rebutting testimony, the evidence in favor of the marriage was very conclusive. Independently of the direct testimony of Mrs. Storms, the very long cohabitation, with the circumstances attending it, treating each other in every respect as husband and wife, would have justified the verdict of the jury. But the evidence on the other side was also very strong. Their separation, and the subsequent marriage of both, was evidence that they did not regard each other as ever having sustained the relation of husband and wife. Then the paper mentioned in the brief, purporting to have been executed at Savannah, on the 10th March, 1796, and that produced before us, said to have been executed on their separation in 1810, were very strong to show the same thing. But then these papers were not properly in evidence before the jury, at least with respect to the former—it was for the jury to say whether it was sufficiently proved or not. If they had been in evidence, however, they would not have been entirely conclusive. If the marriage became complete, (and if Mrs. Storms is to be believed, hers was so,) no subsequent act or acknowledgment of the parties would invalidate it. Certainly, there were circumstances which went very strongly to discredit the witness, Mrs. Storms; but we cannot, where there is a conflict of testimony, take from the jury the right to judge of it. The motion is dismissed.

JOHNSON, J., concurred.

Rich. Eq. Cas. *115

*JOHN MARSH and Wife v. CASPER NAIL and Others.

(Columbia. Jan. Term, 1832.)

[*Husband and Wife* ⟸11.]

A. G. died intestate, in 1822, leaving as his distributees, his widow D. G., and his daughter S., wife of J. N.: J. N. administered on his estate, and he and D. G., by private agreement, divided the property between them: D. G. died, in 1823, intestate, leaving her daughter, the said S., her sole distributee, and J. N. took possession of her estate without administration: J. N. died in 1825, testate:—*Held*, that his marital rights had attached on the interests of S., in the personal estates, both of her father and mother.

[Ed. Note.—Cited in Spann v. Jennings, 1 Hill, Eq. 325; Spann v. Stewart, Id. 333; Huson v. Wallace, 1 Rich. Eq. 23; Petigru v. Ferguson, 6 Rich. Eq. 386; Read v. Read, 8 Rich. Eq. 153; Markley v. Singletary, 11 Rich. Eq. 403; Miles v. Wise, Id. 540, 78 Am. Dec. 461.

For other cases, see Husband and Wife, Cent. Dig. § 53; Dec. Dig. ⟸11.]

Before De Saussure, Ch., at Edgefield, June, 1831.

De Saussure, Ch. Andrew Glover died intestate, on the 3d August, 1822, leaving as his next of kin, his widow Dicey, and his daughter Sarah, then the wife of John Nail, now of John Marsh.

John Nail administered on the estate of Andrew Glover, and returned to the Ordinary's office, an appraisement of his property, to the amount of $8080 25. John Nail and Dicey Glover, by private agreement, divided the property of Andrew Glover between them, Dicey Glover taking as her share, six negroes, two mules, twenty cattle, beds, sideboard and other furniture. Dicey Glover died intestate, Nov. 9, 1823, leaving said Sarah Nail (now Marsh) her next of kin. Upon the death of Dicey Glover, John Nail took possession of the whole of her property above mentioned, without administration or legal authority. John Nail died November 1, 1825, leaving a will, dated June 25, 1823, whereby he disposed of his estate equally between his wife Sarah, and his three children, each taking one-fourth part, of which will, Casper Nail, Jr., Matthias Ardis and Dawson Atkinson, were appointed executors. All these executors have qualified, but Casper Nail, Jr., has had the principal management of the estate. John Marsh and Sarah Nail, intermarried in October, 1826, and by marriage settlement, all her property was conveyed to Dawson Atkinson, and Millege Galphin, in trust for her sole and separate use. Casper Nail, Jr., died 17th June, 1830, and Matthias Ardis and Millege Galphin, administered upon his estate.

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*John Marsh and Sarah his wife, have administered upon the estate of Dicey Glover, and claim the six negroes, and other property above mentioned, as belonging to her estate, and not to the estate of John Nail, or if defendants persist in denying the division of Andrew Glover's estate between John Nail and Dicey Glover, they, (John Marsh and wife,) claim the whole of Andrew Glover's property. Jno. Marsh, and Sarah his wife, applied to the Court of Equity, and obtained, on 1st June, 1827, a writ of partition, to divide the plantation or mill tract, containing about 5000 acres, so as to allot 5-12 to Mrs. Marsh, and 1-12 to each of the children of Jno. Nail, and 4-12 to Casper Nail, Sr.: also to divide some other lands and certain slaves enumerated in the writ, and the rest of the personal estate of John Nail, deceased; one fourth part to his widow Sarah, now Mrs. Marsh. The Commissioners named in the writ, made return thereto, on 24th July, 1827. In that return, they made division of the slaves, allotting eight of them by name to Mrs. Marsh, and the remainder to the three children of John Nail. The slaves so allotted, were delivered to John Marsh and wife, and have been kept by them. The other slaves went into the possession of John Nail's executors, and are held by them for the three children of John Nail. But the return of the writ of partition was never con-

firmed, though the parties acted under it; and took and held the negroes as allotted. The parties, Marsh and wife, and Casper Nail, Sr., and the executors of John Nail, and Mr. Galphin, trustee, agreed to the sale of the mill tract of 5000 acres, and the stock, according to the recommendation of the Commissioners. The Commissioner made a report on the mill accounts, which was confirmed, 16th June, 1829. The will of John Nail was produced in evidence. A good deal of parol evidence was introduced at the hearing of the cause.

The principal question made, on the argument of the cause, was, whether the complainants are entitled to six slaves, who belonged to Mrs. Dicey Glover, at the time of her death, or the defendants? It was argued

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for the defendants, that the estate *of Andrew Glover, who died intestate in August, 1822, was divided by agreement between Mrs. Dicey Glover, his widow, and his daughter, then the wife of John Nail, and now the wife of John Marsh. The possession went with this division to the respective parties; and that on Mrs. Glover's death intestate in Nov., 1823, leaving no other heir than her daughter Sarah, her slaves and other property devolved on her said daughter; and she, and her then husband, (Nail,) getting possession of them, the marital rights attached, and they became part of the estate of John Nail. Also that these slaves were included in the writ of partition, sued out by John Marsh, and the said Sarah his wife; and a division was made according to the return made by the Commissioners, and the possession went with the division to the respective parties, which fixed their rights.

It was further argued for the defendants, that Mrs. Marsh having accepted the fourth part of the estate of her late husband, John Nail, under his will, she is not at liberty to set up a hostile claim to these slaves, which her husband was possessed of, and considered as his own. For the complainants it was argued, that the voluntary division of Andrew Glover's estate, made between Mrs. Glover, and Mr. John Nail, vested in each of them their respective shares; and that she dying intestate in November, 1823, the right devolved on her daughter, Mrs. Nail, but the marital rights did not attach in her husband, as he never administered on her estate, but merely took the slaves into possession, and that they survived to her on Mr. Nail's death. That with respect to the ground alleged, that the slaves were included in the will of her husband, Mr. Nail, and that she cannot take under that will, and claim these slaves in opposition to the will, there was no foundation for the argument; as the will of Mr. Nail, was dated 25th June, 1823, nearly five months before the death of Mrs. Glover; and property he did not then own, could not have been contemplated by him at the making of the will. I have considered these opposite views presented to the Court, and feel that there are difficulties in the question. Upon the whole, however, I am

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satisfied that the argument *preponderates on the side of the defendants. On the death of Mrs. Glover, there was no other heir than her daughter, Mrs. Nail, (now Mrs. Marsh,) and her husband got possession of the slaves left by Mrs. Glover. There was no division to be made. She was sole heiress; no writ of partition could issue, nor any claim be made. The wife was entitled to the right and to the possession, and the marital rights attached. To be sure, if any person had then administered, it might have made a different case. But the administration taken out since the death of Mr. Nail, cannot defeat his marital rights. This was the understanding of the complainants themselves; for in suing out a writ of partition of Mr. Nail's estate to obtain the share of Mrs. Marsh, of that estate under his will, they themselves included these negroes, derived by Mr. Nail from Mrs. Glover's estate. And the Commissioners having, in their return of July, 1827, divided said slaves, between Mrs. Marsh and the children of John Nail, Mr. and Mrs. Marsh accepted, took and held those allotted to them. This is, I apprehend, a confirmation and acquiescence in that division; and they are bound by it. This was the only question argued, whence I presume that there are no others in dispute. If there are any others requiring an account, the complainants may take a reference if they choose. If not, the complainants' bill must be dismissed, but without costs.

The Complainants appealed.

The opinion of the Court was delivered by

O'NEALL, J. The question necessary to be considered in this case is, whether the marital rights of John Nail, the first husband of the complainant, Mrs. Marsh, attached upon her interest in the estate of her father, Andrew Glover, and her mother, Dicey Glover, so as to vest the same in him?

I place both estates on the same footing, not that there is any necessity so to do, from any claim set up by the complainants, but because the defendants have placed their rights on that ground. It is, for them, the

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least advantageous position which *they could have assumed; but if, in that point of view, their rights can be sustained, the complainants' claim is at an end. There is no doubt about the rule, that if the wife's rights in property are no more than a chose in action, the husband must reduce it into actual possession to give him a right jure mariti. In this respect, there is no difference between a legal and an equitable chose in action. The case of Byrne v. Stewart, 3 Desaus. Eq. Rep., 135, and of Elms v. Hughes, 3 Desaus. Eq.

Rep., 155, are cases where the personal estate of the wife consisted in a share of an undivided property, to which others, as well as the wife, were entitled, and it was held that this was a mere equitable chose in action, of which there could be no possession until division, and hence, that the marital rights could not attach. It is said, 1 Roper on Husband and Wife, 217, that the husband's receipt, or possession of his wife's choses in action, must be in the character of husband, to defeat his wife's title to them, upon her surviving him. This rule, I am disposed to think, with some qualifications, is the correct one. If the husband of a legatee or distributee is the executor or administrator, it could not be pretended, until the debts were paid, and administration of the estate thus effected, that he held the estate in any other than his representative character; but after the debts are paid, and each legacy or share is ascertained, it would be monstrous to say that his subsequent possession of his wife's share is in his character of executor or administrator, and not in that of husband. In such a case, how can he divest himself of his character of executor or administrator, and assume that of husband? I know of no mode other than that of paying the debts, and ascertaining each legacy or share. In the case under consideration, John Nail administered on the estate of Andrew Glover; before the death of Mrs. Glover he paid the debts: so that, before her death, the estate of Andrew Glover became divisible between her and her daughter, Mrs. Nail, (now Marsh.) Up to her death the share of the wife was a mere chose in action, not reduced into possession. Upon the death of Mrs. Glover, having no issue but the complainant,

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she *became the sole heiress of her father, Andrew Glover, and of her mother, Dicey Glover's estates. Of the latter, it is to be presumed there were no debts, or, if there were any, that they became chargeable on the husband, by his subsequent possession of her estate, and holding it as his own. In this state of things, what were the wife's choses in action? She was sole heiress of both estates, and entitled to the whole of each. How was the husband to reduce them into possession? Both estates consisted of slaves, and other tangible personal property. Could he otherwise reduce them into possession, than by possessing himself of the property and treating it as his own? This, it appears to me, was the only course he could pursue, and that, by pursuing it, he actually reduced the wife's choses in action into possession. The evidence fully proves that he held the whole property as his own, by actual possession. And as to her choses in action, if the contract or nature of the demand be altered by the husband, this will be a reduction into his possession, sufficient to defeat the wife's right of survivorship. It is true, in this case, that the wife's right to possession was a mere equity; but if this equitable chose in action was united, during marriage, with the husband's actual possession, it would seem that his estate became perfect. In relation to Mrs. Glover's estate, whether it consisted in a share specifically ascertained, or whether it was an undivided interest in Andrew Glover's estate, let it be supposed that administration had been granted to a stranger, and he had brought suit, either in Law or Equity, against John Nail, who was in possession. To the suit in Equity, the fact that he, in right of his wife, was entitled to the whole, would have been a sufficient ground to have prevented that Court from depriving him of the possession, except so far as might be necessary for the payment of debts. Against the suit at Law, the same ground would have induced the Court of Equity to grant an injunction. If, therefore, his possession could not have been legally divested, and was in his own right, and not in a representative character, I am satisfied that his marital rights did attach,

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and that the wife took nothing *by survivorship. It seemed to be supposed, that, as to the estate of Mrs. Glover, the fact of her estate having been separated from the rest of the estate of Andrew Glover, would, if true, make some difference in favor of the complainants; but I don't think so. Administration is not necessary, in order to reduce the wife's interest in an intestate estate into possession. It may often happen that the intestate owes no debts, and that all the distributees are of full age: in such a case, if an actual division is made, and actual possession obtained, the share of each feme covert distributee would be vested in her husband. In the case of Hix v. Cox, decided by the Court of Appeals, December Term, 1828, at Columbia, it was held, that where the distributees of an estate constituted agents to sell the estate of their intestate, and the sale was made and notes taken, but not due or collected, before the death of a feme covert distributee, that this was such a reduction of the wife's interest in the personal estate into possession, as to vest it in the husband. 1 Roper on Husband and Wife, 216. I am hence satisfied that the husband's possession was a possession in his own right, and not in a representative character, and that the wife's right of survivorship is defeated. The bill ought, therefore, to be dismissed, as to the claim set up by the complainants, for the personal estates of either Andrew Glover or Dicey Glover, (deceased,) and it is so ordered; but as it also seeks partition of land and slaves, which, it is conceded, ought to be made, and which, perhaps, has not already been done, the bill ought to be retained. So much of the decree of the Chancellor as entirely dismisses the bill is therefore reversed, and the bill is re-

tained for partition of the land and slaves, to which no objection has been raised.

JOHNSON and MARTIN, JJ., concurred.

Decree modified.

Rich. Eq. Cas. *122

*W. B. FARR v. REUBEN SIMS et al.

(Columbia. Jan. Term, 1832.)

[*Witnesses* ⇐86.]

Plaintiff has the right to examine a defendant as a witness, without his consent, to any point in the cause in which he is not interested; and with his consent he may examine him against his interest, and other defendants have no right to object.

[Ed. Note.—Cited in Capehart v. Huey, 1 Hill, Eq. 408.

For other cases, see Witnesses, Cent. Dig. § 225; Dec. Dig. ⇐86.]

[*Execution* ⇐247.]

Plaintiff, in execution, desiring to purchase defendant's land at a low price, ordered the Sheriff to sell for specie. The order was indorsed on the execution, but no such condition was stated in the advertisement. On the day of sale, a junior creditor offered $3,000 for the land, in bank bills. His offer was refused, and the land was sold to a third person, for $1,000. The debtor remained in possession. *Held*, that the sale was fraudulent, as against the junior creditor, and, at his instance, it was set aside.

[Ed. Note.—Cited in State v. Moseley, 10 S. C. 4; Ex parte Cooley, 69 S. C. 155, 48 S. E. 92.

For other cases, see Execution, Cent. Dig. § 694; Dec. Dig. ⇐247.]

[*Execution* ⇐233.]

A judgment creditor has a right to require payment in specie; but this, like all other legal rights, must be exercised in good faith, and not with a view of sacrificing his debtor's property, and obtaining an unconscionable advantage.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 656; Dec. Dig. ⇐233.]

[*Execution* ⇐222.]

A Sheriff's advertisement must contain, not only the names of the parties, and a description of the property, but also the terms of sale, and if he intends to sell for specie, it should so state.

[Ed. Note.—Cited in State v. Moseley, 10 S. C. 4.

For other cases, see Execution, Cent. Dig. § 631; Dec. Dig. ⇐222.]

[*Execution* ⇐249.]

If a Sheriff sell without having duly advertised, his sale is void, semble; and if he sells for specie, he has not duly advertised, unless that was stated as a condition.

[Ed. Note.—Cited in State v. Moseley, 10 S. C. 4.

For other cases, see Execution, Cent. Dig. § 701; Dec. Dig. ⇐249.]

[*Execution* ⇐249.]

Any act, on the part of the auctioneer, or persons causing the sale, which prevents competition among bidders, will vitiate the sale; and a Sheriff's requiring specie, without having advertised that as a condition of the sale, is such an act.

[Ed. Note.—Cited in State v. Moseley, 10 S. C. 4; Howlett v. Garner, 50 S. C. 12, 27 S. E. 533.

For other cases, see Execution, Cent. Dig. § 698; Dec. Dig. ⇐249.]

[*Execution* ⇐275.]

Though one cannot be punished for the fraud of others, yet he cannot avail himself of it.

[Ed. Note.—Cited in Du Pont v. Du Bos, 52 S. C. Append. 601.

For other cases, see Execution, Cent. Dig. §§ 16, 148, 345, 791–796; Dec. Dig. ⇐275.]

[*Execution* ⇐275.]

A fraudulent Sheriff's sale is void, and even an innocent purchaser can claim nothing under it.

[Ed. Note.—Cited in Black v. Childs, 14 S. C. 321; Carrigan v. Byrd, 23 S. C. 95.

For other cases, see Execution, Cent. Dig. §§ 16, 148, 345, 791–796; Dec. Dig. ⇐275.]

[*Execution* ⇐275.]

The Sheriff is the agent of a purchaser, at his sale; and such purchaser will be affected by the Sheriff's fraud.

[Ed. Note.—Cited in Brown v. Barnwell Mfg. Co., 46 S. C. 415, 425, 24 S. E. 191.

For other cases, see Execution, Cent. Dig. §§ 16, 148, 345, 791–796; Dec. Dig. ⇐275.]

[*Execution* ⇐256.]

A purchaser's, at Sheriff's sale, permitting the debtor to remain in possession of the land, is a strong circumstance of fraud.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 723–733; Dec. Dig. ⇐256.]

[*Fraudulent Conveyances* ⇐132, 146.]

A gift of slaves, unaccompanied by actual possession, is, as against subsequent creditors of the donor, without notice, void; and it makes no difference that the donee is a minor, residing with the donor, his parent. In such a case, all creditors without notice, whose debts were contracted before the donee left the parental roof and took the slaves into his own possession, may look to the slaves for satisfaction of their debts.(*a*)

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 409, 455; Dec. Dig. ⇐132, 146.]

The cases, in this State, relative to fraudulent gifts reviewed.

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*Before Harper, Ch., at Union, August, 1831.

This case will be sufficiently understood from the Circuit decree, and the opinion delivered in the Court of Appeals.

The Circuit decree is as follows:

Harper, Ch. The defendant, R. Sims, with several others, was indebted, as surety of one Jas. Moorman, to complainant, in a considerable sum, by a joint and several obligation. The complainant commenced suits at law against the parties to the obligation. Moorman confessed judgment, and complainant recovered against the other sureties. Pending the suit against defendant Sims, defendant E. Stevens purchased and

(*a*) The Act of 1832 (6 Stat., 483) avoids all parol gifts in favor of subsequent creditors, purchasers, or mortgagees, with or without notice, it would seem, where there is no change of possession. Motte v. Aiken, 2 Sp. 113. Gifts evidenced by writing stand as they stood before that Act was passed; and that such gifts are valid against subsequent creditors, with notice, where there is no actual fraud, seems clear. Moultrie v. Jennings, 2 McM., 508.

procured to be assigned to him, a judgment which the Bank of the State of South-Carolina had obtained against Sims. Sims also confessed judgments to defendant, George Ashford, and several other persons, to the amount of $4,000 or $5,000. Executions on these judgments were levied on the property of Sims, consisting of a tract of land, and about twenty-three negroes. The Sheriff in selling the property, was directed by the plaintiffs in the executions to receive nothing but specie in payment. The land was sold on Monday, a sale day, and purchased by defendant, Wm. Rice, for $1,000: part of the negroes were purchased by defendant, George Ashford: part by defendant, Jno. Sims, and part by defendant, Edw. Stevens. The land, according to the testimony, was worth about $2,500, or $3,000. The slaves, it appears, sold at full prices. The complainant objected to the sale of the land for specie, and offered to give $3,000, if defendant would take paper. The Sheriff states, that complainant himself had an execution, on which he demanded specie. The negroes were sold in lots of ten or eleven. After the sale, defendant, R. Sims, continued in possession of the plantation and slaves except those purchased by Ashford. Those bid off by Stevens were removed at the end of the year. Reuben Sims, with the slaves purchased by defendant, John Sims, still con-

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*tinues on the plantation. Some time after this transaction, Reuben Sims, sold off all his remaining property at auction. He admits he spoke of going to Florida, but denies that he intended to remove property with a view of defeating creditors. Upon these circumstances, and others of minor importance, which I do not think it necessary to advert to at present, complainant charges, that the sales made by the Sheriff were fraudulent, and made in combination with Reuben Sims, in order to defeat complainant's claim on Sims, (James Moorman and his other securities being insolvent,) and prays that they may be set aside. The fraud charged, may be of a two-fold character; either that the other defendants purchased at inadequate prices, in combination with Reuben Sims, by demanding specie, without giving notice of their intention to do so, upon some secret trust for, or promise of favor or indulgence to him: or that the plaintiffs in the executions fraudulently procured a sacrifice of the property, with a view to purchase it at an under value. And certainly the circumstances do go far to raise strong suspicions, if they do not make out a prima facie case of fraud. The defendants, however, in their answers, deny any fraud or, combination with Reuben Sims. With respect to the demand for specie, which is one of the leading circumstances, it was one which the plaintiffs unquestionably had a right to make. The constitution of the United States unquestionably secures that right. Yet if a plaintiff, knowing the habits and circumstances of the country, should studiously conceal his intention of demanding specie till the time of sale, and then suddenly require it, I should deem it a strong circumstance in Equity, to show fraud and unconscionable dealing. In this case the defendant Stevens, was examined as a witness for complainant. He states, that without any combination with Sims, he directed the Sheriff to sell the land for specie, expecting thereby to obtain it at a low price. This was hard, and unconscionable, especially as complainant offered a so much higher price in paper. But he states that he indorsed the

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direc*tion to the Sheriff on his execution when he lodged it, and the Sheriff confirms his statement. He did not then conceal his intention to demand specie, and if there was any neglect to give notice of this, by advertisement, or before the day of sale, it would seem that the fault must have been with the Sheriff; and that could not affect the sale. Nor is it shewn that the plaintiffs to other executions concealed their intentions. The Sheriff, Anderson, was examined, and might have proved it, if the fact had been so. For aught that appears, this also may have been the neglect of the Sheriff. The circumstance of Reuben Sims remaining in possession of the land after the sale, is one of the strongest to shew fraud. The defendant, Wm. Rice, the purchaser of the land, in his answer, swears that he had no agency, whatever, in procuring the land to be sold for specie, and in this, he is confirmed by the testimony of Stevens. His purchase, therefore, was not fraudulent on that score. I cannot say, that his permitting Reuben Sims to remain in possession after the sale is, of itself, conclusive evidence of fraud. He states, that after the sale, out of humanity to Reuben Sims and his family, he permitted them to remain on the land till the end of the year, when the growing crop would be finished, and took a written acknowledgment of tenancy; at the end of the year rented it to John Sims, and this year cultivated part of it himself. The possession of land, is not so strong a badge of fraud, as that of personal property. The possession is not so much evidence of ownership. With respect to the negroes, Ashford's were taken away immediately, and Reuben Sims had no after possession of them. Stevens' were taken away at the end of the year, and I think it was competent for him to leave them on the plantation till the crop was finished. John Sims states, that he cultivates the plantation for himself, and employs Reuben Sims to oversee it. This, I confess, is suspicious, but with respect to all of the negroes, it may be observed, that if fraud was intended, there was no injurious fraud effected. The negroes were sold for a full price. It is not

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alleged that the *judgments confessed to the defendants were not bona fide. If I should set aside the sales, I do not know that it would benefit the complainant, unless I could deprive defendants of their priority of lien, as a punishment of their fraud. Besides these, the other circumstances are entirely inconclusive, and there is no direct testimony against the denial of the answers.

There is another part of this case. The bill charges that the defendant, John S. Sarter, on his marriage with Reuben Sims' daughter, in 1825, received from him several slaves. This is charged to have been a gift, fraudulent as to creditors. The answer is, that the girl Rhoda was given by her father to defendant's wife, in 1813, and that the other slaves received by Sarter, are her children since born. The evidence of Reuben Sims himself, and of Mr. Stansbury is, that in 1813, he made a formal gift and delivery of a girl to his daughter, putting her hand into that of his child. Their testimony is confirmed by that of Dr. Meacham, a very respectable witness, who states that about that time he was living in the family, and practicing as a physician, and that he then understood that the girl had been given to Mrs. Sarter.

Under the current of decisions in this State, I shall hold this as sufficient proof of the gift against the parent himself. There is no question about fraud on creditors existing at the time. R. Sims was then in good circumstances, nor does it appear that any of his debts were contracted for several years afterwards. There is, therefore, no ground to infer fraud on subsequent creditors from the mere circumstance of the gift being voluntary. The girl, however, remained in possession of the father, in whose family also the daughter resided; was employed by him indiscriminately with his own, and he also paid taxes for her. From the decided cases in this State, I shall be induced to conclude, that a slave being given by a parent to a child, and remaining in his possession under such circumstances, did not of itself vitiate such gift: there being no question as to existing creditors, nor any actual intention to defraud subsequent cred-

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i*tors; though some expressions in the case of Madden v. Day, (1 Bail. 337, 587,), might seem to authorize me to come to a different conclusion. There are two cases in which a vendor's or donor's remaining in possession after a gift or transfer, is evidence of fraud: first, where the transfer or gift was not bona fide, but colourable, and on some secret trust, and to put the property out of the reach of creditors; secondly, where it enables the possessor to obtain credit, and defraud persons who trust him on the faith of the property. In the first case, the retaining possession is a badge of fraud, and a strong one. But it is susceptible of explanation. A trustee conveying, may retain possession, if his possession be consistent with the trust, and so, in our adjudged cases, if an infant child having received a gift, continues to reside in the family of the parent. In the latter instance, the possession of the donor or vendor, is said, in the leading case of Edwards v. Harben, 2 T. R. 587, to constitute fraud of itself, though no actual fraudulent intention appears. This is just with respect to the donee or vendee, who put it into the possessor's power to deceive others; but this cannot apply to a child, under the power of a parent, who had no discretion, or power of disposition in the matter. Though not without difficulty, I must affirm the gift. The bill is dismissed, but without costs.

The complainant appealed on the grounds:

1. Because the Court should have permitted Edward Stevens, one of the defendants, against whom no decree is now sought, to have been fully examined as a witness, which was not done, as defendants' solicitor raised an objection to his competency, in the midst of his examination, which was sustained.

2. Because the decree is in part predicated on the partial examination of Edward Stevens, which constitutes error in the decree, as what he had said in his partial examination should have been excluded, or he should have been examined in full.

3. Because the sale of defendant Sims's,

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land, under the *circumstance, was null and void, and should have been so declared.

4. Because the gift of the negroes to defendant Sarter, by defendant Sims, was null and void, as regards complainant, as he trusted him in 1817, and the negroes remained in Sims's possession until February, 1825, which was the earliest period that complainant had any notice of such gift; so that, as to him, it must be regarded as a gift of that date, and not earlier.

A. W. Thomson for appellant.
Herndon, contra.

The opinion of the Court was delivered by

O'NEALL, J. Three questions have been argued in the appeal in this case:

1st. Was the defendant, Stevens, a competent witness for the complainant, upon such parts of the case as did not seek to make him liable?

2d. Is the sale of the land void, on account of the alleged fraudulent conduct of the creditor, Stevens, and the Sheriff?

3d. Is the gift of the slaves to Mrs. Sarter good, as against the complainant?

1. Modern decisions have very much relaxed the rule of exclusion of witnesses, on account of interest. The inclination is now to permit a witness to be sworn, in every case, where he has not a certain and direct interest, either in the record or the event.

In all other cases, the weight of the objection is to his credit, and not to his competency. A witness who has an interest, but is offered to testify against it, is generally competent. A party to a record in the Court of Law cannot, in general, be a witness. An exception, however, was allowed even to this rule. In a suit by a public officer, where he had no interest in the event, and was not even liable for costs, he was held to be a competent witness for the party for whose use the suit was brought. Price v. Gregory, 4 McC., 261.

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*In Equity, where the proceeding, by bill and answer, places the Court at once in possession of the supposed relative rights and liabilities of the parties, it has long been allowed to examine either a complainant or a defendant, where there were more than one, to any point in the cause in which he had no interest. In the case of Neilson v. McDonald, 3 Johns., Ch. 204, the Chancellor held that a co-defendant, charged with combination in a fraud, and who might be liable for costs, but against whom no particular relief is prayed, might be a witness for the other defendants. If this rule be correct, as between parties offering one of their own number as a witness, it must be obvious that there is a great deal less force in the objection to its application, where the complainant offers a defendant. In this case he risks both his interest and prejudice against himself. All the temptations to perjury arise from the interest which the witness has against the complainant. If he is able to overcome these, or if the complainant is willing to hazard their influence, there can be no objection, on the score of interest, to the witness. The only objection which can then arise, is that of privilege to a party in a cause; and this is, first, a personal privilege, and, second, one of interest. If the party, however deeply he may be interested, is willing to be sworn against his own interest, and the party opposed to him in interest is willing to risk his testimony, none of the other parties in the cause can make the objection for the witness. If, however, the witness is interested in the result, and makes the objection to being sworn, it would be irresistible. For if the proposed witness is a defendant, his answer is the only means of obtaining the knowledge confined to his own breast. It is hence, in the English practice, that a defendant is required to answer every pertinent interrogatory put to him in the bill, and, if he fails to do so, his answer may be excepted to for insufficiency. If he is a complainant, his discovery can only be obtained by a cross bill. In the case under consideration, it appears that Stevens had no interest to support the sale of the land; or, if he

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had, he does not appear *to have made the objection to being sworn. For, from the Chancellor's decree, it appears that he was sworn, and testified to many facts, having a very important bearing on the case. I have no doubt, therefore, that he was a competent witness for the complainant.

2. The circumstances attending the sale of the land make out a case, at which, if the debtor had not been a party consenting to, and acquiescing in it, every one would exclaim as a gross fraud and oppression upon him. His acquiescence and combination in the fraud upon his own rights does not make it less a fraud upon the rights of his creditors. Indeed, it strengthens their claims to relief; for, in this point of view, it may be regarded as a shift of an insolvent debtor, to delay or hinder his creditors from the collection of their debts. I know of no fraud which more deserves reprehension, than a fraudulent abuse of the process of execution, for the purpose of either unjustly sacrificing a debtor's property, or protecting it for him, against other debts.

It is true, that every creditor has a right to demand and coerce payment in specie; but this, like all other legal rights, must be exercised in good faith, and not with a view of sacrificing a debtor's property, and thus obtain an unconscientious advantage. Every one to whom a debt is due has a right to be paid; but if this legal right is used to obtain the debtor's property, at enormous sacrifices, this might be considered as a fraudulent abuse of the rights of the creditor and debtor, and might avoid the transaction. A legal right must be always used, and not abused. If the party who desires to be paid in specie gives reasonable notice, or if he shows that a necessity, on his part, existed to demand it, either might negative the presumption of fraud arising from so unusual a requisition. But in the case before us, the defendant, Stevens, without any apparent necessity, purchased from the Bank of the State of South-Carolina a judgment, which they were not pressing against the defendant, Reuben Sims. He gave for it his own

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note, in payment of *which bank notes of that or any other of the banks of this State would have been taken. There was, then, no necessity existing, on his part, to demand payment in specie. So soon as he became the proprietor of the judgment, he lodged the execution, with orders to sell immediately and for specie. This was a short notice; but if the Sheriff had advertised the sale to be for specie, it might have availed to protect them both from legal censure. As it was, however, the Sheriff gave no such notice until the day of sale, and this failure of duty, on his part, must also attach to the creditor; for, in effecting the sale, the Sheriff is the agent of the creditor, the debtor, and the purchaser, and his acts may, more or less, affect them all. Before the Sheriff can sell, he must advertise lands for twenty-one days. To be a compliance with the law, his advertise-

ment must not only contain a description of the property to be sold, and the names of the parties, but also the terms of the sale. Look to the object for which the Sheriff is required to advertise, and it will at once be perceived that I have not stated too broadly the constituent parts of his advertisement. Not only the debtor and creditor are to be apprised of the sale, but also the whole community, that they may attend and compete with each other for the purchase of the property to be sold. To enable persons to buy, they ought to be apprised of the terms on which the property is to be sold. The usual terms of a Sheriff's sale are cash. The term cash has two meanings, one a payment in current bills, the other in specie. The first is the popular, the latter the legal meaning. The former has, in common parlance, entirely supplanted the latter. An advertisement that the sale was to be for cash, would be understood by every one to be for current bills. A sale made for specie, under such a notice, was anything else than fair. It was, in fact, a sale without being advertised, for one of the most important conditions of the sale was not disclosed in the advertisement. In this respect, the sale was void, for want of authority on the part of the Sheriff to sell. The usual presumption is, that the

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Sheriff, or any *other public officer, has done his duty, and this presumption would sustain his acts, until the contrary was shown. But it may be rebutted, as was fully done in this case. It is the Sheriff's duty, when he sells for specie, to say so in his advertisement, so that every one may be fully informed. It might, perhaps, be enough on this question to stop here, and say that, as the Sheriff sold without having properly advertised, that he sold without any authority, and that, therefore, the purchaser took nothing by his bid. But this would be, perhaps, unsatisfactory to the parties, and they might complain of being made the victims of a new rule.

I am satisfied the sale is void, on account of the fraud; and on this part of the case, I might refer to Neilson v. McDonald, 6 Johns. Ch. 201, as a perfectly analogous case to this. They are, indeed, in some particulars, the same case, and, as against the creditor, Stevens, and the Sheriff, that case would decide this. As a general rule, it may be laid down, that any act on the part of the auctioneer, or persons causing the sale, which prevents competition among the bidders at an auction, will vitiate the sale. 4 Johns. Ch. 254. Let us apply this rule to this case. The first thing calculated to prevent competition, was that the terms were unusual, and not made known until the sale. None could buy, at such a sale, but the creditor, or such as had been apprised of the terms in sufficient time to prepare for it, or such as, by sheer accident, happened to have specie. Few could, therefore, compete for the property to be sold—probably not one-tenth of those who might have desired to do so. The next fact, showing that competition was actually prevented, and that the property sold for not more than one-third of what it otherwise would, is that the complainant, at the sale, offered $3,000 for the land, in bills of the Bank of the State. This bid was refused, and the land knocked off to the defendant, Rice, at $1,000. The third and last fact necessary to be noticed is, that Stevens himself, on his own examination, said that he directed the land to be sold for specie, with

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the *view of buying it for less than it was worth. Take all these circumstances together, and they present a case, not only of oppression in a public sale, but of fraud, which would soil the ermine of justice, if it could escape with impunity.

If no one was concerned in the sale but the creditor and Sheriff, I might here stop the investigation; but, at that sale, that defendant, Rice, was the purchaser, and it is contended for him, that, as he has denied, in his answer, the fact of combination, that he must be protected in his purchase. If the first position which I have stated, that the Sheriff sold without legally advertising, and, consequently, without authority, be correct, then the defendant, Rice, cannot avail himself of the purchase. But, waiving that for the present, let us examine how far he is to be affected by the fraud in the sale, supposing him to be an innocent purchaser. This question is, I am free to confess, not without its difficulties. In Robson v. Calze, 1 Doug., 228, the distinction is pointed out by Lord Mansfield, "that although a third person should not be punished for the fraud of another, he shall not avail himself of it." In the conclusion of his opinion, he puts "the case upon the broad ground, that a certificate is void if obtained by fraud, though without the knowledge of the bankrupt." In the Attorney General v. Vigor, 8 Ves., 283, it is said, "If a deed is absolutely void at law, for covin, it may be treated as a nullity." The defendant, Rice, claims title to the land, through the Sheriff's sale; can he avail himself of it, though fraudulent, to sustain his title? It is true, he is the defendant, and if the case sought to punish him, he could say the fraud was another's, and not mine, and therefore I cannot be punished. But the claim seeks to subject him to no loss: he must be refunded the amount paid, and interest; it seeks to prevent him from setting up his purchase, under a fraudulent sale, to the injury of the complainant. I can perceive no difference between his claim, under the Sheriff's deed, and the bankrupt's claim to be discharged, under his certificate,

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in Robson v. Calze. Both *were conceived in sin and brought forth in iniquity. I must

confess that I never have been able to see the reason why a purchaser, under a vicious sale, should be protected. If a Sheriff sells without authority, or in such a way as to be contrary to law, the debtor, I should suppose, might elect either to make the Sheriff responsible for his improper conduct, and thus confirm the sale, or to pursue and recover his property, and leave the purchaser to his remedy over against the Sheriff. A person can only be deprived of his property according to the forms of law; and if these have been violated, the right still remains in him. If the Sheriff fraudulently sells a debtor's property, his sale, it is conceded, is void. If the sale is void, must not his deed to the purchaser be void also? It is his sale which authorizes him to convey, and if he has not made a legal sale he has no authority. The sale of the Sheriff was, in this case, covinous and void at law, and I apprehend the sale and deed are both nullities. So far, I have considered the Sheriff and Rice as strangers to each other in law. But the Sheriff is his agent in the sale and the purchase, and it will not be pretended that the principal can protect himself by the fraud of his agent. Placing the case, therefore, on this footing, there can be no doubt that Rice's purchase must fail, if the sale is fraudulent. If the defendant, Rice, had notice of the fraud, it is clear that he cannot be protected. The terms of sale were unusual, and were enough to put him on an inquiry why they were so. Any thing which is enough to put a party on an inquiry is usually noticed in Equity. But I think he had actual notice. I understand from the case, that the complainant, when the land was offered for sale, proposed to give for it $3,000 in bank bills. This bid was refused, unless it should be paid in specie. After this, the defendant, who purchased for one-third of the sum, could not pretend that he did not know that advantage was taken, and a sale forced, on unusual terms, to obtain the debtor's property at less than it was worth.

The possession of the land by the defend-

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ant, Sims, since the *sale, is a strong circumstance of fraud, and, nine times out of ten, is almost conclusive evidence of it. It has been, in some degree, explained in this case; but when coupled with the other circumstances of the case, it goes far to sustain the conclusion that the sale was made by the combination of the creditor, the debtor and the Sheriff, to cover the property for the debtor. I, therefore, conclude that the sale of the land must be set aside.

3. This question is one of more vital importance to the community than any other. As was well observed, a lecture on honesty here, is worth more, perhaps, than in any other place: for it furnishes the means to make men honest, even against their wills, and, although there may not be much virtue in legal honesty, yet there is a good deal of utility in it. If all could act in strict conformity to Law, it would be carrying us back in reality to the fancied golden age of poetry. Such, however, cannot be the case, while man is fallible and human institutions imperfect. The nearest we can approach to certainty, in any one branch of jurisprudence, we have by so much improved the condition of man in society.

I concur fully with the late presiding judge of this Court, that the statutes against fraudulent conveyances are only declaratory, or rather, in affirmance, of the Common Law. Any gift or conveyance which, by their provisions, is void, is so also at the Common Law. Fraud can never be the predicate of a Common Law right—it is always its destruction.

Upon the question, whether a gift, unaccompanied by actual possession, as against subsequent creditors, without notice, is good, different opinions have been entertained by distinguished jurists in this State and elsewhere. But I propose to shew, by a review of all our own decided cases, that we are free to answer the question in the negative, if we choose to do so; and that this answer is more in unison with reason, justice, and the majority of our decided cases, than one in the affirmative would be. In the order of time, the first case, in which the legal

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effect of a *voluntary conveyance against creditors was fully considered, was the case of Kid v. Mitchell, 1 N. & McC. 334, [9 Am. Dec. 702.] In that case the gift was supported, but the fact of notice was fully brought home to the defendant. There is, therefore, in that case, nothing repugnant to the conclusion, that if notice had not been proved, it could not have prevailed. Indeed that case, as I shall hereafter shew, goes far to sustain the doctrine for which I am contending. Smith v. Littlejohn, 2 McC., 362, was a case, where the parent at the time of the gift was not in debt. He contracted the debt subsequently, and sold the slave to pay it. The fact of explicit notice of the gift was proved. In Hudnal v. Teasdall, 1 McC., 227, [10 Am. Dec. 671,] and the same case reported under the name of Hudnal v. Wilder, 4 McC., 294, [17 Am. Dec. 744,] the main question was on the fact of notice to the purchaser. In the case of Madden v. Day, 1 Bail. 337, Judge Nott stated this question, and gave fully his opinion, that the gift, where the possession remained in the donor, would not be good against a subsequent creditor, who had given credit on the faith of the property. I tried the case of Madden v. Day, on the circuit, and instructed the jury, that a bona fide gift by a parent to his child, where the donor retained possession, would be good against subsequent creditors. This, I thought then, was in compliance with previous adjudications, although my own opinion was then in full accordance

with that expressed by Judge Nott. Believing that case to have in some degree settled the law according to my own opinion, I cheerfully and heartily adopted Judge Nott's dictum as a correct exposition of the law. At Spring term, 1830, was tried the case of Howard v. Williams, (1 Bail. 575, [21 Am. Dec. 483,]) in which my ingenious and learned brother Evans, maintained that a gift from a parent to a child, if not made with a view to future indebtedness, was good against subsequent creditors without notice, notwithstanding the parent retained the possession. That question was, however, not necessary to the decision of the case. For I had instructed the jury, that, as against existing debts, a

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gift, when the donor retained *possession, could not prevail: and if, on the final winding up of the donor's affairs, it was necessary to sell the property given to pay both the existing and subsequent debts, that the gift was void, and it was for this supposed misdirection, that a new trial was ordered. The subsequent cases of McElwee v. Sutton, 2 Bail. 128, 361; Cordery v. Zealy, 2 Bail. 205; Izard v. Middleton, (Bail. Eq. 228), and Brock v. Bowman, [Rich. Eq. Cas. 185,] decided at this term, have overruled the doctrine of Howard v. Williams, on the point necessary to its decision. In Cordery v. Zealy, 2 Bail. 205, and Brock v. Bowman, [Rich. Eq. Cas. 185,] it is distinctly said, that where a gift is made, and the donor retains possession, it will be void against subsequent creditors without notice.

In Sexton viz. Wheaton, 8 Wheat. 229, [5 L. Ed. 603,] C. J. Marshall has reviewed all the English authorities on this subject, and comes to the conclusion, that a voluntary conveyance is good against subsequent creditors. But it will be seen, on looking into that case, and the English cases, that they are all decided upon conveyances, actually executed, and, in the last case, the fact of the deed being recorded, is relied upon as a circumstance, to shew that credit could not have been given upon the faith of the property conveyed. A parol gift by delivery, but possession retained by the donor, cannot be found, as a class of cases, in the Courts of any country but our own. It hence, is, perhaps more important, that we should adopt some rule which will compel them to operate fairly on the community. Possession, all our books tell us, is prima facie evidence of right to personal property. In this State, it is almost the only evidence of title to slaves. Is it to be tolerated, that one should be the ostensible owner of a slave for years; obtain credit upon this apparent ownership; and, when misfortune overtakes him, that he should be permitted to turn round and say to his creditor: it is true you trusted me on the faith of this property, but I was not the owner; some ten or fifteen years ago, I gave it to my child? If this is allowed, I know of no greater fraud which can be committed on a creditor. In the language of Judge Nott,

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in Madden v. Day, "a *vendor's continuing in possession of personal property is usually considered as furnishing such evidence of fraud, as will render the property liable to the claims of creditors, even against a bona fide purchaser for valuable consideration; and the principle must apply more strongly in the case of a volunteer. The only circumstance which can be relied on to repel the presumption, is, that the possession of a parent of the property of his infant child, of whom he is the natural guardian, is not inconsistent with the nature of the claim set up by the child. But if it may be evaded by so flimsy a pretext, as by conveying to one under his own roof, and for whom he is bound to provide, the rule is of but little value." The retention of possession after an absolute sale or gift, as between adults, furnishes a presumption in law, that either is fraudulent. Can the relation of a parent and a minor child diminish the presumption? The parent is bound to take care of the property of the child, it is said. Be it so. His duty is not to treat it as his own: he should either separate it from the mass of his property, or permit the fact of right ownership to be known. If he does not do it, who is to be injured—the donee or the creditor? I think the former. To constitute a good gift, the donor must not only give, but the donee must accept. In the case of a minor child, the parent gives to and accepts for him. As between them, this makes the gift capable of being enforced; but until possession is actually delivered, or the child demands possession, the gift is not strictly consummated. For until then, the donee may dissent from it. It is true, it is not likely he would: or, to use a cant phrase, that "he would look a gift horse in the mouth." But still, I think, in strict law, we are at liberty to regard parol gifts, where the donor retains possession, as executory, until the donee is legally capable of assenting and does assent. In this view, it is plain, that it would be bad against all debts existing before possession is actually delivered, or claimed after attaining to maturity. For until then, it is no gift. But a different notion has so long prevailed in relation to parol gifts, that I will

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not *rest the argument here. If one is in possession of property as his own, and obtains credit on the faith of it, it will be liable to his debts, is the rule broadly laid down. In Kid v. Mitchell, 1 N. and McC. 340, [9 Am. Dec. 702,] it is said, "neither is a deed fraudulent because the vendor continues in possession; it is only against creditors and subsequent purchasers without notice." Why is it that it is void against them? The same authority tells us, "The ground on which a voluntary conveyance is held void

against creditors, is, that he who has trusted another on the faith and credit of the visible property which he has in possession, shall not be defeated of his debt by a transfer without consideration; and the same principle applies in the case of subsequent creditors and purchasers, without notice, when the vendor continues in possession." This dictum of the wise Judge, who delivered the opinion, put the case on its true footing. The question is not, was the gift good in its beginning; but between a volunteer and creditor, which is to be preferred? and that question must be always answered by another: was credit given on the faith of the property? If it was, it is a plain fraud on the creditor, although the donee may be innocent of it: and in such a case a valuable consideration must always prevail over a good consideration. In Hudnall v. Wilder, 4 McC. 306, [17 Am. Dec. 744,] Judge Nott says, "A man continuing in possession, is regarded as to creditors or subsequent purchasers, as the owner against the most solemn unconditional deed in the world." This, I take it, is the rule of the law, to which, it is true, there may be exceptions, but none of the exceptions can apply when a creditor or purchaser is uninformed of a previous voluntary conveyance. I come, therefore, to the conclusion, that a gift to a minor child, when the donor retains the possession, is void against subsequent creditors, without notice. This view of the law of the case, subjects the slaves in the possession of the defendant, Sarter, to the complainant's debt.

The slaves sold and purchased by the defendants, Ashford, Stevens and John Sims, appear to have sold for their full value: and as the complainant does not press to set that

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sale aside, *although it is manifest, that it is a fraudulent one, that part of the decree which dismissed the bill as to the said slaves is affirmed.

It is ordered and decreed, that so much of Judge Harper's decree as dismisses the bill as to the sale of the land, and the slaves in the possession of John S. Sarter, be reversed, and that, upon the complainant, within three months from the date of the decree, depositing with the Sheriff of Union District, the sum of one thousand dollars, with the interest from the day on which it was sold to, and purchased by defendant Rice, to the time of the deposite, as the bid of the complainant, the said sale be set aside, and the deed from the Sheriff to the defendant Rice, be cancelled; that the said Sheriff, as soon after as practicable, do advertize and sell the said land under the complainant's execution against the defendant, Reuben Sims, commencing the said sale at the bid deposited by the complainant; and out of the proceeds of the said sale, that the said William Rice be refunded his purchase money and interest, and that the balance of the purchase money be applied to the payment of the debts of the defendant, Reuben Sims, according to their legal priorities.

It is further ordered and decreed, that the defendant, William Rice, do account for and pay over to the Commissioner of this Court, the rents and profits of the said tract of land, to be applied by him to the judgment debts of Reuben Sims, according to their legal priorities.

It is also ordered and decreed, that the slaves in the bill mentioned, in the possession of the defendant, John S. Sarter, are liable to the debts of Reuben Sims, contracted before he delivered the actual possession, and that the same be sold by the complainant on a credit of twelve months, purchasers giving the usual securities, and that the proceeds, when collected, be applied to the satisfaction of the judgment debts of Reuben Sims, obtained on contracts made by him before he delivered the possession to the said defendant, according to their legal priorities.

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*Let the defendants, Reuben Sims and Edward Stevens, pay the costs in this case, except the costs of the defendant, John S. Sarter, which will be paid out of the sale of the slaves herein mentioned, and ordered to be sold.

MARTIN, J., concurred.

Decree reversed.

Rich. Eq. Cas. 141

W. L. WALLACE and Wife v. JOHN GILL et al.

(Columbia. Jan. Term, 1832.)

[*Partition* ⟸114.]

In cases of partition, the costs are usually to be paid out of the property, or by the parties, according to their interests.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 442; Dec. Dig. ⟸114.]

[*Partition* ⟸114.]

Plaintiff being entitled to one-seventh of two-thirds of a tract of land, filed his bill for partition thereof: on the return of the Commissioners, the whole estate was ordered to be vested in one of the defendants, and "the costs to be paid out of the estate." *Held*, that plaintiff was liable for only one-seventh of two-thirds of the costs.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 442; Dec. Dig. ⟸114.]

The bill in this case was filed for partition of a tract of land. The intestate left a widow, entitled to one-third of the land, and seven children, (of whom plaintiff's wife was one, and John Gill, the defendant, another,) each entitled to one-seventh of two-thirds. A writ of partition was issued; and the Commissioners recommended that the whole estate be vested in John Gill, on his paying,

&c. The return was confirmed, and the "costs ordered to be paid out of the estate."

The Commissioner taxed the costs, and required the plaintiff to pay only one-seventh of two-thirds thereof. The defendant, John Gill, insisted that plaintiff was bound to pay one-half; and at York, June sittings, 1831, made the question before Johnston, Ch., who confirmed the Commissioner's taxation. The defendant appealed.

Williams, for appellant.
Mills, contra.

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*The opinion of the Court was delivered by

O'NEALL, J. In cases of partition, the costs are usually to be paid out of the property to be partitioned, or by the parties according to their interests.

In the case before us, the whole property has been assigned to the defendant, and the complainant is entitled to receive only one-seventh of two-thirds of the assessed value. His share of the costs must be in the ratio of his interest. It was said, in the argument, that the defendant, before the bill was filed, purchased the interests of the other distributees. If this be so, he is liable to the whole of the costs except the complainant's share: if it be not, he will be entitled to deduct, from each distributee's share of the assessed value of the land, his or her share of the costs, before he pays over the amount to him or her. This will be, as to himself and his co-defendants, paying the costs out of the land according to their interests.

It is ordered and decreed, that Chancellor Johnston's decree be confirmed.

JOHNSON and MARTIN, JJ., concurred.

Appeal dismissed.

Rich. Eq. Cas. 142

JAMES WESTBROOK, Ex'or, v. O. LANIER et al.

(Columbia. Jan. Term, 1832.)

[*Equity* ⇐394.]

The Commissioner is not entitled to one per cent. for receiving, and one per cent. for paying out money, collected by him on a bond taken by his predecessor, for property sold under the order of the Court.

[Ed. Note.—Cited in Davenport v. Williams, 9 Rich. 402.

For other cases, see Equity, Cent. Dig. § 857; Dec. Dig. ⇐394.]

At Lancaster, July, 1831.

The present Commissioner in Equity, collected and paid out money on a bond taken by his predecessor in office for property sold under the order of the Court; and charged one per cent. for receiving, and one per cent. for paying it out.

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*The presiding Chancellor rejected the charge; and the Commissioner appealed.

PER CURIAM. We concur in opinion with the Chancellor, on the question now raised. His decree is therefore affirmed, and this motion is dismissed.

JOHNSON, O'NEALL and MARTIN, JJ., concurring.

Appeal dismissed.

Rich. Eq. Cas. 143

JOHN KIBLER v. MARY ANN CURETON, Executrix.

(Columbia. Jan. Term, 1832.)

[*Judgment* ⇐429.]

Vendee gave his single bill for the purchase money of land, and was afterwards sued at law on the bill and judgment recovered against him: he then filed his bill in Equity, claiming a pro rata deduction from the amount of the judgment,—alleging that a valuable part of the land had been taken from him by a paramount title:—*Held*, that he was not entitled in Equity to the relief he sought,—that he could, and should have availed himself of the matter, as defence to the action at law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 808; Dec. Dig. ⇐429.]

[*Judgment* ⇐429.]

Where a party may, at law, avail himself of a defence, and neglects to do so, he cannot afterwards apply to the Court of Equity for an injunction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 808; Dec. Dig. ⇐429.]

[*Vendor and Purchaser* ⇐310.]

Where part of the land is taken from the purchaser by a paramount title, he may, in an action at law for the purchase money, claim a deduction for the value of such part.(*a*)

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 907; Dec. Dig. ⇐310.]

[This case is also cited in Garvin v. Cohen, 13 Rich. 153, 155, on the remedy of vendee for defect in warranted title.]

Before De Saussure, Ch., at Newberry, July, 1831.

This was a bill for an injunction against the balance of a judgment and execution at law. The defendant, as executrix, had brought an action against the complainant on a single bill, given for the purchase money of a tract of land, of which, as it was alleged, sixty acres of superior value were taken from the purchaser by a paramount title in a third person That the testator pointed out and pretended to the complainant, while they were negotiating the trade, that the line

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ran so as to include *the sixty acres, on which was a very valuable spring; which,

(*a*) Means v. Brickell, 2 Hill, 657; Taylor v. Fulmore, 1 Rich. 52; [Abercrombie v. Owings] 2 Rich. 127.

with the richness of the soil of that part, constituted it one of the main objects of the purchase.

That defendant and the legatees, and heirs at law of the testator, resided out of this State, and have no property in it that can be attached.

The defendant demurred, and insisted that complainant might have relied on the deficiency of the land by way of discount, in the action at law, and not having done so, had precluded himself from relief in Equity. The Chancellor ordered that the demurrer be overruled, and that the defendant answer the bill of complaint, and that the injunction be continued until the further order of the Court.

From this decree, the defendant appealed, and moved the Court of Appeals to reverse the decree, and sustain the demurrer.

Dunlap, for appellant.

The opinion of the Court was delivered by

O'NEALL, J. The ground on which the bill seeks relief, is that a part of the land sold by the testator to the complainant, is covered by a paramount title in a third person. It is not pretended that this was not known to the complainant at the time of the trial of the action in the Court of law for a part of the purchase money: indeed, on the trial of that cause, the defect was set up by way of discount, and being unable to sustain it by proof, it was withdrawn. The complainant does not now seek a recision of the contract, on the ground, that the object of his purchase is defeated by the part covered by a paramount title; he asks for a pro rata, or relative compensation for the land to which he alleges the testator had no title.

Can the complainant, under these circumstances, ask the aid of the Court of Equity? The rule is, when a party may, at law, avail himself of a defence, and neglects so to do, that he cannot afterwards apply to the Court of Equity for an injunction. (1 Johns., Ch. 98, 465; 61 b. 87; 4 Johns., R. 510.) If this was not so, a suit at law would be noth-

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ing more than the *commencement of a suit in Equity. A party might at pleasure, withdraw his defence at law, and subsequently set it up in Equity. This cannot be allowed. If a party can defend himself, and fails to do so, he has no Equity which entitles him to relief. The defence, proceeding upon the ground, that part of the land to which the testator had no title had been taken from the purchaser, was matter of compensation, and not of recision, and was a legal defence, and might have been set up. The ground assumed by the case of Bordeaux v. Cave, (1 Bail., 250,) is, that when the defect of title does not amount to an entire want of title in the vendor, in the whole of the land sold, but still goes to rescind the contract, on the ground that the main object of the purchase is defeated by the defect, and the purchaser is in possession, the defence is an equitable, and not a legal one: and in such a case, relief in equity would be afforded after judgment obtained at law. A partial failure of the consideration is a legal defence; and perhaps more peculiarly proper for a Court and Jury, than almost any other. How much is the defendant injured by the land to which he has acquired no title by his purchase, is always the question. This must depend upon the relative value of the part so lost to the whole tract: this makes it strictly a question of damages, depending upon the opinion of witnesses, and in such a case the verdict of a jury is greatly to be preferred to any other mode of decision.

I will not say, that the complainant may not have some claim to relief on a proper statement of the case. If, as was said at the bar, the land to which the testator had no title, is embraced in his deed of conveyance, and there is a covenant of warranty, the existence of a paramount title would be a breach of the covenant of seizin: and if more than four years has not intervened between the execution of the deed, and the commencement of the suit, the complainant by proceeding on the covenant of warranty in Equity, and alleging that the executrix is out of the State, and that the funds of the testator are within it, might entitle himself

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to relief. But the case made in the bill, *proceeds on the misrepresentation made at the sale, or rather on the implied warranty of title, which at law is presumed to extend to all the land pointed out at the time of sale. This is strictly a defence, arising out of the sale, and if not set up at law, cannot be set up in Equity.

It is, therefore, ordered and decreed, that the Circuit decree be reversed, that the injunction be dissolved, and the bill dismissed with costs.

JOHNSON and MARTIN, JJ., concurred.

Decree reversed.

Rich. Eq. Cas. 146

WILLIAM TOWLES et al. v. J. G. BURTON et al., administrators.

(Columbia. Jan. Term, 1832.)

[Reported and annotated in 24 Am. Dec. 409.]

[*Trusts* ⇐⇒35.]

Testator, having several children, bequeathed to a married daughter a very inconsiderable legacy, and to a son a double portion, taking from the son a bond, conditioned to hold one-half of the personal property, which he was to receive of his father's estate, for the benefit of the married daughter and her children. Eleven years after, the testator executed a second will, with similar provisions. Parol evidence was *held* admissible to show, that when the second will was executed, and afterwards,

the son acknowledged the trust: and, he being dead, his representatives were ordered to account to the cestui que trusts.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 47; Dec. Dig. ⟸35.]

[*Trusts* ⟸43.]

Parol evidence is admissible to show a trust in personalty bequeathed, the bequest being absolute.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 62–65; Dec. Dig. ⟸43.]

Before De Saussure, Ch., at Newberry, July, 1831.

The Circuit decree, from which the case will be sufficiently understood, is as follows:

De Saussure, Ch. It appears that William Burton, Sr., made and executed his last will and testament on the 5th May, 1812, by which, among other things, he directed that, after the death of his wife, Phebe, to whom he gave a life estate, all his personal estate, including all his negroes and moveable property, should be divided as follows: his son,

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William, was to have *one-half, his daughter, Phebe Ragan, should have one-fourth, and his son, Aaron, one-fourth, to them and their heirs. It appears, further, that the testator, at that time, had another son, Gideon Burton, to whom he bequeathed fifty dollars, saying he, the son, had already received a full share of his property. The testator had also another daughter Scythia Towles, to whom he bequeathed a cow and calf, at the death of her mother. The testator does not say, in this bequest to his daughter, Scythia, that the small bequest of a cow and a calf to her was because she had received her share of the estate, and that it was not intended to be so was obvious, from the fact that he caused his son, William Burton, Jr., to execute a bond, on the said 5th May, 1812, (the day of the date of the will,) in the presence of Kirk and Cleland, two of the subscribing witnesses to the will, in the penal sum of eight hundred dollars, payable to Aaron Burton, one of the sons and legatees of the testator.

The condition of the said bond was, that William Burton, Jr., should, after the decease of the mother, pay to his sister, Scythia Towles, the one-half of the personal property which he was to receive at his mother's death, in case her husband, Daniel Towles, should then be deceased. If not dead, then the said William Burton, Jr., should not be bound to pay it, only at his discretion, in small payments, in such property as he should think best for her and her children. This bond discloses the reason why the testator gave to his daughter, Scythia Towles, only a cow and calf. It was to exclude her husband, Daniel Towles, from getting the property and squandering it, for he was a prodigal, spendthrift and drunkard, and the testator had been obliged to assist his unfortunate daughter and her children for a livelihood. It appears, further, that the testator, on the 19th August, 1823, made and duly executed another will and testament, in the presence of three witnesses. This will is nearly a copy of the former—the variations are small. To his son, Gideon Burton, he bequeathed two hundred, instead of fifty dollars, given by the former will, repeating that he had already provided for him. He

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bequeathed one slave, to which*ever of his children the slave would choose for a master or mistress. In other respects, it is similar to the former will. He bequeathed to his daughter, Scythia Towles, a cow and calf. The testator also directs that, after the death of his wife, Phebe, all his personal property (except the negroes) should be sold, to pay his debts, and afterwards the whole of the balance of the said property to be divided as follows: one-half to his son, William Burton, Jr., a fourth to his son, Aaron Burton, and a fourth part to his daughter, Phebe Ragan. Phebe, the wife of the testator, died in his life time; and the testator died in April, 1826, leaving his said last will and testament in full force and virtue. After his death, William Burton, Jr., the son, proved the will, and had it placed on record in the office of the Ordinary, where Mr. Aaron Burton, who had charge of the bond above mentioned, also deposited the said bond. After some time, an appraisement and division of the personal estate was made, and the slaves were divided into four lots, of which Aaron Burton drew one, Phebe Ragan drew another, and William Burton drew two lots, and has used and employed them for his own purposes. Daniel Towles hath since died, and also his wife Scythia. The complainants are the children of Scythia Towles, and claim the fourth part, or share, of the slaves, which they insist their mother was entitled to by the provision of the bond executed by their uncle, William Burton, which was substantially a trust, in behalf of their mother and themselves, of one-fourth of the slaves received by William Burton, after his mother's death. This demand having been refused, the suit is brought against the representatives of William Burton.

It was contended, on the part of the defendants, that the bond in question, having been executed on the same day with the first will of the testator, (5th May, 1812,) must be considered as connected therewith and dependent thereon; and, as that will was superseded (not revoked) by another and a later will, the bond fell through, and was no longer obligatory or operative. The bond does not name or directly refer to the will; but that it was intended to refer to it is

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obvious, because it *provides that the obligor, W. Burton, was to pay his sister, Mrs. Towles, one-half of the personal property

which he was to receive at the death of his mother, and it was by the bequest of that will that he was to receive one-half of the testator's personal estate, at the death of his mother. The new will repeats the same provisions, and under them, the legatee, William Burton, received one-half of his father's personal estate. The bond is as applicable to the last will as the first. It is a general engagement or promise of the obligor, (in the irregular form of a bond,) to pay or deliver to his sister one-half of the personal property of the father's estate, which he should receive on his mother's death. He has received one-half of his father's personal property, and W. Burton and his representatives are bound to comply with the bond, and deliver a moiety of the slaves to his sister's children. It was argued that, at all events, no more than the penalty of $800 could be recovered, and that the complainants should be sent to law to recover that. I do not think so. It is not a bond to pay a sum of money. It is conditioned to do certain things, under certain contingencies: to deliver the slaves, if Daniel Towles was dead: if not, then to hold them, for the benefit of Mrs. Towles and her children. This was a trust, and a very sacred one. It was the contrivance of the anxious father, to protect an unfortunate daughter and her children from the rapacity and prodigality of her husband, whose habits were bad; and he confided this trust to his son and her brother, in whom he had full confidence; and he, or his representatives, ought to perform their trust, and deliver the property, with compensation for the use and hire of the slaves. There is, however, a great deal of other matter in this case, which must now be considered. The complainants offered parol evidence to prove that, at the time of the execution of the second will, on the 19th of August, 1823, the testator asked for the bond of the 5th of May, 1812, which had been executed by his son, William Burton, and had expressed a desire that it should be taken care of, as it might be wanted after his death; also, that William Burton, Jr.,

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was the person *who desired the will to be altered, and mentioned in what particulars; and that Mr. Tinsley, who drew the new will of 1823, had the old one before him, as his guide, and his understanding thereof. The admission of the parol evidence was opposed, and argued at great length, and with great learning and ability. It was finally agreed that the parol evidence should be received for the present, but that the Chancellor should subsequently make up his judgment as to the admissibility of such evidence, and admit or reject the same, according to the judgment he might form. The parol evidence, thus conditionally admitted, was to this effect:

James W. Tinsley was examined under a commission, and he testified, in writing, that he knew the parties, and was called upon by William Burton, Jr., to draw a will for his (Burton's) father, a few days before its actual drawing and date, but he cannot remember the time: that, in pursuance of that request, he did attend at the house of William Burton, Sr., and drew the will. William Burton, Jr., Aaron Burton, and Charlotte Knight were present. At the time of drawing said will, he had before him a prior will, which had been executed by William Burton, Sr., some time in 1812. The witness understood that there had been a bond given by William Burton, Jr., to Aaron Burton, at the time of the execution of the first will, drawn by Kirk, for the purpose of securing one-half of the personal estate given to William Burton, Jr., for the benefit of Mrs. Towles and her heirs. At the time witness was drawing the will of 1823, Aaron Burton was looking for the bond. The bond was considered to be still good, both by William Burton and his father, whilst he was writing. The understanding of the witness was, that Mrs. Towles' part of the personal estate of her father was willed to her brother, William, to prevent her husband from spending it. He was considered insolvent. Witness does not think that testator would have willed more than a fourth part of his personal estate to William Burton, Jr., if it had not been for this understanding between him and his son, William Burton, Jr. The testa-

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tor was an old *man, and appeared to be under the influence of William Burton, Jr., his son, or, as the witness expresses it, adhered much to his son, William. The witness himself, in his answer to the 15th interrogatory, says, that William Burton, Jr., called on him, to go with him to his father, as he wished to make some alteration in his will. On their way, William Burton, Jr., told him he wished his father to make some particular alteration in his will: that he wished the lines dividing the lands between himself and his brother Aaron altered; also, he stated, that he expected to be able to settle up with Mrs. Towles and her children, in time, without giving up the negroes. On the cross examination, the witness, Tinsley, testified, that William Burton, Sr., appeared to him to be of sane mind, and no undue influence was used. The third cross interrogatory inquired of witness whether the property bequeathed to William Burton, Jr., by his father, in the will drawn by witness, was not William's absolutely: and was it not said that the testator gave this legacy (half his personal estate) to his son William, in consideration of his having already done many acts of kindness towards Mrs. Towles, and in consideration of the testator's expecting him to continue the same generous course of conduct towards her, if she should survive her father. To this interrogatory,

the witness answered that it was not, according to his understanding. The sixth cross interrogatory repeats the inquiry, whether the bequest of the personal estate to William Burton, Jr., was not to be absolutely his, without any trust, and that it was left to his free will to give his sister, Mrs. Towles, what he thought proper, for her maintenance, during her natural life. To this the witness answered, that was not my understanding.

The parol evidence given at the hearing was very full. The substance, only, will be stated here:

Squire Herbert proved the execution of the first will, in 1812, in the hand-writing of Isaac Kirk, one of the subscribing witnesses; also the bond of William Burton, Jr., 5th May, 1812.

Aaron Burton (brother of William Burton, Jr.) testified that he was present at the exe-

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cution of the will of 1812, and of the *bond. He kept that will, and the bond, until after his father's death. When the time was appointed to draw a new will, in 1823, his father, William Burton, Sr., requested witness to go for the bond; he went, but could not find it immediately. His wife found and brought it after the other will (1823) was drawn. William Burton, Jr., said it was not worth while to have taken the trouble to have hunted for the bond: he would have done as much for his sister, (Scythia,) without the bond as with it, and that he would rather give her two dollars than take one from her. It had been concluded by his father to draw a new bond; but Tinsley said it was as good a bond as he could draw, and no new bond was drawn. But his father said to the wife of the witness, take the bond home and take care of it, as it may be wanted after my death. The witness told his father the bond was not large enough. His father answered, it was merely to show his son, William, what he intended. His brother, William, was present at both periods, (1812 and 1823.) His brother, William, in 1823, and at other times after, acknowledged his liability, under the bond, as much as ever, and that he was to let his sister, Mrs. Towles, have half the property bequeathed to him, and never disputed it till some time after his father's death, when there was a family meeting. He then said that he was told by counsel that the bond was of no account—it was revoked. The witness knew of no reason why his father should give half his personal estate to William Burton, and none to Mrs. Towles, except her husband's conduct, which made him wish to save it for her; and his father stated expressly, that the reason he did not give the property on the face of the will was, because of her husband's spendthrift and prodigal conduct. His father, William Burton, Sr., died in April, 1826. The division of his father's negroes was made about Christmas, 1826. They were divided into four lots. The witness drew one lot, his sister, Mrs. Ragan, got one lot, and William Burton, Jr., took two lots. There were four distinct lots, and the names of the slaves were placed on four different papers. An

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objection was made, at the time, *that one of the lots was not specially assigned to Mrs. Towles. The witness spoke to his brother about it. He answered, if he had done wrong, he would correct it at any other time. One of the appraisers and dividers had gone away. The witness never heard his sister say she had got her share of her father's estate. On a further examination of Aaron Burton, he testified that his father, in his lifetime, gave a good deal of corn and bacon to the Towleses, and the daughter of Mrs. Towles worked for them. After the father's death, and on reading his will, their sister, Mrs. Ragan, said to William Burton, Jr., how do you get half, and I get only a fourth? I reckon you have many charges against sister Towles' share. He answered, No, he had not the scratch of a pen. When William Burton, Jr., carried his father's will to the office of the Ordinary, the witness carried the bond and placed it with the will. His brother, William, knew it, and did not object.

Elizabeth Burton (wife of Aaron Burton) testified, that she was not present at the making of the will, for she did not go until the evening; then saw William Burton, Jr., there. Witness carried the bond of William Burton, Jr., and the old man was told of the bond. William said, it need not to have been brought, as he would have acted as well without it as with it. Old Mr. Burton said, Betsy, take the bond home and take care of it, it may be wanted after my death. Aaron Burton remarked that the bond was too small, as his property had increased. The old man said it was of no consequence, as the object of it was merely to show that the half of what he (William) got was for his sister Towles' family. When Mrs. Ragan seemed to find fault with the will, giving half to William Burton, Jr., he said, the family of his sister Towles was to have half of it, and he had no charges against her. Cross examined, this witness said, she had never heard Mrs. Towles say she had got more than her share of the estate.

Phebe Ragan (sister of William Burton, Jr.,) testified, that soon after the making of the will of her father, in 1823, she saw her brother, William Burton, who told her his

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father had *willed half of his property to him, but that he was to hold half of it for Mrs. Towles and her children. He has frequently repeated this. His wife wished him to give up to his sister, Mrs. Towles, her lot of negroes, as it was her right. He said they would waste and part with them; to which his wife replied, that was not his

business. This last conversation was after the division, and at his own house. Her brother, William, answered, he did not know what he should do with the share or lot of the Towleses, at that season of the year. Mrs. Towles was greatly the object of her father's affection. He said he had done a good deal for her. Yet she and her children had done a good deal for him, in the way of service, and he had no charge against them. Daniel Towles, the husband of her sister, Scythia, died about Christmas, 1829. After their father's death, his will was read, his body lying a corpse before them. Witness said to her brother, William, she supposed he had charges enough to take all of Mrs. Towles' share in the negroes. He said he had no charge against her and her family. She has heard her brother, William, acknowledge, that of the legacy to him, Mrs. Towles and her children were to have half, and that this was done to prevent her husband from spending it. This was told her in the life time of her sister, Towles, who died about 1825. Has heard her father say, as well as William Burton, Jr., that Mrs. Towles was to have half the negroes. The father helped Mrs. Towles a good deal, through his sons William and Aaron, and his son-in-law, William Ragan. He said Mrs. Towles and her daughters had rendered him services, which he was willing to consider as equivalent to his advances. There was some talk of a suit against William Burton, Jr., before his death, but none was brought. Some of the daughters of Mrs. Towles were of age at father's death, but not William.

Charles Floyd was called upon about four years ago, (last Christmas,) by Wm. Burton, Jr., to make a division of the negroes of the estate of his father. He said he wanted the division in four lots; one for Mrs. Ragan; one for Aaron Burton; one for himself, and one for Mrs. Towles; and that he should

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*keep Mrs. Towles', and pay the money to her children. The division was made by witness and two other persons. The slaves were appraised and placed in different lots with the valuations. The lots were drawn for. The two first for Wm. Burton. When he drew, he said he had got two choice lots. Witness said he ought to discriminate and set down which was for Mrs. Towles. W. Burton said, it was of no consequence, as he would, at any time, put those two lots in a hat, and draw to ascertain, which should be his, and which Mrs. Towles'. One of the appraisers was gone, when this conversation took place.

Cross-examined. Aaron Burton came during the drawing. W. Burton did not say he had ever paid Mrs. Towles or her children, for the negroes. W. Burton was of good character.

On the part of the defendants, the following witnesses were called:

Mrs. Rebecca Bonham, lived at old Mr. Burton's about seven years ago, before, and at the time he made his will. She heard him say he had willed part of his property to Wm. Burton, Jr., who was to give it out to her, Mrs. Towles, as she called for it. She did not understand it to be to her for life, or how. Old Mrs. Burton sent a middling of meat to Mrs. Towles. The old man grunted, and said, that Mrs. Towles had had as much as he could give any of his children, and said, Mrs. Ragan had not had as much as she ought to have had. It was the general opinion that Mrs. Towles had been much helped by her brother, W. Burton, and she, Mrs. Towles, said to witness, her brother had been good to her, and helped her, or she would have suffered. In the life time of W. Burton, Jr., heard him say he had offered the Towles as much as he intended, and if they would not take it, they might resort to the law. Was present at the making of the will of 1823 by Tinsley. Don't remember whether W. Burton, Jr., was present; does not remember that a bond was produced at the time of the execution of the will; nor anything about it.

Cross-examined. W. Burton, Jas. Burton,

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Aaron Burton, *Miss Knight, Mr. Tinsley and witness were the only persons present that she recollects; can think of no other; was not living with old Mr. Burton, when Mrs. Towles died; cannot tell the exact time when old Mr. Burton complained about sending the bacon—perhaps before; did not hear the terms offered by Wm. Burton, Jr., to the Towleses to settle.

Mary Vickory. Lived at old Mr. Burton's till she married; heard the old man say, his black people would not go out of the family. Heard him say, he had given to Mrs. Towles as much as he would give any of his children. Understood the old man to say, that the slaves were to be Billy Burton's own, but he was to supply Mrs. Towles with what she wanted during her life. But did not understand there was to be any thing for her children.

Cross-examined. Does not remember the words used, except that he did not want the negroes to go out of the family.

Robert Floyd. Was one of the appraisers and dividers. After the division, some one asked, which negroes belonged to Mrs. Towles? W. Burton said the property was his, by the will, which said he was to have half the property. Witness told him he ought to go to Court and sue for his property. Knew of an attempt to settle by W. Burton and the Towleses—talked of an arbitration. Both parties were contentious. But witness and another, (J. Red,) acted as arbitrators, sent for by W. Burton, to go and make a settlement. Witness and Red talked it over. Does not know if Red was employed by W. Burton. Witness and Red made a sort of

conclusion of what property Capt. Burton said Mrs. Towles had had—does not remember the amounts—nothing put on paper. W. Burton and A. Burton were to give Ragan $400, to make him equal to their shares under the will. W. Burton gave Ragan his note for $200—thought Mrs. Towles ought to allow half of the $200, to W. Burton. Witness went in and made proposals to them—was at the division when Aaron Burton drew his share—a little elevated—not habitually drunk. W. Burton, a very correct man—does not remember what was the valuation of W.

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Burton's *or Mrs. Towles' share—heard them talk about a bond of $800—does not know from or to whom, nor any thing about it—proposed Capt. Burton's paying the bond of $800, (on his being allowed this $100, and some little accounts.) Witness is not sure what was proposed as to the bond or negroes, but thinks they agreed to the proposals, though he cannot remember what they were. W. Burton went to the house to get paper. Mr. Towles said he wanted interest on the money, or hire of the negroes—either of them would satisfy him. W. Burton said, he would not allow it, nor have any thing more to do with it—said there was the bond, recover it if they could.

Cross-examined. The witness said the Towleses were not willing to pay any thing. But Mr. Burton required them (the Towleses) to pay one-half of the $200, to be paid to Ragan to equalize him in his shares of the estate—did not understand much about the bond, but supposed it was a bond Wm. Burton was to pay, for he said there was the bond, and they might sue and recover. In their estimate and calculations, they did not estimate the negroes. The Towleses claimed the negroes or the money (interest on the bond, or appraisement, cannot tell which.) The only points of misunderstanding were about the $200 to Ragan, and hire of the negroes or interest on the money for the slaves. W. Burton flew off—the appraisement was about Spring, 1827.

Re-examined. Witness does not remember what accounts were brought in. This witness' evidence was obscure, entangled, and uncertain.

Margaret Harper testified, that Mrs. Burton and Mr. Burton let the Towleses have a good deal of corn meal and bacon—never heard Mrs. Towles speak on the subject. Heard old Mr. Burton say, he had given Mrs Towles more than he expected he would have to give to any of his other children.

Cross-examined. Saw many articles furnished by old Mr. Burton, but never saw any thing go from W. Burton's to the Towleses—cannot tell when these conversations took place, loose talk between the old man and

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his wife. Witness does not know *whether what the old man said related to supplies and support or to property given.

Richard Bob testifies, that he lived near Mrs. Towles'; has heard her say, she has got the rise of $700 out of her father's estate, not more than twelve months before her death. That it came out of her father's estate.

Cross-examined. About a year before she died—her father would get (Buck) Wm. Burton, to furnish her, but it came from her father's estate, not from William himself.

Sackfield Adams lived between old Wm. Burton's and Mrs. Towles'—old Wm. Burton sent meat and meal to Mrs. Towles from one to two or three weeks—it appeared as if they got their chief supplies from the Burtons.

Cross-examined. Witness testified, that Mrs. Towles told witness she got supplies from her father, and after his death, from W. Burton, Jr.

Mrs. Walker testified, that her husband was a magistrate. She has heard Mrs. Towles speak to her husband. Said she lived badly with her husband. He told her she had good friends, and was not so badly off as she said. She said she had good friends who supplied her, but what she got from them came out of her share of the estate. Mrs. Towles would come to her husband to sign notes as her security—he would refuse, she would say, do not be afraid, if I fail, Buck Burton, (Wm. Burton,) will pay. W. Burton supplied the Towleses with provisions.

W. Goggans testified, that he furnished wheat and meal to Towles, and Wm. Burton paid him for it, about $21.

Cross-examined. This was about fifteen or sixteen years ago.

Mrs. Brooks testified, that Mrs. Towles came to buy corn, and said that W. Burton would pay for it, and it was to come out of her share of her father's estate; this was nine or ten years ago.

Cross-examined. Witness says, Mrs. Towles sent her two sons for the corn. She said her father or brother would pay for the corn, and it was to be taken out of her share of her father's estate.

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*Evidence in reply. William Brown testified, that Daniel Towles, son-in-law of Wm. Burton, Sr., had some of old Mrs. Towles' property sold—witness bought two slaves for James Towles, and gave his own note—Sukey and Jim; it was paid for out of old Mrs. Towles' money. These negroes went into the possession of Daniel Towles and his family. The money was paid out of old James Towles' funds.

Mr. Dunlap, for complainants, produced a deed for land from Walker to W. Burton, Jr., 123 acres, in trust for the children of Mrs. Towles, consideration, $329 paid by W. Burton, Sr., 7th August, 1818.

Mrs. Ragan. Knows of Sukey and Jim, purchased with the funds of old Mrs. Towles.

Her father, (old Wm. Burton,) never paid a dollar for them. Witness does not know that her father paid any incumbrances for negroes for the Towleses. Her father told her, that two negroes and the land were paid for by the old people for the Towleses.

Mrs. Stewart, (witness for defendants,) Mrs. Stevens, one of the complainants, told her that a negro boy who was present, was to work at her uncle Buck's (W. Burton, Jr.) She said, that W. Burton had done a great deal for her. That her Uncle Buck had tried to get old W. Burton to raise money to save the negroes; the old man and woman were reluctant, but at last did agree to raise the money to pay for the land and negroes.

Cross-examined. The negroes were three, called Sukey, Jim, and Frank. The deed of James Towles to the children of Daniel and Scythia Towles, for Sukey, Jim, and Frank, dated 21st February, 1817, produced.

The admissibility of all this parol evidence is now to be decided on. The general rule is, that parol evidence is admissible to explain—but not to contradict, alter, add to or diminish a written instrument. The whole doctrine is clearly stated and illustrated in the new American edition of Fonblanque's treatise on Equity. Book 1st, ch. 3, sec. 11, note to page 170(201.) To the general rule there are exceptions, as where a declaration, showing the design or intention, is made be-

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fore a deed is exe*cuted, in cases of fraud or trust, though no trust is declared in writing—and parol evidence is admissible to show that an absolute deed was intended as a mortgage. In Stevens vs. Cooper, 1 Johns., Ch. 429, Chancellor Kent states the doctrine; see 1 Fonb. 171, 2. (201.) Though in the direct application of parol evidence to the contents of written instruments, the rule is the same at law and equity, to reject such evidence, yet the Courts of Equity will open the written instrument to let in equities arising from facts distinct from the sense and construction of the instrument itself. 1 Bro. Ch. Rep. 350. The result of the great mass of cases, founded on the essential principles of justice, is, that relief can be had on any deed or contract in writing. The mistake, or fraud, may be shewn by parol evidence, and relief granted to the injured party, whether complainant or defendant; 2 Johns. Ch. 596, in which the cases are reviewed. With respect to the admission of parol evidence, in cases of wills, it is let in in various cases to explain ambiguities as to the persons or things, meant by the testator, and in cases of fraud or mistake, where the intention of the testator was misconceived by the drawer of the will, or he was imposed upon. In cases where the testator desired a clause to be inserted, and he was assured by his executor or heir, that his wishes should be complied with, parol evidence has been admitted to prove that. Upon the whole, I am satisfied that parol evidence is admissible. It is collateral to the provision in the will. It goes to prove that though the will was regularly and understandingly made and executed by the testator, as is expressed on its face, yet that he meant to create a trust for the benefit of his daughter, and that evidence goes to support and explain the bond given by the legatee, Wm. Burton, Jr., to give effect to the trust. The son and legatee, Wm. Burton, understood and accepted the trust—acknowledged it at the execution of the second will, and repeatedly after his father's death. I feel bound, therefore, to admit this parol evidence; and the moment it is admitted, the case is at an end. There was never a clearer case made out in a Court of justice of a trust, and that too, confided by a father

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to a son, in *whom he had confidence, in favour of an unfortunate daughter and her family: a trust fully understood and assumed by that son; who rendered it unnecessary to renew the bond on the execution of a new will by his declarations to his father. There was some slight contradictory evidence. But the great and overwhelming evidence, from unimpeachable and unimpeached witnesses, establishes the trust beyond the shadow of a doubt, and it is the duty of the Court to oblige the representatives of Wm. Burton, Jr., to perform it. The pretence set up, that the supplies furnished Mrs. Towles and her family, by her father, and by her brother William, were equal to her share of the estate, are swept away by the clear proof of several witnesses of the declarations, that they had no claims or charges against her or her family. It is, therefore, ordered and decreed, that the defendants deliver up to the complainants the slaves to which they are entitled, of the estate of Wm. Burton, Sr., and that the Commissioner settle which of the lots or shares drawn by Wm. Burton, Jr., shall belong to the complainants; and it is referred to the Commissioner to report what sums are due for the hire and labour of the slaves, deducting the supplies furnished by Wm. Burton, Jr., to Mrs. Towles and her family, after the death of her father. Costs to be paid by the defendants.

The defendants appealed, and moved this Court to reverse the decree, on the grounds:

1. Because the evidence, on which the decree predicates the trust on the part of the testator, is incompetent: and as there is neither evidence in writing of the nature and extent, or the assumption of the trust, the decree ought to be reversed, and if there be any liability, the complainants should be left to their remedy at law on the bond.

2. Because the negroes are decreed to be delivered up, which interferes with the rights of third persons, and is impossible to be performed, and if there is to be an account for

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them, and *their hire, it should extend to

the supplies furnished by Wm. Burton, Jr., before, as well as after the death of his father.

Caldwell, for appellants.

The opinion of the Court was delivered by

JOHNSON, J. We are very clearly of opinion with the Chancellor, that in the absence of written evidence, parol was admissible to show that one-half of the personal estate bequeathed by Wm. Burton, Sr., to his son, Wm. Burton, Jr., was bequeathed by the testator, with the knowledge of the legatee, on the confidence that he would take and hold it in trust for his sister, Mrs. Towles. It is certainly no violation of the rule of evidence, which excludes parol evidence to add to, vary or alter a will or other writing; for the will takes effect precisely in the manner expressed on its face. Wm. Burton, Jr., takes one-half of the residue of the personal estate. The foundation of the plaintiffs' claim rests on a parol contract between the testator and his son William. The transaction, as explained by the most unequivocal proof, supposes, that the testator held to the legatee a language something like this: "I am desirous of providing for my daughter, Mrs. Towles, but her husband is a prodigal, and will waste it if I give any thing to her directly; to prevent this, I propose to bequeath to you directly, the portion which I intend as a provision for her:" and that the legatee consented to accept it upon these terms, and promised on his part to fulfill his wishes. Now here is a clear and explicit promise, founded on full consideration, (the legacy,) in relation to personal estate; and where is the rule of law which avoids it? (see Stickland vs. Aldridge, 9 Ves. 516.) But we incline to think this evidence was superseded by the higher evidence of the bond of Wm. Burton, Jr., of the 5th May, 1812. That was made, it is true, in direct reference to the will of the same date, but it contains a direct undertaking on the part of Wm. Burton, Jr., that he would hold "one-half of the personal property which he was to receive" of his father's estate, to the use of Mrs. Towles, and it was one from which he could

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not discharge himself by any act *of his, and would apply to that or any other will. As a contract, it was immaterial whether it preceded or followed the execution of the consideration on which it was founded. He would have been as much bound by a bond made in reference to a will contemplated to be made ten years after, as if it had been contemporaneously executed. The fact that the testator gave, in the last will, also a double portion to this son, and nothing, comparatively, to his daughter, Mrs. Towles, in a will intended otherwise to put all his children upon a footing of equality, goes very far to show, of itself, that the will was made in reference to the bond, and on that account would be binding. The trust proved by the parol evidence is precisely that indicated in the condition of the bond, and whether the one or the other is adopted, the result is the same. In support of the motion, it is also contended, that if the bond is set up, the plaintiffs' remedy is at law for the penalty, and Chancery not having jurisdiction, the complainants' bill ought to be dismissed. But this position cannot be maintained. When the penalty is intended merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty is considered as only accessorial, and equity will enforce the performance of the condition at the instance of the obligee, or restrain proceedings at law to recover the penalty; 1 Fonb. 151.

In the order of reference made by the Chancellor, the circumstance, that the testator was possessed of personal estate, other than his negroes, and which was covered by the bequest to Wm. Burton, Jr., seems to have been entirely overlooked, which renders a modification of the decree indispensable. It is, therefore, ordered and decreed, that the defendants do account before the Commissioner for the one-half of the whole personal estate, (including slaves,) so as aforesaid bequeathed by Wm. Burton, Sr., to his son, Wm. Burton, Jr., and which was disposed of by the said Wm. Burton, Jr., in his life time, or the defendants, since his death, and for the hire of slaves, interest on moneys, or other income arising from the

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one-half of the said estate so *bequeathed to the said Wm. Burton, Jr., and that he credit the defendants with any payments made to Mrs. Towles, or supplies furnished her family in the execution of the trust reposed in the said Wm. Burton, Jr., by his said father, as herein before stated. That if, upon the adjustment of these accounts, it shall appear that the defendants or their testator are in advance to Mrs. Towles beyond the amount of their receipts, the defendants shall be reimbursed out of the personal estate remaining in their hands; and upon a final account, according to these principles, it is further ordered, that the said personal estate now remaining in the hands, power or possession of the defendants, be partitioned in equal moieties between the complainants and defendants; and that this order be taken as a substitute for that made by the Chancellor, the object being an equal partition of the legacy to Wm. Burton, Jr., between the complainants and defendants.

O'NEALL and MARTIN, JJ., concurred.

Decree modified.

Rich. Eq. Cas. 164

SARAH T. HUSON v. SILAS ANDERSON.

(Columbia. Jan. Term, 1832.)

[*Vendor and Purchaser* ⇐107, 126.]

Bill by vendee to rescind a contract for the sale of land; vendor had, at most, only an equitable title to the land, dependent upon his paying for it; this was known to vendee, but she was told that vendor expected to be authorized by the Court to make titles; five years elapsed, and vendor had taken no steps towards the perfection of the title, and, in the mean time, had become insolvent. *Held*, that vendee was entitled to have the contract rescinded; and she, having been in possession, was ordered to account for the rents and profits, deducting therefrom the value of any permanent improvements she may have made on the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 191, 229; Dec. Dig. ⇐107, 126.]

Before Harper, Ch., at Union, Aug., 1831.

Harper, Ch. On the 26th Jan., 1826, the defendant, Silas Anderson, executed to the

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complainant his bond, in the penal *sum of $760, conditioned to make titles to a tract of land therein described, and complainant gave to defendant her notes of hand for $375, the consideration money. The object of the bill is to rescind this contract, and to enjoin defendant, who has commenced suits at law on the notes of hand, on two grounds:

1st. That the defendant is unable to make a title to any of the land specified in the condition of the bond.

2d. On the ground of misrepresentation: the defendant having represented to her that a certain hill, on which she afterwards built a house, was included within the limits of the land described in the condition of the bond, when, in fact, it was without those lines—that building site having been the principal inducement to the purchase.

The facts relating to the first ground are, that Elijah Anderson, of whom defendant is executor, in his life time executed a bond for titles to the land in question, to one Burell. Burell, according to his own statement, (having been examined as a witness in the cause,) applied to defendant to take back the land. He agreed to do so, gave up the witness' notes, which had been given for the purchase money, and took the bond for titles. Witness understood that he took the land for himself. If this be so, defendant purchased Burell's equitable title to the land on his own account, and may have a right to the aid of this Court to perfect his title. It may be, however, that the heirs of Elijah Anderson may have a right to consider this purchase a trust for them. This is not a matter now before me. The bill does not seek or offer performance—it merely claims a recision, on account of defendant's inability to perform. Certainly for any thing that now appears, I cannot say that defendant will be unable to perform. It appears, moreover, from the testimony of Morgan Huson, the son of complainant, that she knew the situation of the title at the time she completed the contract and gave her notes. The witness says that defendant informed her he expected to be authorized by the Court to make title to Burell, and Burell would make title to her. She was informed that a title was to be obtained by

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the aid of the Court. Thus *knowing the situation of the title at the time of the contract, if her bill had been for performance, she would have been bound, in this Court, to make Burell and the heirs of Elijah Anderson parties, that the Court might have been able to make a final determination of the matter.

As to the second ground on which the recision is claimed, the allegation and testimony is, that while complainant and defendant were in treaty for the land, defendant represented the line of the land as running within fifteen or twenty feet of a certain spring. If the line had run there, it would have included the hill on which the house was built. The site was selected on account of its convenience to the spring. There is another suitable site for a house, about one hundred yards further from the spring, less convenient on account of that remoteness. The fact of the misrepresentation is not very clearly proved. It is denied positively by defendant, in his answer, who states that, when complainant was about to build her house, he informed her that the site was without the line of the land, and if she built there it must be at her own risk. It is sustained chiefly by Morgan Huson, son of complainant. He is supported by the testimony of William T. Clark, who states that, when the survey of the land was made by one Pope, in 1826, defendant was present, and admitted to complainant that he had pointed out the hill in question as part of the land: but William Selby, who was present on the same occasion, said that defendant denied having sold her that land. Moses Glenn states that, when he was about to cut logs for complainant's house, defendant directed him to cut logs on the site where the house now is, as well as the other site, about one hundred yards off. If the case depended entirely on the alleged fact, I should hesitate as to the proof. But suppose it to be proved.

If defendant is able to make title to all the land described in the bond, there is no actual breach of contract. But if, without an actual breach of contract, a vendor wilfully misrepresents the thing sold, as by representing a described tract to contain land which it does not contain, to the injury of

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the purchaser, *this is a fraud, and will vitiate the contract. There is, however, no allegation or proof of any such fraud in this case. On the contrary, when it was

discovered that complainant had built her house without the lines of the land, defendant seems to have been disposed to compensate her as far as it was in his power.

If, without fraud, the vendor makes a material misrepresentation, this may be good ground for compensation, or an abatement of the price. If he misrepresents with respect to a matter which was the chief inducement to the purchase, or without which the object of the purchase would be defeated, this affords a good ground for the entire recision of the contract. Compensation is not claimed in this case, but an entire recision. I cannot say, speaking with reference to the time of complainant's purchase, that the hill in question was the main inducement to the complainant's purchase, or that, without it, the object of the purchase would be defeated. The situation on which defendant has built is about one hundred yards nearer to the spring, and therefore more convenient than the other situation on the land. I cannot say that the object of complainant's purchase would have been defeated, if she had been subjected to this inconvenience, by being compelled to build on the more remote situation. Nor have I any evidence that the building site was her main inducement to purchase. Her son says, the bargain was delayed for some time, because the spring was not on the land. It is true that she did afterwards build on this site, as being the most convenient. But, from all the testimony, I cannot say but that the other situation would have answered nearly as well, or that she would not have purchased, if she had known that she was not to have the most convenient situation. That she did, in fact, afterwards select the situation which appeared most convenient, cannot affect the case, further than to increase her title to compensation or to damages, for the injury she may have sustained by defendant's misrepresentation. Contracts are not to be lightly rescinded. The complainant may obtain all that she contracted for, and, for any injury she has

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sustained *by the false representation of defendant, she may have compensation.

There is another view of the case. It appears that the hill on which the house is built is on a tract of land which had also belonged to Elijah Anderson, the father and testator of defendant. By his will, (if I understand correctly the land meant,) it is devised, on certain terms, to defendant. When complainant discovered that the house was not included in the land sold to her, it appears that defendant proposed to give her a small portion of this land, including the house —to which proposal she assented, and defendant marked out the piece of land. It appears further, from the testimony of Davis Caldwell, that, on some occasion, complainant made a formal tender to defendant, of the first instalment of the purchase money, on consideration he would make her a good title to this piece of land. He offered to execute a title, which she, after inspecting the will of Elijah Anderson, declined to accept. By that will, the land is directed to be valued, and given at valuation to his son, the defendant. If the land amount to more than defendant's equal share of the estate, he shall pay the overplus to testator's daughters. This is sufficient to give defendant a fee in the land. It is provided, however, that if defendant should die before testator's youngest daughter should attain the age of fourteen years, the land should be divided between his (defendant's) children, they paying in like manner the overplus. This can only be an executory devise to defendant's children, on the contingency mentioned. It appears to me that defendant must be able to make a good title in fee, subject only to be defeated on the event of defendant's dying before the testator's youngest daughter shall have attained the age of fourteen. Whether testator's daughter has yet attained the age of fourteen I do not know. But if defendant be able to make her a good title to the land in question, and having offered to do so, she has clearly waived any equity she might have had, to rescind the contract, on the ground of misrepresentation. It is said that, when lands are shown to a purchaser, as

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part of his purchase, he will be *entitled to hold them, though not included in the conveyance. Sugd. on Vend., (2d Am. Ed.) quoting Oxwick v. Brockett, 1 Eq. Ca. Ab. 355. If so, complainant may yet compel defendant to convey the piece of land in question. It does not appear that defendant has ever yet been molested in her possession, either of the house or land, but has continued to cultivate and enjoy them. I must dismiss her bill, leaving her either to proceed on her bond at law, or to file her bill for specific performance and compensation, making proper parties.

Bill dismissed with costs.

The complainant appealed on the following grounds:

1st. Because, from the case made by the bill, and sustained by the evidence, the complainant was entitled to the relief prayed for in the bill.

2d. Because the bill should have been retained until after the trial at law, or the Chancellor should, in his decree, have decreed compensation for the land shown as defendant's, which was not his.

3d. Because the Chancellor has given force and effect to the defendant's answer, as to a matter concerning which the bill expressly states there was no discovery sought: that is, he denies he pointed out the hill mentioned in the bill, to complainant, to build on, when the bill stated, that could be proved by others,

and his evidence was not wanted on that point.

4th. Because the Court should, under the prayer for general relief, have made such order and decree as the equity of the case required, though not strictly in accordance with the particular relief prayed in the bill.

5th. Because it is clear that defendant, Anderson, had no right or title to the land, at the time of the sale to complainant, nor has he, even now, and therefore the bill should have been retained, and the titles completed, and that at defendant's costs.

A. W. Thomson, for appellant

The opinion of the Court was delivered by

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*JOHNSON, J. The circumstances of this case abundantly shew, that the defendant's title to the land, sold by him to the complainant, and described in the bill, is, when put upon the best possible footing, merely equitable. It had originally belonged to his father, Elijah Anderson, now deceased. He had contracted to sell it to Burell, and took his notes for the price, and gave him a bond to make titles. After his death, the defendant, his son and executor, agreed with Burell to rescind that contract, as it is said on his own account, and in pursuance of it, delivered up Burell's notes, and received his testator's bond in exchange. If then it be conceded, that the defendant might thus barter the funds of his testator's estate for his own emolument, and that the delivery of the bond is a legal and valid assignment, still the legal title is in the heirs general of Elijah Anderson; and placing the defendant precisely in the situation that Burell would have been in if he had retained the bond, his whole interest consisted in the right to enforce in Equity the specific performance of the condition of the bond on the payment of the purchase money—a title which Equity, (other considerations being out of the way,) will never compel a purchaser to accept: a purchaser is not obliged to accept an equitable title, but has the right to insist on a clear legal title. Cooper v. Denne, 1 Ves., Jr., 565; Sug. on Vend. 259, et seq. I concur, however, with my brother Harper, that the complainant's knowledge of the situation of the title, was in some sort evidence of her assent to make the contract upon the responsibility of the defendant, and in the confidence that he would, and could, at a convenient time, extinguish the title of the heirs: but she was told at the time, that he expected to be authorized by the Court to make titles. Five years have elapsed, and the defendant has yet taken no step towards the perfection of the title—how long is she to wait? Her object in purchasing was doubtless the land. What security has she, other than the personal responsibility of defendant, that her title will ever be perfected? and here I must notice a most important circumstance which seems to have been entirely overlooked by the

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Chancellor, and which *if it had struck his attention, I am satisfied would have materially changed his view of the case.

Whatever might have been the situation of the defendant at the time of the contract, the bill charges that at the time of its filing, the defendant was in doubtful or insolvent circumstances. That is not directly controverted, and the fact is said to be matter of public notoriety. The effect of the Circuit Court decree is, then, to compel the complainant, as a purchaser, to pay for a tract of land, to which the defendant, the seller, had at most a merely equitable title dependent upon his paying for it—which he is not now, and probably never will be able to do. Whatever knowledge she may have had of the state of the title, it will not be believed that she could have foreseen, and contracted with reference to these results, and Equity will not compel her to perform the contract upon a mere hazard, and on conditions so unreasonable; but upon the same principle of Equity, she must account with the defendant for whatever benefit she may have derived from the contract.

It is, therefore, ordered and decreed, that the complainant do account before the Commissioner, for the rents and profits of the land during the time she has had it in possession, deducting therefrom the value of any permanent improvements that she may have made, as well on the land defined in defendant's bond, as that which he represented as contained within the boundaries, and that she pay to defendant the balance that may be so found to be due, if any thing, and that she deliver up, to be cancelled, the defendant's bond to make titles. And it is further ordered and decreed, that the defendant be forever enjoined from proceeding in his action at law against the said complainant, on her notes of hand or other obligation, given as the price of the said land, and that he also deliver up the said notes, or other obligation, to be cancelled.

O'NEALL and MARTIN, JJ., concurred.

Decree reversed.

Rich. Eq. Cas. *172

*T. W. McNEIL v. JAMES R. MORROW et al.

(Columbia. Jan. Term, 1832.)

[*Trusts* ⇐356.]

T. M., being indebted to guardian, in right of his ward, by judgment, conveyed her slaves to him, on condition that he should pay and satisfy her debts. Guardian entered satisfaction on the judgment, and became insolvent. His letters of guardianship were then revoked, and one, who was surety on his bond, appointed

guardian in his place. Held, that the new guardian might sustain a bill, in behalf of the ward, against the previous guardian and his creditors, to make the slaves specifically liable to satisfy the debt to the ward.

[Ed. Note.—Cited in Haynsworth v. Bischoff, 6 S. C. 165.

For other cases, see Trusts, Cent. Dig. §§ 529–538; Dec. Dig. ⟸356.]

[*Assignments for Benefit of Creditors* ⟸7.]

One who takes an assignment, or bill of sale, of slaves, on condition that he will pay and satisfy the debts of the assignor, is a trustee for the creditors of the assignor.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 6; Dec. Dig. ⟸7.]

[*Trusts* ⟸231.]

A trustee cannot make any advantage to himself, by the application of the trust fund to his private purposes.

[Ed. Note.—Cited in Bass v. Lucas, 7 S. C. 116.

For other cases, see Trusts, Cent. Dig. §§ 330–335; Dec. Dig. ⟸231.]

[*Trusts* ⟸349.]

So long as property held in trust, or a trust fund, can be traced and distinguished, it will enure to the benefit of the cestui que trust; and all claims of the creditors of the trustee must be postponed until the trust is discharged.

[Ed. Note.—Cited in Mathews v. Heyward, 2 S. C. 245; Bass v. Lucas, 7 S. C. 116; McCreary v. Burns, 17 S. C. 51; Brazel v. Fair, 26 S. C. 386, 2 S. E. 293; Wulbern & Co. v. Timmons, 55 S. C. 464, 33 S. E. 568.

For other cases, see Trusts, Cent. Dig. § 514; Dec. Dig. ⟸349.]

[*Guardian and Ward* ⟸70.]

Where a guardian takes slaves in satisfaction of a debt due his ward, intending to hold them as his own property, the ward, nevertheless, or a new guardian appointed for him, may elect to follow the slaves, as the ward's property, or to claim the money.

[Ed. Note.—Cited in Bass v. Lucas, 7 S. C. 116.

For other cases, see Guardian and Ward, Cent. Dig. § 314; Dec. Dig. ⟸70.]

[*Subrogation* ⟸7.]

A surety on a guardianship bond, paying the debt of his principal, has the right to be subrogated to all the ward's securities and rights against the principal.

[Ed. Note.—Cited in Rhame v. Lewis, 13 Rich. Eq. 296.

For other cases, see Subrogation, Cent. Dig. § 22; Dec. Dig. ⟸7.]

[This case is also cited in Haynsworth v. Bischoff, 6 S. C. 164, without specific application.]

Before Johnston, Ch., at York, July, 1831.

This case will be sufficiently understood, from the opinion delivered in the Court of Appeals.

Williams, for appellant.

The opinion of the Court was delivered by

O'NEALL, J. In this case, the following facts are stated in the bill, and conceded to be true: Tabitha Morrow was indebted to Robert Clendenin, Esq., as the guardian of her son, John Morrow, in a considerable sum. For it she and her security confessed judgment. She was then the owner of five slaves —Richard, Sally, Eliza, Jim and Edward. Subsequently, Mr. Clendenin's letters of guardianship were revoked, and the guardianship committed to James R. Morrow, another son of the said Tabitha. Being unable to pay her debts, she conveyed her slaves to the said James R., upon the condition that he should pay and satisfy her debts. He re-

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ceived from Mr. *Clendenin the judgment against Tabitha Morrow and her security, Thomas Williams, Jr., as a part of his ward's estate, and entered satisfaction upon it. Tabitha Morrow died insolvent, and no administration has been taken out on her estate. James R. Morrow is also insolvent, and has not paid any money on account of his mother's debts. The complainant is one of the securities of the said James R., for his guardianship of John Morrow. The guardianship of the person and estate of John Morrow, committed to James R. Morrow, has been revoked, and granted to the complainant, by whom this bill is filed to restrain the creditors of James R. Morrow from selling the slaves which he received from his mother, and to make them specifically liable to the payment of the debt of Tabitha Morrow to the complainant's ward.

Had it not been that the learned Chancellor who tried this cause dismissed the bill, I should have thought it only necessary to state the case, to show that the complainant was entitled to the relief which he seeks. In the spirit of that respect to his judgment, to which I always think it entitled, I have reviewed my first impressions in relation to the case, with the hope that I might discover some ground on which we might affirm the Chancellor's decree; but, after a thorough examination of the case, I am compelled to differ from the Chancellor. As he has not assigned any reasons for his judgment, except "that the case stated in the bill did not entitle the complainant to the relief prayed," it will only be necessary that I should point out the views of the case which, in our judgment, do entitle him to relief.

It is perfectly clear, that the effect of the deed from Tabitha to James R. Morrow, was to create a trust in him for the payment of her debts, out of the property conveyed to him. He was, in the discharge of this trust, bound so to apply the property, and it was specifically liable, in his hands, for the payment of the debts. Until he paid the debts, he had no title to the slaves, unless it might have been, that he would have been entitled, as a donee, to the residue, which might have

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remained *after the debts had been satisfied by a sale of a part of them. When James R. Morrow became the guardian of the complainant's ward, and received the judgment as a part of his estate, and entered satisfac-

tion upon it, it was an ackowledgment that he had received the amount, and was legally to be regarded as a payment to him of it. In what he received it, whether in money or property, is a question which his ward might investigate or not, as he chose. He might have elected to consider it as money, and have charged his guardian accordingly. But, if it was more advantageous to the ward to follow the specific property received, it is, I think, demonstrable, that he had a right so to do. The most eminent Chancery judge of modern times, Chancellor Kent, in Green v. Winter, 1 Johns., Ch. 36, says, "A trustee cannot act for his own benefit, in a contract on the subject of the trust." In Parkist v. Alexander, 1 Johns., Ch. 397, he says, "An agent or trustee, undertaking a special business for another, cannot, on the subject of that trust, act for his own benefit, to the injury of his principal." In Schieflin v. Stewart, 1 Johns. Ch. 625, speaking of the funds of an estate, he says, "an executor ought not to turn the money to his own private advantage." These rules are the same in substance, and from them I would state, as a necessary corollary, that it is a clear principle of Equity, that a trustee cannot make any advantage to himself, by the application of the trust fund to his private purposes. The defendant, James R. Morrow, stood to the complainant's ward in a twofold character, as trustee. He was trustee, under the deed of Tabitha Morrow, for the payment of her debt to him; and, as his guardian, it was his duty to manage the estate of the ward to his advantage, and not to make of it any gain to himself, or loss to his cestui que trust. Take the first relation in which he stood, that of trustee under the deed, and let us examine whether, by entering satisfaction, he discharged and ended that trust. In Equity, it is clear that he did not—for if he did, the result would be that, by the use of a legal authority, conferred upon him to protect his ward's estate, he would divest him of a spe-

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cific lien on *property held in trust, for the payment of the debt due to him, without any equivalent indemnity for it. But the effect of entering satisfaction on the judgment was nothing more than the destruction of that security, and a transfer of the amount of it, as a direct charge upon the property, in the hands of the trustee. He could only discharge this charge by paying to his ward, on his attaining to full age, or to the guardian who succeeded him, the debt and interest.

It may be stated, as a general rule, that so long as property held in trust, or a trust fund, can be traced and distinguished, it will enure to the benefit of the cestui que trust, Moses v. Murgatroyd, 1 Johns. Ch. 128; Dexter v. Stewart, 7 Johns. Ch. 55. Apply this rule to this case in two aspects, and the complainant is entitled to a decree. Regard James R. Morrow as a trustee, under his mother's deed, for the payment of her debt to her son, the complainant's ward, and ask, has it been paid? The answer must be no. But it has been released by the trustee, as his guardian! This is no performance of the trust, and of course the property held under the trust must be still liable, if it can be traced. It is in the possession of the defendant, and the claims of his creditors must be postponed until the trust is discharged. In the case of Dexter v. Stewart, the contest was between the assignees of a bankrupt and the cestui que trust, and in that case Chancellor Kent states the rule to be, "though a chose in action be taken in the name of the agent, it does not pass by his bankruptcy to his assignees, provided it be taken and held in trust." In the same case, he remarks, "the assignees of a bankrupt, in such cases, stand exactly in the situation of their principal, and with no greater rights." If this be true as to assignees, it must also be true as to creditors. If James R. Morrow was alone interested in the question before the Court, it could never be questioned that the property conveyed by his mother to him, would be liable to the payment of the debt to complainant's ward, notwithstanding the entry of satisfaction on the judgment. His

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creditors have no greater *rights than he had, and the decree must be the same against them as it would be against him.

But lay out of view the trust created by the deed, and let it be assumed, as probably the fact really was, that the deed was executed to him to procure the entry of satisfaction to be made by him as guardian. So long as the fund or property, received for the cestui que trust, can be traced, it must inure to his benefit. Here the property was received by his guardian, in payment of the debt due to his ward, and although he, no doubt, did not intend the property to be his ward's, yet he cannot, by the use of his ward's funds, make any advantage to himself, and as the very thing received in payment is now within the power of the Court, it must be followed, as belonging to the ward. If the defendant, James R. Morrow, acquired a title to the slaves by the entry of satisfaction on his ward's judgment, it was, in effect, purchasing them with the funds of his ward, and a trust results for his cestui que trust. The whole valuable consideration, paid for them, was trust fund, and I am unable to see the difference between the case, as it stands, and as it would have been, if he had received the amount of the judgment in money for his ward, from Mr. Clendenin, the former guardian, paid it to his mother for the slaves, and she had paid the money back to Mr. Clendenin, in satisfaction of the judgment. A clear resulting trust would be the consequence, if the facts had been so; and although the case, as it is, is not in terms identical with the one with which I have com-

pared it, yet in effect it is the same, and the same consequence must result from it. Boyd v. McLean, 1 Johns. Ch. 582; Botsford v. Burr, 2 Johns. Ch. 405; Steere v. Steere, 5 Johns. Ch. 1. But it is said, the complainant is surety for James R. Morrow's guardianship, and is liable to his ward, in that character, for the amount of the debt of Tabitha Morrow, which his principal admitted he had received, by the entry of satisfaction on the judgment, and that, therefore, he ought not to recover in this case. It is true, that he might be made liable in his character

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*of security; but his ward has a right to elect, whether he will charge the amount of his mother's debt as so much money received to his use by his former guardian, or follow the property received, as may be most advantageous to him. The complainant, as his guardian, has now the right to make that election for him, and having done so, it is not for us to question its propriety. It may be, if he has made an injudicious election, that his ward may, on attaining to maturity, disaffirm it, and hold him responsible for the amount of the debt, as money received by his principal. If he should do so, or if it was now done, it would not alter the complainant's claim to a recovery. For, as security, upon paying the debt of his principal, (which I, for the purposes of this question, now regard as done, by his appointment as guardian, and consequent right to receive it,) he has the right to be subrogated to all the creditor's securities and rights against the principal. In this view, he would have the right to set up, for his indemnity and protection, all the liens or claims which his ward had, under the deed of his mother, or from the receipt of the property in satisfaction of a debt belonging to him.

If the complainant had sought a recovery of the whole of the slaves as a resulting trust, from the purchase being made with his ward's funds, he might have succeeded even to this extent, upon showing that Mrs. Morrow owed no other debt. But as he has not made this claim, and has only sought to make the property liable to the payment of the debt due by Mrs. Morrow to his ward, and as it has not appeared that Mrs. Morrow did not owe other debts, the slaves will only be declared liable to the payment of that debt. It was said in the argument, and not denied, that the complainant has had, for some time, the slaves in his possession. If this be so, and their services have been of any value, over and above their maintenance, he must account for their hire.

It is, therefore, ordered and decreed, that Chancellor Johnston's decree be reversed; that it be referred to the Commissioner, to ascertain the amount of the judgment of

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Robert Clendenin, *Guardian v. Tabitha Morrow and Thomas Williams, Jr., at the time the satisfaction was entered thereon by James R. Morrow, with the interest on the aggregate then due from that time to the time at which the Commissioner shall make up his report; that he do also ascertain and report the value of the hire of the said slaves, since they have been in the complainant's possession, which he will deduct from the aggregate of the principal and interest of the sum reported on account of the said judgment; and, for the balance due, the said slaves are declared to be liable. And it is further ordered and decreed, that the Commissioner do advertise and sell the said slaves, on a credit of twelve months, taking the usual securities for the payment of the purchase money; and that he do apply the proceeds of the said sale, first, to the payment of the costs of this case; second, to the payment of the balance which may be reported in favor of the complainant, on account of the said judgment; and third, any surplus which may remain, as may be hereafter directed by the Court of Equity for York District.

JOHNSON and MARTIN, JJ., concurred.

Decree reversed.

Rich. Eq. Cas. 178

A. BUCKLER and Others v. WM. FARROW and Others.

(Columbia. Jan. Term, 1832.)

[*Partition* ⇐92.]

In confirming the return of Commissioners in partition, the Court has no authority to refer it to the Commissioner in Equity, to enquire and report what sum shall be paid by a party for equality of partition: The return of the Commissioners, if accepted, is the law between the parties:—if there be valid objections to it, either a new writ should issue, or the same Commissioners should be required to amend their return.

[Ed. Note.—Cited in Goulding v. Goulding, 8 Rich. Eq. 86; Mellichamp v. Seabrook, 2 S. C. 369, 371; Irwin v. Brooks, 19 S. C. 102; Simonds v. Haitcock, 24 S. C. 210; Aldrich v. Aldrich, 75 S. C. 373, 55 S. E. 887, 117 Am. St. Rep. 909.

For other cases, see Partition, Cent. Dig. § 283; Dec. Dig. ⇐92.]

This case was heard at Spartanburgh, June, 1831. The bill was for partition of a tract of land—the plaintiffs being entitled to one-half thereof, and the defendants to the other half.

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*The Commissioners in partition, divided the land into two equal parts, (valuing each at $1000,) and assigned one part to the plaintiffs. They recommended that the other part should be sold, and the proceeds divided among the defendants.

No motion was made to recommit, or set aside the return. The presiding Chancellor

ordered, that it be confirmed, and that the Commissioner of the Court enquire and report "what sum should be paid by the complainants, in order to produce an equality of partition."

The plaintiffs appealed on the ground, that as no cause was shown against the return of the Commissioners in partition, it should have been confirmed unconditionally.

Bobo, for appellants.
Irby, contra.

The opinion of the Court was delivered by

MARTIN, J. I must suppose from the case stated in the brief, which is fully supported by the return of the Commissioners and the decretal order, that some misunderstanding has occurred in relation to the return of the Commissioners.

The complainants were seized in fee of an undivided half of the land, and defendants of the other moiety. The Commissioners made their return in the form prescribed by law, and assigned one portion of the land to complainants, which they valued at $1000: and the balance to the defendants, valued at the same price: and they recommend that the lands set apart for defendants be sold, on terms suggested by them, the reason for which recommendation seems to have been, that some of the defendants were residing on the lands allotted to all the defendants jointly. Possibly the Commissioners exceeded their authority in undertaking to suggest a course for partition among the defendants, but of this it does not seem that defendants complain, and the Court has acted under their suggestion.

But as the Commissioners set apart the lands for complainants and defendants, valuing their several joint portions at $1000

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*each, there was no course left for the parties or the Court, but to accept, or set aside the return. It does not appear to have been questioned for irregularity or any cause whatever, but is confirmed by the Court, and by its decretal order, the several portions allotted to the complainants and defendants are declared to be vested in them in fee. The order, therefore, referring it to the Commissioner to ascertain the value of the several parcels of land, vested in complainants and defendants, with a view to equalize them, cannot be maintained.

The Commissioners are required by law to divide the land if it be practicable to do so without injustice to any of the parties; and they are also required to make a return of the entire valuation. This latter requisition was, no doubt, intended as one mode by which the Court could ascertain whether justice had been done, and be the better able to decide on the character of their return. If it appear, on such a return made, that there has been mistake, fraud, or corruption, no doubt the proceedings would be set aside, and a new writ of partition ordered. But nothing of that sort is pretended in this case. It would be wholly useless then to require Commissioners to divide lands, and in doing so, have respect for value, as well as quantity, if, after the return, the Commissioner must equalize the value. The Commissioners are the agents of the parties, acting under the authority of the Court, and they are as much bound by their return, made in due form, fairly and impartially, as a plaintiff and defendant would be by an award of arbitrators made under a rule of Court.

When Commissioners have made their return, no one, I presume, will contend that the Court can alter or modify the partition by assigning to either complainant or defendant a greater or less quantity of land than the Commissioners have done. Yet if they can institute an inquiry, not with a view of determining on the propriety of confirming or rejecting the return, but for the purpose of producing equality in the valuation, they exercise a power decidedly more unlimited, and unac-

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countable *to the one or the other of the parties. A partition must be the act of the Commissioners, confirmed by the Court. But if Commissioners are to make partition, and the Court, through its officer, afterwards fix the valuation, the incongruity must be obvious. The former, in executing their ideas of justice between the parties, must of necessity be governed by their own opinions of the valuation in designating the several quantities. But if equality is to be sought for by the Commissioner in Equity, subsequently, where the relation of quantity and value can neither be known or appreciated, no one can conjecture what would be the result in a variety of cases.

But I do not conceive it necessary to pursue this subject, with a view to shew the inconvenience which would grow out of such a practice, as that to which the order here made would lead.

I place the question upon the want of authority in the Court. The return of the Commissioners, if accepted, is the law between the parties. If there were valid objections to it, they should have been made, and a new writ should have issued, or the same Commissioners required to amend their return.

It is, therefore, ordered and decreed, that so much of the decretal order made in this case as required the Commissioner to report "what sum shall be paid by the complainants, in order to produce an equality of partition," be reversed. In all other respects the decretal order is affirmed.

JOHNSON and O'NEALL, JJ., concurred.

Appeal sustained.

Rich. Eq. Cas. *182

*WILLIAM NORRIS v. R. W. HUGHES et al.

(Columbia. Jan. Term, 1832.)

[*Venue* ⇐62.]

Bill filed in Union against four defendants, one of whom resided out of the State,—one in Union, and two in Charleston: *Held*, that either of the defendants residing in Charleston, had the right to require the complainant to transfer the bill to that district.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 101; Dec. Dig. ⇐62.]

This case will be sufficiently understood from the opinion delivered in the Court of Appeals, by Martin, J. (sitting for Harper, J.) which is as follows:

MARTIN, J. The brief in this case, is rendered almost unintelligible by erasions and interlineations. If I have deciphered it correctly, it presents the following case:

The bill was filed by Wm. Norris, against R. W. Hughes, Joseph Hughes, (of Alabama,) and Ker Boyce, of Charleston. R. W. Hughes lived in Union, where the bill was filed. The defendant, Boyce, filed two pleas. 1st, for the nonjoinder of Henry, his partner. 2d. That he and his partner, Henry, both resided in Charleston: that they constituted a majority of defendants residing in one district, and the complainant should have filed his bill in Charleston, and had no right to proceed in Union. At the trial, the defendant, Ker Boyce, in support of his pleas, relied on the statements in the bill: his own affidavit filed with the pleas, and the evidence of two witnesses who testified, that at the time of the transaction mentioned in the bill, and ever since, he carried on business with George Henry, and did not then, nor has he since acted as a factor on his own account. The Chancellor who heard the case, overruled the pleas, but delivered no written opinion or decree, but we are given to understand, that he was of opinion, the defendant's objections were prematurely made,—that if, at the final hearing, it appeared that proper parties were not before the Court, the risk will have been the complainant's, and he must abide the consequence.

I have always understood the rule to be well settled, that all parties in interest must be before the Court; and if the complainant by his bill, shews that there are others, who must of necessity be affected by the decree prayed for, it is cause of demurrer. It is not necessary to enquire, whether it be good

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*ground of a plea, for it will be seen the objection is not, that all parties are not before the Court. It is, that the complainant has made two persons residing in Charleston defendants, and as there is but one defendant in Union, he has no right to call on one or both of the others to answer there. (1 Brev. Dig. 208, § 23.) As there can be no difference of opinion as to the law, it becomes a question of fact, whether he has made two persons defendants, who reside in another district, and this must be determined by his bill. He alleges, that R. W. Hughes, one of the defendants, delivered the cotton (for which he seeks to make Boyce & Henry, or Boyce liable,) "to Ker Boyce and George Henry, merchants, trading under the firm of Boyce & Henry," &c.

I think I should be justified in saying, that the complainant has distinctly shown, that if any one be accountable for the proceeds of this cotton, it must be Boyce & Henry. And in this conclusion, I take it for granted, all will agree with me, unless by some subsequent statement or charge in his bill, he discharges them, and looks to Boyce alone, or some other, for indemnity. On examination, it will be found, that the other material charges are, that Boyce & Henry having sold the cotton, appropriated the proceeds to the payment of a debt due by R. W. Hughes to them, or to Ker Boyce alone: and that they, or Ker Boyce, refused to pay over the proceeds, alleging that they would retain the amount in their hands as a payment of his debt: and, again, that he had well hoped the said Boyce & Henry, or Ker Boyce, seeing the situation in which he was placed "by their improper, unjust and fraudulent conduct with R. W. Hughes, in thus subjecting him," etc. The object of the bill is to set aside the receipt given by R. W. Hughes to Boyce & Henry, as having been obtained in fraud of his rights, and that Boyce & Henry, or Boyce alone, be compelled to pay the amount, and prays process against the defendants.

If the statements in the bill be true, the complainant will no doubt rely with great confidence on his right, to the relief prayed for, and if he is entitled to this relief, it is

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Boyce & Henry who *must be answerable, for they received and sold the cotton. Their liability is joint, not several: and if the money was retained by Boyce alone, for a debt due him individually, it does not discharge them; or enable the complainant to call on Boyce for the default of the firm in not accounting with him. So that if the complainant's right to be relieved, be placed on the ground of contract, it rests on a joint undertaking. If it rests on fraud, the fraud consisted in a faithless appropriation (as charged by complainant) of the proceeds of the cotton:—and who was guilty of that fraud, if any was committed? That question is answered by asking who were answerable to the complainant? Certainly Boyce & Henry, and not Boyce. Suppose the want of the good faith now charged on Boyce & Henry, or on Boyce, had consisted in Boyce's applying the proceeds under the same circumstances to the payment of a debt due by R. W.

Hughes to any other person, (and this is putting the case in the strongest light for complainant,) such misapplication would still have been considered as the joint act of the firm, so far as their liability was involved, and so far as it might be necessary so to consider it, to enable one or both of them to show that the transaction was fair and honest. To carry this view still further: if the bill had been filed, alleging that Boyce & Henry received and sold the cotton as factors, but that Boyce had received and applied the money to his own use, or had appropriated it fraudulently, with the consent of Henry, to the payment of a debt due by R. W. Hughes to a third person, none I presume will doubt the necessity of making Boyce & Henry defendants, and the complainant's counsel seems to have taken the same view of the case by his manner of stating the complaint. It certainly then, is stronger against the complainant, as put by the bill, for it is there alleged that they sold the cotton and received the amount, and that they, or Boyce, applied it to their, or his debt, due by R. W. Hughes.

In any view I have taken of the case, I think it clear that Boyce & Henry have been made defendants by the case stated, and that gives either or both the right to

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claim the benefit of *the Act insisted on. But I see no necessity for dismissing the bill. The complainant may transfer it to the Register in Charleston, and take out new process for the defendants.

The decree of the Chancellor, therefore, overruling the defendant's second plea, is reversed.

JOHNSON, and O'NEALL, JJ., concurred.

Decree reversed.

Rich. Eq. Cas. 185

J. R. BROCK and Others v. JOHN A. BOWMAN and Others.

(Columbia. Jan. Term, 1832.)

[*Fraudulent Conveyances* ⇐255.]

Creditors may file a bill against a donee of their deceased debtor to have a voluntary conveyance of slaves set aside as fraudulent; but to such a bill the legal representative of the debtor must be a party.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 744; Dec. Dig. ⇐ 255.]

[*Husband and Wife* ⇐30.]

A voluntary post nuptial marriage settlement, unless recorded in the Secretary of State's office, is void, as against creditors of the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 176; Dec. Dig. ⇐30.]

[*Fraudulent Conveyances* ⇐132.]

A voluntary conveyance cannot be allowed to prevail against an existing debt, whether great or small, where due diligence is used by the creditor.

[Ed. Note.—Cited in Buchanan v. McNinch, 3 S. C. 500.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 408; Dec. Dig. ⇐132.]

[*Fraudulent Conveyances* ⇐249.]

The rule laid down in McElwee vs. Sutton, (2 Bail. 128,) and Izard vs. Middelton, (Bail. Eq. 228,) "that slight indebtedness, such as for current expenses, will not vitiate a gift," explained.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 735; Dec. Dig. ⇐ 249.]

[*Fraudulent Conveyances* ⇐1.]

Rules for ascertaining when a voluntary conveyance is void, against creditors existing and subsequent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 1; Dec. Dig. ⇐1.]

[*Fraudulent Conveyances* ⇐74.]

[A voluntary conveyance by a debtor, though fraudulent as to existing creditors, is not necessarily fraudulent as to subsequent creditors.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 189; Dec. Dig. ⇐ 74.]

[*Fraudulent Conveyances* ⇐132.]

[Cited in Farr v. Sims, Rich. Eq. Cas. 137, 24 Am. Dec. 396, and Bates & Co. v. Cobb, 29 S. C. 404, 7 S. E. 743, 13 Am. St. Rep. 742, to the point that subsequent creditors cannot complain of a prior gift, accompanied by possession, since they did not trust the creditor on the faith of property which is not in his hands; but, where the debtor retains possession, the gift is absolutely void as to such creditors without notice, as they are legally presumed to have given credit on the faith of such property.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 409; Dec. Dig. ⇐ 132.]

[*Fraudulent Conveyances* ⇐209.]

[Where a debtor, solvent at the time, and having no actual intent to defraud creditors, disposes of property for an inadequate consideration or by a voluntary conveyance, subsequent creditors cannot question the transaction.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 632; Dec. Dig. ⇐ 209.]

[This case is also cited in Suber v. Chandler, 36 S. C. 350, 15 S. E. 426, as an illustration of what constitutes a voluntary conveyance.]

Before Johnston, Ch., at Sumter.

In June or July, 1820, John Dinkins intermarried with Sarah Bowman, who was then the owner of four negroes, to wit, Nero, Daphne, Maria and Laura, given to her by her father, in April of the same year. John Dinkins being in possession of these negroes, on February 12, 1822, conveyed them by deed to John Bowman, Sr., and John A. Bowman, in trust for his wife, Sarah, with remainder to her issue. This deed was recorded February 18, 1822, in the Register's office for Sumter, but was never recorded in the Secretary of State's office.

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*John Dinkins became indebted to the plaintiffs in 1819, to the amount of $1,400, and they recovered judgments against him

in 1822 and 1823, but after the execution of the deed aforesaid. In 1823 he became a lunatic, and he died in 1825. At the time of the execution of the deed, he was the owner of two negroes, not included therein, and of about $6,000 in choses in action. These choses were wasted before and after his death, and the two negroes not included in the deed were sold by the Sheriff in his life time. The plaintiff's fi. fas. were returned nulla bona.

No administration had been taken out on the estate of John Dinkins. His widow, Sarah, intermarried with the defendant, D. D. Richbourg; and this bill was filed November 1, 1829, against John A. Bowman, one of the trustees, and Richbourg and wife, to compel them to account, as executors of their own wrong; for a discovery of assets; to set aside the deed of February 12, 1822, as fraudulent; and to subject the negroes included therein to the plaintiffs' judgments.

His Honor, the presiding Chancellor, dismissed the bill, and the plaintiffs appealed.

W. and C. Mayrant, for plaintiffs.
De Saussure, contra.

The opinion of the Court was delivered by

O'NEALL, J. Only two questions appear to be necessary to be considered here, in order to a decision of the cause: 1st. Has the Court of Equity jurisdiction? 2d. Is the post nuptial settlement of the slaves, Daphne, Nero, Maria and Laura, on Mrs. Dinkins, now Mrs. Richbourg, and her issue, a good legal conveyance, as against the complainants? Another question, raised by the defendants, as to the want of proper parties, will be considered under the first.

1. The jurisdiction of the Court of Equity extends to all cases in which the party seeking its aid has not plain and adequate remedy at law. The complainants are the creditors of John Dinkins, who died a lunatic,

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and on whose estate admin*istration has not been granted. The defendants are supposed to be liable, as executors de son tort. Without deciding on the questions, whether, as such, they must account in this Court, and whether, in fact, they have so intermeddled with the goods of the deceased as to make them liable, it will be sufficient if, against them, even divested of that character, the complainants are entitled to the aid of the Court. The complainants claim as creditors, and if the settlement is void as to them, they are entitled to have it set aside. At law, can they even make the question? They cannot, for there they cannot sue. The administrator is the only one who can maintain an action for the goods of an intestate. As between an administrator and a voluntary donee, the question of fraud against the rights of creditors cannot be raised at law. For, in this respect, the administrator has no other legal rights than the intestate. A voluntary deed, or a gift, would be good as between donor and donee, and, of necessary consequence, between the administrator and donee: Shelton v. Crosby. (a) The creditors are, therefore, obliged to seek the aid of this Court to have a voluntary deed set aside, for their rights are purely equitable. In seeking it, however, they must, if there is no administrator who can be made a party, administer themselves, so as legally to represent the rights of the intestate. Until this is done, it is impossible to say, by a legal judgment, that the complainants are creditors. For their debts are to be established against the deceased as legal subsisting demands, and this can only be done against his legal representative. If the defendant, Mrs. Richbourg, formerly Mrs. Dinkins, has any issue, her children must be made parties, for they have a direct interest in the matter now in issue, and to conclude them they must be properly before the Court.

2. We entertain no doubt that the post nuptial settlement of the slaves, on the defendant, Mrs. Richbourg, and her issue, as against the existing creditors, is void. For we concur with the Chancellor in saying, that the marital rights of the husband attached on the property given to her by her father,

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and it *became his property. Her estate, both in interest and possession, was a legal one, and to be enjoyed in præsenti, and of course vested in the husband. Being his property, it was liable to the payment of his debts, unless he is legally divested of it. It would be sufficient, on this part of the case, to say, that the post nuptial settlement was not recorded according to law, and is therefore void: Price v. White, (Bail. Eq. 244.) But I am not disposed thus to evade the question made and argued by the Chancellor with so much ingenuity: if there is any uncertainty of the law in relation to this class of cases, for one I am disposed (as is my duty) to assume the responsibility of putting it forever at rest. But after the cases of McElwee v. Sutton, 2 Bail. 128, and Izard v. Middelton (Bail. Eq. 228,) decided at our last session in Charleston, it would seem that the law ought to be settled, if the opinion of the Court in the last resort is to be obligatory on the circuit. In each of these cases, it is said, that a voluntary conveyance, or gift, cannot be allowed to prevail against existing debts. The last of these cases was as strong an one in favour of the conveyance as can be presented to a Court: the donor, on his marriage, intended to make a settlement of his wife's property: it was not however done: after her death, when he owned property to three times the amount of his debts, he settled all the property which he received in marriage with her, on her children: he owed at that time a debt to his father's estate, of about $15,000. After some

(a) Cited in Chapell v. Brown, 1 Bail. 531.

years he died, leaving this debt unpaid, and to the payment of it, the residue of his estate was insufficient, and it was held, unanimously, that, as to it, the settlement was void; and the property settled liable to its payment. The rule, as stated in both of these cases, is, that slight indebtedness, such as for current expenses, will not vitiate a gift. The meaning and application of the rule is perhaps, not distinctly seen, from the general way in which it is put. It never was intended to say, that, if a debt was small, the gift might prevail against it, where diligence was used to collect it. It was intended as a guide in two cases: 1st. If a man slightly indebted gives away property, not at all

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*endangering the collection of his debts, and the creditor stands by until improvidences, or casualty has swept his debtor's estate away; in such a case, slight indebtedness shall not avoid the gift. 2d. If a subsequent creditor seeks to set aside a gift, slight indebtedness, existing at the time of the gift, shall not vitiate the gift. This last, is, I am perfectly satisfied, the true application of the rule, and that, as to existing debts, whether great or small (if for their payment it is necessary) all gifts and voluntary conveyances, where the possession in fact still remains in the donor, must be set aside; and whenever necessary, I am prepared to go to this extent. Reade v. Livingston, 3 Johns. Ch. 500. Another proposition maintained by each of these cases, is, that where debts do exist, at the time of the gift, the test of the donor's capability to give depends upon his final solvency. This is carrying out the principle already stated, and giving full effect to it, that a gift cannot prevail against existing debts. If it becomes necessary for their payment that it should be set aside, it follows, that the gift being destroyed, the property is the debtor's and liable to all his debts, and therefore subsequent as well as existing debts must be paid out of it. But on a still plainer and more familiar principle of Equity the rule must be so. For as to existing debts the property given and that retained is alike liable for their payment: as to junior debts, the last may be their only fund. In Equity they have the unquestionable right to force the existing debts to exhaust the fund to which they can alone resort, before they can resort to the common fund. These rules are general ones, but like all others they have their exceptions. Ordinarily they would have no application to cases, where a donor, retaining an abundance to pay his debts, gave a part of his property to a child, and parted with the actual possession. There, if the creditor stood by and suffered the property retained to melt away, without collecting his debt, the laches would be his, and he must abide the consequence. But if a debtor gives away property, and still retains the actual possession, the creditor has the right to suppose that all the property in his posses-

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sion is liable to his *debt, and therefore his rights cannot be affected by a gift of which he is not bound to take notice. As to gifts consummated by the transfer of actual possession, subsequent creditors cannot, of course, complain: for they do not trust the debtor on the faith of property not in his possession. But if, after having made a gift, the donor retains possession, it is, as to the subsequent creditors, without actual or constructive notice, (by recording, when done in conformity to law,) absolutely void. Cordery v. Zealy, 2 Bail., 205. For they are legally presumed to give credit on the faith of the property in their debtor's possession. These legal rules, and their exceptions, I have stated with more than ordinary care, so that the complaint may not be again made, that the law is unsettled. They are rules to which all decisions must conform, as settled law. I enter into no reasoning upon them, for I presume it is only necessary to state them. Whether wise or not, they are such as appear to us to be legally right, and our reasons in support of them have been given in previous adjudications.

In the case before us, the debts now claimed, existed at the time the conveyance was made, and the property in the possession of the defendants seems to be the only available fund out of which they can now be paid. It is in vain to say there was an abundance of other property to have paid it. Where is it? It has been squandered. By whom? No one can tell. Whose duty was it to have seen it applied to the payment of the debts? The donor in the first place, and the donee after his death, should have seen to the application of it. It is wise policy to cast on donors and donees the extinguishment of existing debts, before they can set up a gift. "Be just before you are generous," is a command that cannot be too often repeated to debtors. But in another point of view the defence cannot avail the defendant; the bulk of the reservation, as it is called, to pay the donor's debts, was in choses in action: he could not convey away his visible property, and throw his creditors on this for payment; Cordery v. Zealy.

The decree of Chancellor Johnston is re-

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versed; the case *remanded to the Circuit Court, and the complainants have leave to amend their bill by making the administrator of John Dinkins, deceased, a party complainant or defendant as they may choose; and also, to make the children of Mrs. Richbourg, formerly Dinkins, (if she has any,) parties.

JOHNSON and HARPER, JJ., concurred.

Decree reversed.

Rich. Eq. Cas. 191

ELIZABETH BAKER v. W. BAKER and SAML. RED.

(Columbia. Jan. Term, 1832.)

[*Husband and Wife* ⟸10.]

Testator bequeathed as follows: "I lend unto my daughter E.," (a feme covert) "enduring her natural life, my negro girl Rosela, at the discretion of my executors from year to year as they think proper; and then said Rosela and her increase to be equally divided amongst the heirs of her body; and in case the said E. shall die without issue, then the said Rosela and her increase to be equally divided among all my other heirs:" the executors delivered Rosela to E. and her husband, who had her in possession many years: *Held*, that the legal title remained in the executors; that the marital rights of the husband had not attached, and that Rosela and her increase were not liable for his debts, and could not be mortgaged by him.

[Ed. Note.—Cited in Hinson v. Pickett, 1 Hill, Eq. 38.

For other cases, see Husband and Wife, Cent. Dig. § 45; Dec. Dig. ⟸10.]

Before De Saussure, Ch., at Newberry, July, 1831.

The bill was filed May 1, 1828, by complainant, Elizabeth Baker, by her next friend, George McCreless. The bill states, that on June 10, 1811, the father of the complainant, Thos. Userry, executed his last will and testament, in which is the following clause, to wit: "I lend unto my daughter Elizabeth, enduring her natural life, my negro girl, Rosela, at the discretion of my executors from year to year, as they think proper; and then said Rosela and her increase to be equally divided amongst the heirs of her body and in case the said Elizabeth shall die without issue, then the said Rosela and her increase to be equally divided among all my other heirs." That on the

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*12th day of the month and year aforesaid, the said Thomas, a resident of Montgomery County, North-Carolina, departed this life, leaving his said will in full force. That shortly after his death, the executrix and executor named in his will, exhibited the said will to, and it was admitted to probate by the County Court of the said County, and the executrix and executor therein named qualified and took upon themselves the burden and execution thereof.

That at the death of her father, the complainant was the wife of Williamson Baker, and resided in Montgomery County, North-Carolina. That at the time she and her husband were about removing to this State, the executrix under the clause of the will above recited and set forth, delivered to complainant, as a loan, for her separate use, the said negro girl, Rosela; that the complainant has held the said negro, Rosela, from that time to the present, in possession, for her separate use, except for a period during which she was hired by herself, and her husband, to one Wm. Haston. That the said negro girl, Rosela, has had three children, to wit, Elijah, Martha and Sam. That Williamson Baker, the husband of the complainant, being indebted to one Samuel Red, the said Samuel Red, well knowing that the said negro girl, Rosela, and her increase, were only in the possession of the complainant, for her separate use, caused the said Williamson to be arrested, under a bail writ, or a ca. sa., or perhaps both. That the said Williamson, without understanding his duty in the premises, assigned all his interest in the said negro and her increase, (well knowing that he had none,) to the said Saml. Red, in order to procure his liberation from confinement, under the prison bounds Act. That the said Saml. Red, under the said assignment, has seized the said negro, Rosela, and her increase, and is proceeding to sell the same.

The prayer of the bill was to restrain the said Saml. Red, perpetually, from proceeding to sell the said negro, Rosela, under the assignment.

Williamson Baker filed his answer July 6, 1829, admitting the material allegations in the bill, and affirming them to be true.

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*Saml. Red also filed his answer, neither admitting nor denying the allegations of the bill in relation to the execution of the will of Thomas Userry; but contending that the executrix of the will, by delivering the negro to complainant and her husband, when they were about to remove from North-Carolina, assented to the legacy, so far as to vest a life estate in the slaves in complainant. He denied that complainant had had the separate use of the slaves, but believed that Williamson Baker had had almost the exclusive use thereof. That he regarded them as the property of Williamson Baker, up to the time, (February 27, 1822,) he took a mortgage of them for the principal part of the debt due him by complainant's husband.

De Saussure, Ch. The question turns on the construction of the will. The clause in question is worded very oddly. It is first a gift of the slave to the daughter, Elizabeth, during her life; then there is a discretion in the executors, to limit the possession from year to year. Then a limitation to the heirs of her body: and upon her death, without issue, to be divided among the other heirs of the testator. Whatsoever degree of discretion was given to the executors, did not diminish the estate, and could only apply to the possession. That discretion they have exercised, by giving possession for many years without control. The bequest to the daughter is for life. The limitations over are upon an indefinite failure of issue, and therefore too remote and void. The legacy then vested absolutely in the first taker; with all the consequences of such vesting. The marital rights of the husband attached, and the husband had a right to assign or transfer the

property. He has done so; and the creditor has a right to be paid by the sale of the slaves. The bill is dismissed; but let the costs be paid out of the sale of the slaves.

The complainant appealed on the following grounds:

1. Because, under the clause of the will, the wife took no estate upon which the marital rights of the husband could attach, and therefore he could not assign or convey it.

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*2. Because the legal estate remains in the executors, who hold the slaves, to be loaned to the wife from year to year during the wife's life, the loan to be at the discretion of the executors.

3. Because the Chancellor erred in decreeing the limitation to be too remote, and that the first taker, took absolutely.

4. Because the words of the will, under the circumstances, the wife being a feme covert, created a separate estate for her use, and particularly so, as the will being made in North-Carolina, is to be construed according to the laws of that State.

Dunlap, for appellant.

The opinion of the Court was delivered by

JOHNSON, J. It is not my purpose, nor is it deemed necessary, to enquire, whether the limitation over, of the negro, Rosela, after the death of the complainant, Mrs. Baker, can or cannot take effect. It is a question, perhaps, not entirely free from difficulty. But be that as it may, if she took an absolute property, the bill of sale, by way of mortgage, made by her husband to the defendant, Red, is good, and binds her. So, if she took only a legal estate for life, the mortgage is good to that extent, and she has no cause of complaint. It is only necessary, therefore, to enquire, whether under the will of her father, Thomas Userry, out of which these questions arise, she took any interest which was subject to the disposition of her husband, or rendered the negro liable for his debts. The following is the provision of the will before alluded to, "item, I lend unto my daughter Elizabeth, (the complainant,) enduring her natural life, my negro girl, Rosela, at the discretion of my executors, from year to year as they shall think proper; and then said Rosela, and her increase, to be equally divided amongst the heirs of her body, and in case the said Elizabeth shall die without issue, then the said Rosela, and her increase, to be equally divided amongst all my other heirs." Every man of competent age, possessing a sound and disposing mind and memory, has a right to prescribe a rule for the disposition of his property after his death. His will or testament is evidence of

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his intention as to *the manner of disposition, and all the rules of construction have been framed to ascertain that intention. To effectuate this, it is admissible to substitute, or for and, and e converso. The strict grammatical construction may be disregarded, and words and sentences transposed: 1 Rob. on Wills, 490. In short, there is no limitation to the powers of construction according to the intent, but certain arbitrary rules rendered necessary by the laws of property.

Let the question then be put—what estate did the testator intend, by this bequest, to give to the complainant, in the negro Rosela? He certainly did not intend to give her the absolute property; for her interest is in terms limited to her life; and, whether the limitation over is good or bad, is immaterial to this question, for that depends on an arbitrary rule. It is, I think, equally certain, that he did not intend to give her an absolute unconditional life estate. If that had been his intention, it was sufficiently expressed by the terms "enduring her natural life," and he would not have encumbered it with "at the discretion of my executors from year to year, as they shall think proper:" and I venture to affirm, that no one ever yet employed these terms, in the belief that they were necessary or fit, in a bequest of an unconditional life estate. He must then have employed them for some other use, and if it be practicable to ascertain the intent, we are bound to give it effect. The word lend is also used in connection with this qualification of the interest given—"I lend unto my daughter," &c. In its legal sense, as well as in its common acceptation, the term loan is used to express a property in the things lent, limited by the contract of lending, or determinable at the will of the lender. The thing lent, must be used in the manner contemplated, for if the borrower use it otherwise, he is liable to the lender,—it is, therefore, necessarily personal in the borrower. If the time be limited by the contract, or if it be terminated by the will of the lender, the thing must be restored, or the borrower is liable to an action. Jones on Bailm. 74. I know that the word lend, in a will, is frequently interpreted give, but that is to give

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effect to the inten*tion. Thus, if a testator says, "I lend my servant Dick to my son John forever," it will be construed give, because a loan would be inconsistent with the extent and duration of the property given. But here it is connected with "at the discretion of my executors from year to year as they shall think proper," and these terms, if they mean anything, not only do not control the technical meaning of the word lend, but expressly limit the loan from year to year; and even then it is determinable at the will of the executors. It is then a loan in the strict sense of the word. It is personal to the complainant, nor can she use the negro otherwise than contemplated, and she must have her ready, at the end of each year, to be delivered to the executors, if they shall think proper to terminate the

loan:—and this is utterly inconsistent with the power of disposition by the husband, or liability to his debts. To enable the executors to exercise any discretion over the negro, it was indispensably necessary that the legal interest should abide in them: for the exercise of a discretion over property in which one has no interest, involves an absurdity. No precise form of words was necessary to create a trust in them; for, when it is necessary to carry into effect the intention of the testator, it arises by necessary implication. The case of Graves v. Johnson, decided at May Term, 1830, is in point, and I think the principle is deducible from Foley v. Burnell, Cowp. 445, note. The legal property, therefore, remained in the executors, as indispensably necessary to carry the testator's intention into effect. It is remarked, in the Circuit Court decree, as the basis of the judgment, that the executors had exercised their discretion by delivering up the negro to the complainant, and suffering her to retain the possession for a long period. It was a trust reposed in them of which they could not divest themselves, as was said in Graves v. Johnson, and besides that, the possession of Mrs. Baker was in the direct execution of the trust, and her retaining possession, was evidence of their assent from year to year, and no more. I am, therefore, of opinion, that the legal estate in the negroes is in the executors of the testator,

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Thomas Userry, in trust for the *use of the complainant from year to year until they shall think proper to determine it; that her possession is consistent with, and in pursuance of the trust, and consequently, that her husband had no power to dispose of them.

It is, therefore, ordered and decreed, that the decree of the Circuit Court, directing that the negroes, mentioned in the complainant's bill, be sold by the Commissioner to satisfy the debts due to the defendant, Saml. Red, by the defendant, Williamson Baker, and for dissolving the injunction heretofore granted, to restrain the said Red from selling the said negroes, be and the same is hereby set aside and reversed: and that the said injunction be made perpetual, and that each of the parties pay their own costs.

MARTIN, J., concurred.

O'NEALL, J., was of counsel in the cause, and gave no opinion.

Decree reversed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT CHARLESTON, SOUTH CAROLINA, MARCH & APRIL TERM, 1832.

JUDGES PRESENT.

HON. DAVID JOHNSON.
" JOHN B. O'NEALL,
HON. WILLIAM HARPER. [for a few days only, at the close of the Term.]

Rich. Eq. Cas. *199

*WILLIAM MAYRANT, Sr., v. F. DICKERSON, Executor of S. Shrewsbury, et al.

(Charleston. March and April Term, 1832.)

[*Injunction* ⇐=26.]

Equity has jurisdiction to enjoin a mortgagee of slaves from selling them under the mortgage, on the ground that the bond, to secure which the mortgage was given, was usurious—the principal and legal interest having been paid: and thus having jurisdiction of the matter, it will enjoin the creditor from proceeding at law upon the bond.

[Ed. Note.—Cited in Badgett v. Frick & Co., 28 S. C. 180, 5 S. E. 355.

For other cases, see Injunction, Cent. Dig. § 46; Dec. Dig. ⇐=26.]

This case will be sufficiently understood from the opinion delivered in the Court of Appeals by

O'NEALL, J. It is stated in the bill that the complainant, by means of the testator, Shrewsbury's notes, obtained a large sum of money, which he secured to him in the notes of another, indorsed by the complainant, with

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a very large usu*rious interest; that, after several years, a part of this debt still remaining unpaid, the complainant gave his bond for it, and secured the payment of the bond by a mortgage of several slaves; that payments have been made upon this, until the balance left is not equal to the usury included in the bond; that suit has been brought upon the bond at law, and the mortgage delivered to the Sheriff of Sumter district, for the purpose of seizing and selling the slaves mortgaged: that the Sheriff has made a seizure, and is about proceeding to sell under it. The bill prayed an injunction against the suit at law, and also against the sale to be made under the mortgage, and that the bond and mortgage may be delivered up to be cancelled.

The defendant, Dickerson, demurred to the whole bill, on the ground that the complainant had plain and adequate remedy at law. Chancellor DeSaussure, at May Term, 1829, sustained the demurrer to so much of the bill as relates to the defence of usury to the bond; but overruled it to so much of the bill as demanded an account for the usury paid.

The defendant pleaded the statute of limitations to the account, and his plea was sustained by the same Chancellor, May Term, 1831, and the bill dismissed.

Both parties appeal from the first decree, and the complainant from the last, and thus the whole case is brought up for our judgment.

The first question is as to the jurisdiction. I concur entirely with the Chancellor, that, if the case stood alone upon the bond, upon which an action had been commenced at law, to it the defence of usury was a plain and adequate remedy, and the complainant had no occasion to resort to the aid of this Court. But I cannot think, with him, if the bill had prayed an account for the excess paid on the bond, over the principal and legal interest, that the party had not for this a plain and adequate remedy at law. The action of assumpsit for so much money had and received, would have enabled him to recover it.

The case, however, it appears to me, turns upon another view of the matter. The Court

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of Equity has long entertained *jurisdiction over cases, where securities have been taken on usurious interest, and which are not attempted to be enforced at law, or to which, from their nature, there is no means of setting up a legal defence. If the party then pays, or tenders to the party, and pays into Court, the principal sum and legal interest, the Court will, upon the usury being established, order the securities to be canceled.

I recollect a case, tried before the able and learned Chancellor who tried this case. The case was Farrow v. Fowler, in which a judgment had been confessed for about $1,000, including an usurious interest of about $350. The complainant offered to pay the principal and interest. An injunction was granted against so much of the judgment as was alleged to be usurious, and an issue ordered to ascertain the fact of usury, and the amount of it. Upon a verdict being found, establishing both points made in the issue, the injunction was made perpetual.

In the case before us, the party defendant, by his own act, the sale of the slaves under the mortgage, is about to enforce payment of his debt. To prevent this, the party has no legal remedy; and if his allegation of usury in the transaction be true, and he has paid the principal and legal interest, it is plain that he is entitled to relief. The want of a legal remedy is a ground for the interposition of this Court, to prevent the sale. Having jurisdiction of that part of the case, it follows, that the question, whether the bond is founded on an usurious consideration, and the quantum of the usury, must be either tried by the Court, or by an issue at law, to be ordered by it. If, by either of these modes, it should appear that there was usury, and that, by excluding it, the bond was paid, or overpaid, the result, in either case, must be the same. The bond and the mortgage will be decreed to be cancelled.

If it should appear that the bond is overpaid, I should have no hesitation in concurring in the decree of the Chancellor, and for the very satisfactory reasons which he has

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assigned, that *the statute of limitations would, either at Law or in Equity, preclude the complainant from recovering back the excess.

But to the questions, whether the bond and mortgage are founded on an usurious consideration? and whether, excluding the usury, the principal and legal interest have been paid? the statute of limitations has no application.

It is ordered and decreed, that the decree of Chancellor DeSaussure be reversed; that the demurrer and plea be overruled, and that the defendants answer the bill.

JOHNSON, J., concurred.

Decree reversed.

Rich. Eq. Cas. 202

HENRY BRADLEY v. BURWELL McBRIDE.

(Charleston, March and April Term, 1832.)

[*Judgment* ⇐554.]

Defendant bought plaintiff's land, of which he was in possession, at Sheriff's sale—brought trespass to try title against him, and recovered. On bill filed to have the sale set aside for fraud, *held*, that the recovery, in the action of trespass to try title, was no bar to the bill.

[Ed. Note.—Cited in Hart v. Bates, 17 S. C. 42.

For other cases, see Judgment, Cent. Dig. § 1055; Dec. Dig. ⇐554.]

[*Execution* ⇐256.]

A defendant in execution, whose land has been sold at Sheriff's sale, is entitled to ten years, under the statute of limitations, within which to file a bill to have the sale set aside for fraud.(*a*)

[Ed. Note.—Cited in Parham v. McCravy, 6 Rich. Eq. 143, 144, 145, 146.

For other cases, see Execution, Cent. Dig. § 728; Dec. Dig. ⇐256.]

Before DeSaussure, Ch., at Beaufort, January, 1831.

In April, 1822, McBride, the defendant, recovered judgment against Bradley, the plaintiff, for $448, besides interest and costs. Fi. fa. was issued on the judgment, and on sale day, August 5, 1822, the tract of land on which Bradley lived, containing one thousand

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acres, was put up for sale by the She*riff, and bid off by McBride, at the price of $29. McBride received a conveyance from the Sheriff, brought an action of trespass to try title against Bradley, to obtain possession of the land, and recovered a judgment against him. This bill was then filed, September 3, 1827, to set aside the sale made by the Sheriff, on the ground of fraud.

The defendant, denying all fraud in the sale, submitted, that the plaintiff was precluded from setting up the fraud, if any existed, by the judgment recovered in the action of trespass to try title; and relied, also, on the statute of limitations, as a bar to plaintiff's bill.

His Honor came, with much hesitation, to the conclusion, that the sale was fraudulent, overruled the defences set up by the defendant, decreed a recision of the sale, and ordered the Commissioner to resell the land—each party to pay his own costs.

The defendant appealed.

Elmore, for appellant.

W. F. Colcock, contra.

The opinion of the Court was delivered by

O'NEALL, J. Two legal questions have been argued in this case. 1st. Is the com-

(*a*) In McDonald vs. May, (1 Rich. Eq., 91,) it was held, that the plaintiff, in such a bill, was entitled to but four years; but that decision was made, seemingly, without much consideration, and without knowledge of the case of Bradley vs. McBride.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

plainant precluded from setting up the fraud in the sale of the land, by the recovery had against him, by the present defendant, in the action of trespass to try title? 2d. Is he barred by the statute of limitations?

1. I cannot think, with the Chancellor, that the discovery of parol evidence, since the trial of the case at law, would be any ground for relief against the judgment. It is no ground for a new trial, and I apprehend it would be still more difficult to show why it would be a ground to authorize the Court of Equity to interfere. Neither am I satisfied that the defendant could not, at law, have made the defence, which is now the ground of his relief in this Court. In the case of Keenan vs. Pearson, 5 Rich., 549, note, a defence, that the sale of land made by

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the She*riff, was fraudulent, was sustained, and defeated the purchaser's title in an action at law. But over many matters of fraud, the Courts of Law and Equity exercise a concurrent jurisdiction. And when a purchase is to be set aside, and the parties to be placed in statu quo, Equity can alone discharge this duty. In this case, the sale is sought to be set aside for fraud, and in doing so, the purchaser ought to be refunded his purchase money, or have the credit on the execution vacated. Both of these objects could not be accomplished by the defence, in an action at Law. Some other and further legal proceedings might possibly have accomplished it. But as the remedy in Equity is more convenient, and as the jurisdiction of the Court over this class of cases is unquestionable, I think the recovery at Law cannot conclude the complainant.

2. The statute of limitations commences to run against a fraud, from the time it is discovered. The time within which the statutory bar against a fraud is complete, must be governed by the nature of the claim against which it is set up. If it is for the enforcement of a parol contract, or the recovery of personal property, the time within which the statute has directed that actions of assumpsit, trover, or detinue shall be brought, is the rule in Equity. If it is for the recovery of land, then the time limited for the commencement of actions at Law, for its recovery, is the time within which a bill in Equity, to be relieved from a fraud defeating the complainant's title, must be filed. The sale, in this case, was made in 1822, and the fraud, if any, was then consummated. In 1824, 6 Stat., 238, the statute of limitations as to land, was extended to ten years. The complainant, not being barred at the time the statute was extended, was entitled to the benefit of its extension, and could, at any time within ten years of the sale, have brought this suit.

Upon the facts, the Chancellor's decision cannot be disturbed. The evidence of fraud was very slight, and I should have been better satisfied if he had dismissed the bill;

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but as he was *satisfied that the evidence warranted him in decreeing that the sale should be set aside, and as there is some evidence which sustains his conclusion, his decree must be affirmed, and it is so ordered.

JOHNSON, J., concurred.

Decree affirmed.

Rich. Eq. Cas. 205

ANDREW MURRAY et al. v. JACOB STEVENS.

(Charleston, March and April Term, 1832.)

[*Equity* ⇐148.]

Several plaintiffs cannot demand by one bill, several matters perfectly distinct and unconnected, against one defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341–367; Dec. Dig. ⇐148.]

[*Equity* ⇐149.]

Two plaintiffs filed their bill against defendant, alleging that he was in possession of land belonging to plaintiffs jointly, and claiming from him, in behalf of one plaintiff, an account for a crop, which that plaintiff and defendant had, by agreement, made on the land, in 1828, on shares; and also, in behalf of both plaintiffs, possession of the land, and an account for rents and profits: *Held*, that the bill was bad for multifariousness.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 368; Dec. Dig. ⇐149.]

[*Partnership* ⇐10.]

An agreement between A. & B. to plant a tract of land belonging to one of them—each furnishing a certain number of hands and specific farming tools, and to divide the crop in certain shares, is not a copartnership, for settlement of which a bill will lie: the remedy is at law.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 25; Dec. Dig. ⇐10.]

[*Tenancy in Common* ⇐55.]

A bill will not lie by co-tenants to compel a defendant to give up the possession of land, and account for the rents and profits,—the remedy is trespass to try the title.

[Ed. Note.—Cited in Albergottie v. Chaplin, 10 Rich. Eq. 430.

For other cases, see Tenancy in Common, Cent. Dig. § 140; Dec. Dig. ⇐55.]

[*Appeal and Error* ⇐870.]

An appeal from a final decree, brings up the whole case; the Court will examine interlocutory circuit decrees made at previous terms, and give judgment upon them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3451, 3487–3489, 3491–3512; Dec. Dig. ⇐870.]

This case will be sufficiently understood from the opinion delivered in the Court of Appeals, by

O'NEALL, J. There are two objections taken to the complainant's recovery. 1st. That two distinct and separate causes of action, and in which the complainants have separate interests, have been joined in the bill. 2d.

That, for the cases stated in the bill, the complainants have plain and adequate remedy at law.

It appears, that complainant, Murray, and defendant, Stevens, agreed in writing, to plant a tract of land belonging to the former, for the year 1828, each furnishing a certain num-

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ber of *hands, and specific farming tools, and to divide the crop in certain shares. After the crop was made, the provision crop was divided, and Murray's share of the cotton set apart for him, but was retained by Stevens, until some demands, which he had against Murray, were satisfied. Afterwards it appeared, that Lacy, the other complainant, who is an infant, had some interest in the land, and the defendant, pretending to be his guardian, retained possession, and an actual division of the land was made by the complainants according to an arrangement between Murray, and Stevens acting for Lacy, in which one-half was assigned to Lacy; notwithstanding which, Stevens still retains possession. The bill seeks, 1st, a recovery of complainant Murray's share of the crop of 1828, and 2nd, that the defendant should give up possession of the land and account for its rents and profits since. To this bill the defendant demurred, and for causes of demurrer assigned the same which are now the subject of appeal. The demurrer was heard, and overruled by Chancellor De Saussure. The defendant afterwards filed a plea and answer: and the case was heard before Chancellor Johnston, who decreed for the complainants. The defendant appeals and moves for a reversal of the decrees on the grounds which I have stated.

1. The rule is stated with great clearness in Cooper's Equity Pleadings, 182, to be that, "the Court will not permit several plaintiffs to demand by one bill, several matters perfectly distinct and unconnected, against one defendant; nor one plaintiff to demand several matters of distinct natures against several defendants, which is termed multifariousness or improperly confounding together distinct matters." The same rule, though not so explicitly stated, is recognized in Mitf. Plead., 147. Under this rule, it is necessary to enquire, are the complainants' claims separate, distinct, and unconnected? In the first place, Murray claims an account of a crop raised on shares, against the defendant, Stevens: this is his demand in his own right against Stevens: in the second place, he and Lacy claim possession of the land, and an account of its rents and profits as co-tenants.

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*The two matters of complaint are distinct and unconnected, and what is so much the worse, there is not even a community of right between the complainants extending to the whole case. The defendant is, I have no doubt, in the wrong, in both the cases stated; but however much he may be in default, it constitutes no reason, why two specific wrongs should be united in one bill, by two persons standing in unconnected rights, because they happen to have a common right in one of the causes of complaint.

2. This objection is the most formidable, if well founded, for it must defeat the complainants altogether, while the effect of the other might have been obviated by an amendment striking out of the bill, one of the cases made, and proceeding upon the other alone.

The first case stated in the bill, is that of an agreement to plant on shares, and I suppose that this was thought to be a partnership, and that, therefore, it was properly cognizable in Equity. But it is not a partnership; it is an agreement that Stevens and his slaves should be paid out of the crop by a certain number of shares for their services for one year. It is the ordinary and familiar case of an overseer's contract, the remedy upon which at law is perfectly plain and obvious. Stevens for any breach of this agreement had his action, and so has the complainant, Murray. If there had been any pretence that the quantity of the crop could not be ascertained, but by a discovery from the defendant, a bill for discovery as ancillary to the remedy at law might have been sustained. But after the quantum of the crop has been ascertained, and even the complainant's share set apart for him, there is no ground whatever for equitable interference. After the complainant's share of the cotton had been ascertained, and actually put into a house for him, if the defendant, on demand, had refused to deliver it, I see nothing to prevent a recovery in either trover or detinue.

The second case stated in the bill is, that defendant, without any title, is in possession

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of a tract of land belonging to the *complainants. An action of trespass to try title would dispossess him of the land, and compel him to pay rent by way of damages. There is no difficulty in the way of a recovery by both. Even Murray could, perhaps alone, recover, on shewing that defendant entered under the agreement to plant the land on shares, for 1828. But by both complainants joining in the action, there could not be any pretence of defence. The agreement between him and Stevens, to divide the land between the two complainants, Murray and Lacy, would be a recognition of the title of both; and inasmuch as the division, made by Murray under that agreement, is not binding on the complainant, Lacy, both from the want of his assent to it in fact, and from his minority rendering him incapable of giving a legal assent to it, and is therefore no severance of their common interest, they can sue jointly; and on proof that the defendant is in possession, he must be legally regarded as a trespasser on the freehold of both.

It is true, as to Lacy, that the defendant's

pretence, that he was his guardian, might make him his trustee, and if he alone was complaining against him, I might be disposed to sustain his bill. But when he has an undivided interest with another, as to whom the defendant holds in adverse possession, and as their joint remedy at law is perfectly plain and adequate, I think they must be referred to it.

It was insisted for the complainants, that no appeal lies from an interlocutory decree, and that the decree overruling the demurrer, was of this character: and the case of Robertson v. Bingley, 1 McC. Eq. 351, was relied on as authority in support of this position. There is no doubt, that a decree overruling a demurrer is interlocutory, and that the party will not be prejudiced by awaiting the final hearing. But I have as little doubt when the demurrer will, if sustained, end the case, that the party may appeal from the decree overruling it.

But it is a strange application of the rule, to insist, that a decree is interlocutory, and not the subject of appeal, until a final decree, and after a final decree, then to insist that

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the party *cannot make the objections which were disposed of by the interlocutory decree. Yet that would seem to be the effect of the objection now raised. The case has been finally heard, and a decree given for the complainants. The appeal from that decree brings up the whole case: and upon the propriety of the interlocutory, as well as the final decree, this Court is bound to give judgment.

It is ordered and decreed, that the decrees of Chancellors De Saussure and Johnston be reversed, and the bill dismissed with costs.

JOHNSON, J., concurred.

Bill dismissed.

Rich. Eq. Cas. 209

DR. FRANCIS PORCHER v. SARAH B. GIST, Her Children, et al.

(Charleston, March and April Term, 1832.)

[*Husband and Wife* ⇐30.]

A settlement executed in 1814, and not recorded as directed by the Act of 1785, is good between the parties: the property was settled to the use of husband and wife during their joint lives, remainder to the use of the survivor for life, &c.: *Held*, that creditors of the wife, whose debts were contracted after the death of the husband, she being the survivor, could look only to her life estate for payment.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 176; Dec. Dig. ⇐30.]

[*Husband and Wife* ⇐110.]

By marriage settlement, negroes were conveyed to the trustee 'for the use of' husband and wife 'during their joint lives, and for the use of the survivor during his or her life,' with remainder to the use of the issue of the marriage: there was issue of the marriage, and the wife survived: *Held*, that upon the death of the husband, the wife being in possession of the negroes, her estate for life became a legal one, and was liable to levy and sale under execution at law against her. Rice v. Burnett [Speers, Eq. 579, 42 Am. Dec. 336] and Iorr v. Hodges, Sp. Eq. 593, contra.

[Ed. Note.—Cited in Ford v. Caldwell, 3 Hill, 250; Pyron v. Mood, 2 McMul. 295, 296; Pringle v. Allen, 1 Hill, Eq. 136; Burnett v. Rice, Speers, Eq. 580, 589, 42 Am. Dec. 336.

For other cases, see Husband and Wife, Cent. Dig. § 405; Dec. Dig. ⇐110.]

[*Trusts* ⇐151.]

The equitable interest of cestui que trust may, in Equity, be reached by creditors.

[Ed. Note.—Cited in Iorr v. Hodges, Speers, Eq. 601.

For other cases, see Trusts, Cent. Dig. §§ 195, 195½, 197; Dec. Dig. ⇐151.]

Before DeSaussure, Ch., at Charleston, April, 1831.

This case will be understood from the circuit decree, and the opinion delivered in the Court of Appeals. The following is the circuit decree.

DeSaussure, Ch. The defendant, Sarah B.

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Gist, before *her marriage with her late husband, States Gist, joined with him in executing a marriage settlement, dated in Dec., 1814, and appointed Thos. W. Bacot, and Henry H. Bacot, trustees thereof, who joined in executing the deed. The marriage was shortly after solemnized. But the settlement was not recorded until the 6th December, 1815, more than three months after the solemnization of the marriage. The property settled, consisted of twenty-six negroes, and a certain undivided interest in real estate. The settlement was to the joint use of husband and wife during their joint lives: to the survivor for life, and to the issue of the marriage after the death of the survivor —with power to the trustees to sell or exchange any part of the property, and to invest the proceeds, or hold the exchanged property, to the same uses as the property conveyed. The parties were of full age at the time of executing the settlement. States Gist died in 1822, leaving assets to pay his debts, and leaving the said Sarah B. Gist, his widow, and two children, Mary and Elizabeth, the issue of the marriage, who are now infants of tender age. On the death of her husband, Sarah B. Gist, being entitled by the terms of the settlement to a life estate in the settled property, took possession thereof, and in the year 1824, the trustees being willing to relinquish their trust, complainant was requested by Mrs. Gist, to accept the appointment in their place, and consented at her earnest request. A petition was then presented to the Court of Equity, setting forth the deed, and the above stated facts; upon which the Court, in January, 1825, made the following order: "That Francis Porcher be, and he is hereby appointed in the place and stead of the petitioners, (the trustees,) the trustee of Mrs. Gist and her

children, under the said marriage settlement; and that a notice of this substitution be endorsed on the original deed, and recorded in the proper office, according to the provisions of the Act of Assembly in such case made and provided: And it is further ordered, that said petitioners from their said trusteeship, be and are hereby exonerated and discharged." This order has never been endorsed on the settlement, or recorded in the office

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of the *Secretary of State. After it was made, two of the slaves settled, were sold by Mrs. Gist, and the complainant joined in the deed of transfer to the purchaser: and for the purchase money, the trustee took the joint and several bond of Mrs. Gist, and her sister, Peter Anne, for three hundred and sixty-five dollars, and the note of hand of Mrs. Gist, for two hundred and eighty-five dollars. Peter Anne died, leaving her will, by which she appointed complainant and defendant, Sarah B. Gist, her executors: the latter of whom qualified. The complainant at the request of Mrs. Gist, entrusted her with the bond, and the note taken by complainant, to secure the proceeds of the sales of the two negroes, and Mrs. Gist refuses to deliver them up, and declares, that she considers the settlement null and void, and the substitution of the trustee equally void, neither of them having been recorded, and that she executed the settlement without knowing the terms of it—although she had it in her possession before it was executed a sufficient time to have read it, and signed it voluntarily. Since the death of States Gist, his widow has contracted certain debts, and the defendant, Jacob Hurtz, has obtained a judgment, and taken out an execution thereon against her, and under it has levied upon six of the negroes mentioned in the settlement. The complainant prays that the liability of the trustee may be ascertained, and the rights of the defendants; and may be decreed upon.

There is no difficulty in determining that, as between the parties to this settlement, it is good, notwithstanding it was not recorded in three months; the want of which record could under the Act affect only subsequent creditors of the husband, as to whom, if there were any, it would be void; but there are none. Mrs. Gist, in her answer, alleges no fraud in the execution of the settlement, and her mere allegation, that she was ignorant of its provisions, can avail nothing, since she voluntarily executed it, after having it in her possession a sufficient time to read it and have it explained to her, if she desired such explanation; and she was of

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full age, and perfectly competent *to the contract. The interests of the issue are now involved, and must be protected.

The order, substituting the complainant as trustee, in place of the trustees mentioned in the settlement, was perfectly regular, and is not invalidated for want of being recorded. If it was, the only effect would be to leave the original trustees where they were. The Act authorizing the substitution, directs the order to be endorsed and recorded, but does not invalidate the order, if not recorded. It merely is directory, and no time is fixed within which it is required to be done. It may be done now.

Under the settlement, Mrs. Gist had a life estate, as a cestui que trust, in the settled property. But the legal estate is in the trustee, and is not subject to an execution against the cestui que trust. Whatever may be the rights of the defendant, Hertz, under his judgment, or as creditor—upon which no decision is intended to be now made—they cannot now be enforced by levying his execution on the property settled; nor can they be provided for by any decree that could be properly made in this case. The complainant, as trustee, is entitled to have the marriage settlement in his possession, and the order of this Court ought to be endorsed upon it and recorded. The bond of the defendant, Mrs. Gist, and of her sister, Peter Anne Porcher, and the note of the defendant, Mrs. Gist, should be delivered to the complainant. The defendant, Hertz, should be enjoined from proceeding, under his execution against Mrs. Gist, to sell the property settled, and should be compelled, if he has already taken the property, to deliver it back to the trustee, or the defendant, Mrs. Sarah B. Gist.

It is, therefore, ordered and decreed, that the defendant, Mrs. Gist, do deliver up to the complainant, Francis Porcher, the marriage settlement and the bond of herself and her sister, Peter Anne Porcher, and also her own promissory note. It is further ordered and decreed, that the former order of this Court, substituting the complainant as trus-

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tee, in place of the original *trustees of the settlement, be now endorsed on the settlement, and recorded in the manner required by that order. It is further ordered and decreed, that the defendant, Hertz, be enjoined from proceeding, under the execution at law, against the settled property, and that, if any part thereof has been taken, under the said execution, it be delivered up. It is further ordered and decreed, that the defendant, Mrs. Gist, be restrained and enjoined from selling or disposing of any part of the settled estate, except in the manner pointed out and fixed by the settlement. The costs of this suit to be paid out of the proceeds of the trust estate.

From this decree the defendant, Hertz, appealed, and moved that the same be reversed, on the following grounds:

1. Because his Honor should have decided that the marriage settlement was void, on account of the want of recording in due time; and that the negroes were liable to

the execution of Hurtz, as the property of Mrs. Gist.

2. Because, if the Judge was right, in exempting the corpus of the property from sale, under the execution, yet he erred in not deciding that the life estate of Mrs. Gist was liable to sale by the Sheriff, under said execution.

3. That his Honor erred, moreover, in deciding that, whatever might be the rights of Hurtz, they could not be provided for by any decree that could be properly made in the cause: whereas, it is submitted, that, as the complainant prays the Court to determine his liability as trustee, and also the rights of the defendants, the Chancellor was bound to have settled them; and that a decree, subjecting the property to the payment of the debt of Hurtz, could be properly made in the cause—the more especially as the Court had previously adjudged that Hurtz had no remedy at law against the corpus of the property, nor even against the life estate in it, whereby it was manifest, by the Chancellor's own showing, that Hurtz was remediless at law.

4. That the Chancellor erred in perpetuating the injunction against Hurtz, and ought, on the contrary, to have decreed the

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*sale of the property, and an assignment of the injunction bond, as a collateral security to Hurtz, to make good any deficiency in the eventual sale of the negroes levied on.

Moise, for appellant.

The opinion of the Court was delivered by

O'NEALL, J. On the appeal in this case, it has been contended, first, that the marriage settlement is void, on account of not being recorded within three months, and that the property is therefore liable to be sold, as the property of Mrs. Gist; second, that admitting the marriage settlement to be good, still that her life estate is liable to be sold, in payment of the debt to Hurtz.

1. The Act, P. L., 357, (4 Stat., 656; 6 Ib., 636,) directs that all marriage settlements, entered into after its passage, shall be recorded, or lodged to be recorded, in the Secretary of State's office, within three months from their execution; and if not so recorded, or lodged to be recorded, "then the same, in respect to creditors, shall be deemed, and is hereby declared to be fraudulent; and all and every part of the estate thereby intended to be secured to such person or persons, shall be subject and liable to the payment and satisfaction of the debts due and owing by such person or persons, in as full and ample a manner, to all intents and purposes whatsoever, as if no such deed, contract, or settlement had ever been made or executed." The Act of 1792, 1 Faust, 210, (5 Stat., 203,) amendatory of this Act, excludes the creditors of the husband before marriage, from questioning the settlement.

The terms of the Act of 1785 are very general, and might, without any violence to the words, receive the construction contended for. But, as the Chancellor has very well observed, the marriage settlement is good as between the parties, notwithstanding it has not been recorded. It is only fraudulent as against creditors, and is, as against them, the same as if no such deed, contract or settlement had ever been made or executed. The effect of this provision is to leave the

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property in the *condition that, by law, it would have been in, had no settlement been executed. The personal property of the wife, jure mariti, on marriage, is vested in the husband, unless his marital rights are prevented from attaching by a settlement. As against his creditors, the settlement, if not recorded, will not prevent his marital rights from attaching. But the deed, as against himself, is effectual, and conveys the property. The conveyance here was from the wife: 1st. To the use of husband and wife during life; 2d. To the use of the survivor for life; and 3d. To the use of the issue of the marriage. The deed was binding on both husband and wife, and as to them, they must take under it. If the deed were void as to the creditors of Mrs. Gist, the result would be, that the property would be in the same condition as if no deed had been executed, and then the marital rights of the husband would attach and make it his, leaving no estate to the wife whatever. But, as there are no creditors of the husband contesting the deed, it follows, that at his death, it was good and valid in law, and the property passed under it, to the uses appointed by it. Mrs. Gist, therefore, takes, under it, all the estate that she can have in the property. Her creditors cannot have any greater benefit from the deed than she takes under it. If she had a legal estate in the property, independent of the deed, then, indeed, her creditors might claim, that the deed, diminishing that legal estate, would be void as to them. But as, at the death of her husband, she could have no other estate than that which the settlement conferred on her, it follows that they could not have the benefit of a greater estate than that to which she was legally entitled.

2. I differ from the Chancellor, in his conclusion on the second ground, both as to the liability of the life estate of Mrs. Gist to be sold under execution: and, if it was not liable to the legal remedy, as to the power of the Court of Equity to make it available to the creditor for the payment of his debt. It is true that the Statute of Uses applies altogether to trusts in land, and that makes one distinction between trusts of real and personal estate. In the former, if the trust

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is not executory, or *if it is not necessary, to preserve the trust, that the legal estate

should remain in the trustee, the Statute executes the trust so soon as the deed is executed, and the legal estate vests in the cestui que use. In personal estate, the legal estate remains in the trustee, until he executes the trust by delivering possession to one capable of holding in himself or herself a legal estate in the property, to the extent of the interest intended by the deed to be conferred. If the estate is to the use of a married woman, the legal estate remains in the trustee during her coverture, for she is incapable, of herself, to hold a legal estate in personalty in possession, which would not vest in her husband. An estate to the joint use of husband and wife, during life, may, in order to preserve the trust, not be executed by the delivery of the possession to the husband. But, after a feme is discovert, the reason no longer exists why the trust should not be regarded as executed to the extent of the estate intended to be conferred on her. If the deed gives her the property for life, her possession of it, by the consent of the trustee, vests in her a legal estate for life. She could sue for, and recover the property from a stranger, in an action of trover. She is entitled to the possession during life, and this right of possession is a legal estate in personal property. If the words of the deed showed that she was not entitled to the possession of the property itself, but was to receive the profits, then she would have no legal estate. I have looked into the deed, and find that there is no such provision—the property is conveyed "for the use of the said Sarah Brandford Porcher and States Gist, during their joint lives, and for the use of the survivor, during his or her life." This trust, after Mr. Gist's death, was executed by the possession of Mrs. Gist. In the case of Jones v. Cole, 2 Bail., 330, Mrs. Jones, the mother of the plaintiffs, being about to marry a second husband, conveyed to Samuel Hughens, in trust, for her separate use during life, and after her death, for the use of the plaintiffs, two slaves. She afterwards married the defendant, who had the possession of the slaves during his wife's life, and after her death, refused to deliver possession

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to the plaintiffs. It was *held that the plaintiffs could maintain trover for their recovery. In that case, it is said by the Judge (Johnson) who delivered the opinion, "The right of possession, as well as the right of property, accrued, therefore, to the plaintiffs, at the instant of the death of the donor. According to the terms of the trust, no act was necessary, on the part of the trustee, to invest the cestui que trusts with the right of property—not even a conveyance, for personal estate passes without it." If this be law, and that it is I have no doubt, how can it be pretended that the estate of Mrs. Gist, upon the death of her husband, accompanied by possession, was not a legal estate for life? Could the trustee recover the property from her? It is clear he cannot. Why? Because she is entitled to the possession, during her life. If she has the absolute right of possession of personal property during her life, is not that a legal estate? Could her trustee maintain either trespass or trover, for the property so in her possession, against a stranger? I apprehend he could not, for he has not the right of possession. He might maintain case, for any injury done to his reversionary rights. If he can maintain neither of these legal actions, trespass or trover, for any injury done to, or conversion of the property, it would seem to be an irresistible conclusion that his legal estate, for the life of Mrs. Gist, is divested, and is in her. I hence conclude that the property is liable to execution and sale, to the extent of Mrs. Gist's interest in it.

But if her estate was only an Equity, and not liable to execution, I think in this Court it might be made available to the creditor in payment of his debts. In McDermutt v. Strong, 4 Johns. Ch. 687, and in Hadden v. Spader, 20 Johns. R. 554, it was held that trust property, not liable to an execution at law, might be subjected to its payment in Equity. In 4 Johns. Ch. 690, Chancellor Kent says: "In Bayard v. Hoffman, the cases were examined touching the power of this Court to enable a creditor to reach trust property beyond the reach of an execution at law; and I concluded the Court had, and ought to have this power. But this case stands on stronger

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ground than if it *rested merely on the general jurisdiction of this Court upon residuary trust interests in chattels, for the plaintiffs come in the character of execution creditors, and have thereby acquired by means of their executions at law, what this Court regards as a legal preference or lien on the property so placed in trust." In the principle of these cases I fully concur, and to their fullest extent I should be willing to give execution creditors the aid of this Court to reach property held in trust for the use of their debtors. It is a good and wise policy to protect, as far as we can legally do so, the rights of creditors. Their property is applied often to the actual support of a debtor, who is wallowing in apparent affluence: and if, after having, perhaps almost consumed the entire means of the creditor, he or she was permitted to turn round and say: true I have an abundance with which I could, if I would, pay your debt, but my estate is not a legal one, it is a mere equity, and Equity will not permit it to be sold to pay you;—such a technical objection, would better subserve the purposes of injustice and fraud, than those of right, equity and good conscience.

The Court should, in giving its aid against a trust property, take sufficient precaution to guard any ulterior rights of others, than the debtor, in the property, against public injury or loss. As the rights of all parties in inter-

est in this case are now before the Court, it is necessary to make such an order as will give the defendant, Hurtz, the full benefit of his rights as an execution creditor, and, at the same time, preserve the rights in remainder of the children of Mr. and Mrs. Gist.

It is, therefore, ordered and decreed, that the decree of Chancellor DeSaussure be modified according to the principles contained in this opinion: that it be referred to the Commissioner to ascertain and report the amount of the debt, interest and costs, due on the judgment of the defendant, Hurtz: and that if the same be not paid, upon the confirmation of his report, that he do advertise and sell so many of the slaves, included in the said marriage settlement, for the life of Mrs. Gist, as may be necessary to pay the same, and that

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he do take bonds and *good personal security from the purchasers, not to abuse the said slaves, nor to sell, alien, or carry beyond the jurisdiction of this Court, any of them; and at the death of Mrs. Gist, to deliver the same, if alive, with their increase, if any, to the complainant, for the use of the children of Mr. and Mrs. Gist; in all other respects the decree is affirmed.

JOHNSON and HARPER, JJ., concurred.

Decree modified.

NOTE. This case, upon the principal point decided, is generally considered as overruled by the principles recognized by the Court of Errors in the cases of Rice vs. Burnett, Speers Eq. 579, [42 Am. Dec. 336,] and Iorr vs. Hodges, Speers Eq. 593; and, so far as the argument of his Honour Judge O'Neall, goes to show, that the life-tenant, Mrs. Gist, took, upon the death of her husband, a legal estate, which was liable to levy and sale under execution, this is correct. But it is apprehended, that the judgment of the Court—the ideo consideratum est—is not inconsistent with the principles of Rice vs. Burnett, and Iorr vs. Hodges. The Judge here discusses the question as to the power of the Court to subject equitable estates to the claims of the creditors of the cestui que trust; concludes that it has the power; and the judgment of the Court seems to proceed upon the idea that the estate of Mrs. Gist was an equitable one; for it orders the sale to be made by the Commissioner, and directs him to take bonds from the purchasers for the forthcoming of the property at the termination of the life estate. The case of Pringle v. Allen, 1 Hill Eq. 135, cannot, however, be reconciled with Rice v. Burnett, and Iorr v. Hodges, and must, therefore, be considered as overruled. The judgment in that case proceeds upon the ground, that the marital rights of the husband of the life-tenant attached upon her estate; and if her estate had been equitable, it would not have attached. R.

Rich. Eq. Cas. *220

*SIMON VERDIER et al. v. WM. YOUNGBLOOD.

(Charleston, March and April Term, 1832.)

[*Insolvency* ⇐55.]

Bequest of personalty to J. S., for life, "provided, nevertheless, that the same shall in no wise, and by no means be made liable for, or subject to any of his debts, contracts, or agreements, but the same shall remain in his possession, and for his sole and only use, benefit and behoof, for and during the term of his natural life;" with remainder "from and after his death." *Held*, that J. S.'s life estate was subject to his debts, and that it passed by his assignment, under the insolvent debtors' Act.(*a*)

[Ed. Note.—Cited in Robert v. Ellis, 59 S. C. 151, 37 S. E. 250.

For other cases, see Insolvency, Cent. Dig. § 68; Dec. Dig. ⇐55.]

[*Wills* ⇐649.]

[Where an estate is given for life provided that it shall not be liable for the life tenant's debts, but shall remain in his possession and for his sole use and benefit, the proviso is invalid, and such life estate may be subjected to his debts.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1540; Dec. Dig. ⇐649.]

Before DeSaussure, Ch., at Charleston, April, 1831.

DeSaussure, Ch. The complainants are the assignees of the defendant under the insolvent debtors' Act, and they claim to subject to his debts a life estate in certain household furniture and negroes, bequeathed to this defendant by his deceased wife. By a previous marriage settlement, she was authorized to make a will, and she accordingly bequeathed the property in dispute to her husband for life, "provided, nevertheless, that the same shall, in no wise, and by no means be made liable for, or subject to any of his debts, contracts or agreements, but the same shall remain in his possession, and for his sole and only use, benefit and behoof, for and during the term of his natural life." The testatrix, in bequeathing the remaining interest, expressly directs that the negroes are to be delivered to the residuary legatees, "from and after the death of her husband." The defendant qualified as the executor of this will, and it appears, that the debts have all been paid off, that the other legacies provided for have been delivered, and the defendant is now in possession as legatee under the will. It further appears, that an assignment, under the insolvent debtors' Act, has been made by the defendant to the complainants, of his interest in the property, if the same is subject to his debts. And the question now is, whether the life estate of the defendant is subject to his debts; or, in other words, whether the proviso to the life estate is void? It is a principle of law, well settled both by reason and authority, that estates, known to

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the law, cannot be *stripped of their essential attributes, at the mere dictates of caprice. A proviso that tenant in tail shall not suffer a recovery, or that tenant in fee simple absolute shall not alien, has been always held to be contrary to law and void. The same course of reasoning which led to these conclusions,

(*a*) Vide Heath v. Bishop, 4 Rich. Eq. 46 [55 Am. Dec. 654.]

would equally well prove that the law cannot recognize an estate in one of full age, which would not be subject to his debts, contracts or engagements. All the estates which are limited under marriage settlements, so as not to be subject to the debts or engagements of a husband, are of a different nature, and stand upon a foundation entirely different from that now before the Court. But it has been urged, that the case of Lynah v. Lynah, lately decided by the Court of Appeals, is conclusive, as to the point now in controversy. In that case, it is obvious, that the question was quite distinct from that now presented. There a testator bequeathed to his son, and in case any of his creditors should attempt to take his estate in execution, then it should immediately cease in the tenant for life, and pass over to the remainder-man. It was a mere question, whether the devise over was good; and, as the event on which it was limited, was not against law, the Court could not prevent the devise from taking effect. But, in the case under consideration, there is a direct instruction, that the estate for life shall continue until the death of tenant for life, and during that continuance, it is shorn of what the law considers its essential attribute. By the very words of the will, the executory bequest cannot take effect until the defendant's death, and thus an estate would be created inalienable in every respect, and incapable of being bound in any way by the act of any individual whatsoever. A proviso producing such a result, is against law, repugnant and void.

It is, therefore, ordered and decreed, that the defendant deliver to the complainants the property bequeathed as aforesaid, together with the issue of the females. That the Commissioner of Colleton District, do, thereupon, sell, after proper notice, the life estate of the defendant in the same for cash, or on such credit as the creditors may think

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proper. That from the pro*ceeds, the assignees shall, in the first place, be allowed their costs and fees of counsel, the balance to be applied to pay the defendant's debts, according to the provisions of the insolvent debtors' Act. That the complainants have the benefit of the usual process of this Court by attachment or otherwise, against the defendant, and all others who may have gotten possession of any of the property during the pendency of this suit. That as soon as a sale may be effected as aforesaid, the assignees do file a schedule in the Registry of the Court, setting forth the persons to whom the property is sold and delivered, in order that the parties entitled to the estate after the death of the defendant, may have a speedy remedy in case of any effort to eloign them by a purchaser; and, lastly, it is ordered, that the defendant pay the costs of suit.

The defendant appealed, and moved to reverse the decree, on the ground, that the property bequeathed to him, was not liable, and could not be disposed of for the payment of his debts.

PER CURIAM. We concur with the Chancellor, for the very satisfactory reasons stated in the decree; which is therefore affirmed, and the appeal dismissed. Costs to be paid out of the fund.

JOHNSON, O'NEALL and HARPER, JJ., concurring.

Decree affirmed.

Rich. Eq. Cas. *223

*THE ADM'OR OF G. and S. SMITH v. SAMUEL PERDRIAU et al.

(Charleston. March and April Term, 1832.)

[*Account* ⟸20.]

The Court having for distribution a fund belonging to several parties, one of whom had received payment of a part of his demand, *held*, that such party, before he could receive a portion of the common fund, must bring into the account the amount he had already received.

[Ed. Note.—Cited in Williams v. McCardell, 14 S. C. 221.

For other cases, see Account, Cent. Dig. § 109; Dec. Dig. ⟸20.]

[*Account* ⟸10.]

Held, also, that another party, who had been paid in full, and claimed nothing from the common fund, could not be compelled to account for what he had already received.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 25; Dec. Dig. ⟸10.]

This case will be sufficiently understood, from the opinion delivered in the Court of Appeals, which is as follows:

JOHNSON, J. The difficulties in this case appear to me to arise rather out of the manner of stating it, than the principles involved; and to put that matter right, it will only be necessary to go as far back as the decree of the Court of Appeals of May Term, 1822, which, as res judicata, concludes all matters involved in it. That decree is founded on a bill filed by the complainant and others, creditors of Paul Michau, against the defendant and others, praying that certain land, mortgaged by him to secure the payment of their debts, should be sold to satisfy them. The decree of the Circuit Court orders the land to be sold on a credit of one, two and three years, the purchaser giving bond and personal security, and a mortgage of the premises; but the parties, being dissatisfied about the manner in which the fund was ordered to be distributed, carried the cause up to the Court of Appeals, and, by the decree of that Court, before alluded to, they were ordered to be distributed in the following manner: viz., two-fifteenths to the defendants in this proceeding, Perdriau and wife; three-fifteenths to William J. Buford and wife; and

the remaining ten-fifteenths to be paid to the plaintiff and the other creditors, according to their legal priorities, if the fund should be deficient. The land was accordingly sold, and purchased by Robert F. Withers, for $22,000; but he neither gave bond and security or mortgage. Withers afterwards purchased up the claim of Buford and wife, and paid off the oldest mortgage to Butler, leav-

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ing the amounts *due to these parties, and a junior mortgage to the Winyaw Indigo Society, unpaid. At February Term, 1825, a rule was obtained, at the instance of the present complainant, against Withers, requiring him to show cause why the terms of sale had not been complied with; and, on the return of that rule, an order was made, by consent, giving him further time of payment, on condition of his paying to complainant the proceeds of one hundred barrels of rice, and giving bond and security, and mortgage of the premises. The Commissioner reports, that on the 25th May, 1825, Withers paid him $1,743.52, the proceeds of one hundred barrels of rice, and that he immediately paid it over to complainant. But he utterly neglected to give bond and security, and a mortgage, as required, and at February Term, 1827, a further order was obtained, directing the re-sale of the land, on his account and risk; and at this sale it brought only $8,010, a sum far short of what was due to the complainant, on account of his debt, and to the defendants, on account of their two-fifteenths of the first sale. Withers is since dead, and his estate utterly insolvent. And, in point of principle, the only question is, whether, in apportioning this sum between these parties, the sum before received by the complainant is to be taken into the account. If it is, then it follows that the amount of the last sale, and the sums received by complainant, constitute the fund to be apportioned, and the plaintiff will be charged with the amount he has received. If not, the defendants are entitled to two-fifteenths of $8,010, the amount of the last sale, and no more.

I did not understand the plaintiff's counsel to insist, that, regarding the payment of the $1,743.52 to have been voluntary, by Withers, to the Commissioner, and by him paid over to the complainant, he would have been entitled to retain it, without bringing it into the account; but that, in point of fact, the payment was made by Withers directly to the complainant, or, at any rate, that it was so in effect, as it was paid under an arrangement made with him, to which the defendants were not parties, and it does appear

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that they remained entirely *passive, and took no part in any of these proceedings. But, admitting all this to be true, and that the money was paid by Withers directly to the complainant, I cannot perceive how that would vary the case. The debt due by Withers was, in effect, a common fund, out of which the parties were entitled to be paid their respective demands, and if it proved deficient, I take it that, on the plainest principles of common justice, the loss must be apportioned between them, in the ratio of their respective demands; and, having fixed that principle, the question is, what is the loss? Surely, not the money received by the plaintiff, for that is so much received from the common fund, and properly appropriated towards the satisfaction of the complainant's demand, and there is no reason why it should be regarded as a loss. The correctness of this view may be further tested, by supposing that the complainant had already received two-thirds of his debt, and that the balance due would cover thirteen-fifteenths of the proceeds of the last sale, and it is obvious according to the principle contended for, the complainant would receive his whole demand, and the defendant would lose more than one-half of his, in direct violation of the principle before laid down.

It is claimed for the complainant, that he has a right to retain the amount received by him, without accounting for it, on the ground that it was so much obtained and saved to the common fund by his own diligence, without the aid or co-operation of defendants. Regularly, all sums paid into the Commissioner's office—and such, according to the Commissioner's report, was the fact here—ought to have been distributed amongst all entitled, in the proportion of their respective demands; and if this had been an application to compel the complainant to refund a part of what he had received, there possibly might have been some merit in this claim. But the complainant has had the full benefit of the rule for which he contends, in being permitted to be preferred to the extent of the amount which he has so received; but that furnishes no reason why he should not account for that amount. His claim is necessarily di-

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minished to that *extent. I am, therefore, very clearly of opinion, that in apportioning the proceeds of the last sale, the Commissioner was right in debiting the complainant with the amount received by him, whether directly from Withers, or through the Commissioner.

It is claimed, also, for the complainant, that Buford and wife, and the representatives of Butler, the mortgagee, ought to have been made parties to this proceeding, and compelled to bring into the common fund, for distribution, what they also have received from Withers. If they had come in to claim any share of the fund in Court, they would have been precisely in the situation of the complainant, and, for the same reason, would have been obliged to have accounted for what they had received. But I do not know on what principle they can be compelled to bring

it in, when they claim nothing, especially as they have not broken in upon the security, (the land.) Their having obtained payment from other sources, and now claiming nothing is rather a benefit than a detriment to these parties.

On all the grounds made by the complainant, his motion must fail, and, thus far, the decree of the Circuit Court is affirmed.

The general ground taken, on the part of the defendant, is founded on the certificate of the Commissioner, dated on the 2d February last, since the trial below, in which he states that the further sum of $5,050 had been paid by Withers to the complainant's solicitor, on account of this demand, and that, by mistake, he omitted to include it in his report.

This is controverted here, and the Court are not at liberty to award judgment upon the mere certificate of the Commissioner. But, if it be true, the complainant ought, on the principle before laid down, to account for that sum also. It is but just, therefore, that the defendant should have an opportunity of investigating the matter, especially as it purports to be an error of the Commissioner, in relation to a matter about which the defendant could not be supposed to be informed. It is, therefore, ordered and decreed, that it be referred to the Commissioner, to as-

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certain *if the said sum of $5,050 was paid by the said Withers, on account of the complainant's demand, herein before stated; and, if it should have been so paid, that the complainant's said demand be credited also with that amount, as of the day on which it was paid, and upon the principles of this decree.

O'NEALL, J., concurred.

Decree modified.

Rich. Eq. Cas. 227

M. I. KEITH, Late Master, v. J. W. GRAY Commissioner.

(Charleston. March and April Term, 1832.)

[*Equity* ⟸395.]

The duties and privileges of a Master, or Commissioner in Equity, expire with his term of office: sales ordered, but not made, his successor must make; and the officer who makes the sales is entitled to the commissions.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 855; Dec. Dig. ⟸395.]

Before DeSaussure, Ch., at Charleston, April, 1831.

On January 21, 1830, M. I. Keith, being Master, the Court made the following order on the return to a writ of partition: "It is ordered, that that part of the return of the Commissioners, which recommends a sale of the whole tract of land called Cedar Hill, be confirmed, and that the Master in Equity do make sale, at public auction, of the said plantation, on or before the second Monday in February next, on the following terms," &c. Under this order, Mr. Keith was unable to effect a sale for want of bidders; and after he had retired from office, a further order was made, January 21, 1831, "that the order for the sale of Cedar Hill, directed to be sold 21st January, 1830, be renewed, and the Commissioner do make sale of the said property on the same terms as therein specified, at any time in which it shall seem advantageous to the interests of the minors to sell," &c.

Cedar Hill was sold at public auction, by the Commissioner, Mr. Gray, on March 12,

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1831, for $17,000; and this was a rule *on Mr. Gray, to shew cause, why he had refused to pay over to Mr. Keith, late Master, the commissions on the sale.

His Honour decided, that the Master and Commissioner should divide the commissions.

Mr. Gray appealed on the grounds, inter alia,

1. Because the duties and privileges of a public officer expire with his term of office.

The opinion of the Court was delivered by

O'NEALL, J., [who, after holding, that the order authorizing the late Master to sell, expired by its own limitation after the second Monday in February, 1830; and that the second order vacated the first, so far as it directed the Master to sell, and substituted the Commissioner in his place; proceeded as follows:] Notwithstanding these views would dispose of the case, yet it is deemed to be best to decide the question, whether the duties and privileges of a Master or Commissioner in Equity do not expire with his term of office? That they do, would not admit of a question, were it not for the decision of the late Court of Appeals, in the case of Hunt v. Elliott, (Bail. Eq. 90.) For the Judges who decided that case, both on account of their learning and experience, I have always entertained a high respect; but it is due both to the State and ourselves, that error should not be perpetuated merely because it has the sanction of the authority of wise and learned men. Error is the lot of every human tribunal; and its correction when palpable, both in ourselves and in our predecessors, seems to me a duty as paramount as that of deciding according to law.

The Master in Equity holds his office for four years; within that period, he is entitled to all its privileges, and is bound to discharge all its duties. The privilege and duty of an officer necessarily depend upon each other: one cannot exist without the other. The moment the office ceases, its future duties are terminated, and of course also its privileges must cease.

The office of a Master or Commissioner, does not, like a Sheriff's levy at common law,

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vest the property in him for sale. *He is merely the agent of the Court, to execute a

decree of sale: he must act within the power conferred on him, or his acts will be set aside: in strict practice, he ought to report his sales, and have them confirmed before he executes a title. The fees of officers of the Courts of either law or Equity, are compensations for services rendered. So far as they act, these must be paid to them; but when they have not performed a service, I am at a loss to discover a reason why they should be paid for it. Their right to fees depends upon the office. So long as it continues, and services are rendered, the officer is entitled to payment; when his office ceases, the fees afterwards accruing in a cause, belong to his successor.

The commissions on a sale belong to the officer who makes it: although his successor may be compelled to collect and pay over the money, he is entitled to no part of the compensation allowed for selling. He is surely, therefore, entitled to the commissions, who both sells and collects.

The circuit decree is reversed, and the rule dismissed.

JOHNSON and HARPER, JJ., concurred.

Decree reversed.

Rich. Eq. Cas. 229

SARAH RUSSELL v. JOHN WALKER et al.

(Charleston, March and April Term, 1832.)

[*Executors and Administrators* ⟸281.]

The executor of J. W. filed a bill against J. S., executor of A. G., to recover a debt due by A. G. to J. W., and had a decree, which was satisfied by setting off against it a debt due by the executor of J. W., individually, to J. S.: *Held*, that a judgment creditor of J. W., might file a bill to obtain satisfaction of his debt, out of the funds of J. W., in the hands of J. S.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1102–1104, 1106–1115; Dec. Dig. ⟸281.]

[*Executors and Administrators* ⟸281.]

Creditors or legatees may follow the assets of the estate which have been improperly disposed of by the executor, particularly in payment of his own debt.

[Ed. Note.—Cited in Fraser & Dill v. City Council of Charleston, 19 S. C. 403; Miller v. Stark, 29 S. C. 329, 7 S. E. 501.

For other cases, see Executors and Administrators, Cent. Dig. § 1113; Dec. Dig. ⟸281.]

Before De Saussure, Ch., at Charleston, April, 1831.

The bill was filed by the administratrix of John Russell, who was a judgment creditor of Jane Whitesides, deceased, against

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*Esther Parsons, executrix of Joseph Parsons, deceased, (who had been executor of Jane Whitesides,) and John Walker, under the following circumstances:—Angus Graham, in his life-time, was indebted to Thos. Whitesides, Jr. Thomas Whitesides, Jr., died, and left his widow, Jane Whitesides, his executrix, who pursued her claim against John Walker, executor of Angus Graham. Jane Whitesides was also the sole legatee of Thos. Whitesides, Jr. Pending the litigation, Jane Whitesides died, leaving Jos. Parsons her executor and legatee. There were no assets of the estate of Jane Whitesides, except the claim upon the estate of Angus Graham. The complainant's intestate, John Russell, sued the executor of Jane Whitesides, and obtained a judgment for $750, but the claim against the estate of Graham, being still in litigation, there were no assets to pay this judgment.

Joseph Parsons, as the executor and sole legatee of Jane Whitesides, filed his bill against John Walker, the executor of Angus Graham, and an account was ordered; and by the final report, it appeared, that the estate of Angus Graham was considerably indebted to the estate of Thos. Whitesides, Jr. But it also appeared, that Jos. Parsons became the security to the Ordinary, of one Daniel Joy, who administered upon the estate of one Charles Whitesides. Joy misapplied the funds of Charles Whitesides' estate, and his security Parsons, became personally liable for his defalcation. John Walker, the executor of Graham, purchased the greater portion of the estate of Chas. Whitesides, and thus became, in that right, the individual creditor of Joseph Parsons. Parsons was the legatee of Jane Whitesides, and thus Walker claimed a set off of the mutual demands. Esther Parsons, who, on the death of Jos. Parsons, became his executrix, resisted this disposition, and claimed the right to administer the fund found due to the estate of Thos. Whitesides, by first paying his debts, and carrying the estate next to the credit of his legatee, and paying her debts, and lastly, by paying the debts of Joseph Parsons, according to their legal priority: and the Court,

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in their decree, admitted *that such was the regular and legal course, but, without directing any inquiry, or giving any notice, decreed, that, as no claims prior to those of Walker appeared, as between the estate of Parsons and Walker, these claims should be set off: Whereupon, the administratrix of John Russell, a judgment creditor, as before mentioned, of Jane Whitesides, filed this bill against the executrix of Jos. Parsons, and John Walker, praying that the funds of the estate of Jane Whitesides, in the hands of Walker, might be applied to pay her debts before they are appropriated to the payment of the debts of her legatee, Jos. Parsons: to which prayer the executrix of Parsons assented, but John Walker, in whose hands the funds were, pleaded the decree between himself and Parsons, as a bar, although the complainant was no party thereto.

The presiding Chancellor sustained defendant's plea, and dismissed the bill.

The complainant appealed on the grounds:

Because, no Court has a right to repeal the law of the land, by which executors and administrators are bound to apply the assets of their testators' or intestates' estates to the payment of their lawful debts before their distribution to legatees or distributees.

Because, the decree in case of Walker and Parsons, was not intended by the Court to work injustice to those entitled in preference, and may therefore be fairly construed as conditional: and the complainant, having presented a judgment against Jos. Parsons' testatrix, is entitled to be paid in preference to Walker, whose set off is a private debt of Jos. Parsons.

Because, the creditors of Jane Whitesides, not being parties, are not concluded by the decree.

Because, all the parties now being before the Court, the assets of Thomas Whitesides, Jr., should be marshalled, and the creditors of the several estates be paid according to their legal priorities, and Walker take only as a bond creditor of Parsons.

B. F. Hunt, for appellant.

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*The opinion of the Court was delivered by

HARPER, J. We are of opinion, that the decree must be reversed, and the plea overruled. The rule is familiar, that none are bound by a decree or adjudication, but parties and privies, or those claiming under them. If A. sues B. for a specific chattel, or a tract of land, and A. establishes his title and recovers, this is no bar to C's. suing A. for the same chattel or land, claiming by a distinct title. It is true, that an executor, in general, represents creditors and legatees or distributees, and they will be bound by a judgment for or against him, if there be no collusion. If an executor is sued for a debt, and without collusion a judgment is had against him, creditors or legatees cannot have that judgment reviewed as being erroneous. Or, if he sues a supposed debtor of the estate and fails, the same rule applies. If, in the case of Parsons against the present defendant, the decree had been, that Parsons, as representing the estate of Thomas Whitesides, was entitled to no account against Walker as the executor of Graham: or if, upon an account had between them in those characters, it had been determined that nothing was due, then no doubt the present complainant would have been bound. But such was not the character of the decree. It established the right of Parsons, as representative of Whitesides, to an account, and on the accounts being had, established a considerable amount due by Walker. It further established, however, that Parsons, in his individual capacity, was indebted to Walker, and that, under an agreement between them, Walker was entitled to set off this demand against the amount recovered by Parsons as executor of Whitesides. If such an agreement appeared to the Court, no creditors of Thomas or Jane Whitesides being before them, they could do no otherwise than to give it effect. It is, as if, after obtaining the decree in his representative capacity, Parsons, by an arrangement with Walker, had credited it with the amount of his personal debt. If Parsons had sued as executor at law, and failed to recover, this had been conclusive, whether the recovery had been prevented by set off or any other defence.

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At law, *only mutual demands in the same right can be set off, and we can only look into the judgment to see upon what it is founded. Equity exercises a larger jurisdiction: it may, upon equitable circumstances, as upon the agreement of the parties where third persons are not likely to be injured, set off demands in distinct rights. All the proceedings in the cause go to make up the decree, and we may look into them to ascertain in what right, and upon what grounds the decree is made. The present bill does not derogate from, or seek to review the former decree. It does not controvert the fact of Parsons' personal debt to Walker, but shews a better right to the fund out of which that debt was satisfied, to wit, Walker's debt to the estate of Whitesides.

It is said that this is a suit by the complainant against the debtor of her debtor, and that, by the rule of law, such a suit cannot be sustained, unless in case of collusion. That is a distinct question, which does not arise under the plea. The doctrine is laid down, nearly as contended for, in Utterson v. Mair, 2 Ves., Jr., 95, and it is said, that, in the case of an executor's insolvency, the proper course is to have a receiver appointed. In Alsager v. Rowley, however, 6 Ves., 748, the Chancellor seems to think that a debtor to the estate may be made party to a bill against the executor, in case of either collusion or insolvency, and he cites the case of Beckley v. Dorrington, decided by Lord Hardwicke, in which it is said, "the Court will interfere, if there is such special case, as collusion or insolvency." But the present does not seem to me to come within that class of cases. It is not a case in which the executor himself could sue, or a receiver, standing in the place of an executor, and it would be to no purpose that a receiver should be appointed. It is embraced by the principle of another set of cases, which authorizes creditors or legatees, whether specific, pecuniary or residuary, to follow the assets of the estate, which have been improperly disposed of by the executor, particularly in payment of his own debt. The doctrine is very fully considered, and the previous cases on the

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same subject *referred to, in McLeod v. Drummond, 14 Ves., 353. That was a bill by two, out of four executors, stating that

the plaintiffs, who resided in Scotland, had never interfered in the management of the estate, and that certain bonds had been improperly pledged and assigned to the defendants, the Drummonds, by the other executors in England, who had become bankrupt. The Master of the Rolls, regarding the plaintiffs as standing in the situation of creditors or legatees, determined the case on the distinction between the transfer of assets, in satisfaction of a previous debt of the executor, and for money advanced at the time, and as it appeared that the bonds in question had been pledged for money advanced at the time, he dismissed the bill. Lord Eldon, in reviewing the decree, seems to think there is no ground for the distinction, provided the person advancing the money knew at the time that it was to be used for the executor's own purposes, and not for the estate. He sustained the decree, however, on the ground that, as the plaintiffs had reposed confidence in the other executors, and had not, for a long period, interfered in the affairs of the estate, and as there were no other persons, before him, interested in the estate, as creditors or legatees, the plaintiffs could not sustain the bill. There are other circumstances relied on, as grounds of distinction, in the other cases on the subject, as whether the transfer were made soon after the testator's death, or after a considerable time, when it might be presumed that, by having advanced his own money, the executor had made the assets his own. It is not necessary to enter on the consideration of such circumstances at present—we have only to decide on the plea. There can be no doubt but that the debt due by Walker, as executor of Graham, was assets, first of the estate of Thomas Whitesides, and then of Jane Whitesides. It was, in effect, transferred or released to Walker, in payment of Parsons' previous individual debt, and by Parsons' own act. Certainly, it can make no difference whether it was exclusively by his own act, or by his agreement, which rendered it necessary for

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the Court of Equity to direct *it, by way of set off. The plea must be overruled, and the defendant directed to answer, which is ordered accordingly.

JOHNSON and O'NEALL, JJ., concurred.

Decree reversed.

Rich. Eq. Cas. 235

A. F. GREGORIE et al. v. J. J. BULOW et al.

(Charleston. March and April Term, 1832.)

[*Specific Performance*, ⇐66.]

A vendor may sustain a bill against the vendee, for the specific performance of a contract for the sale of land.

[Ed. Note.—Cited in Walker & Trenholm v. Kee, 16 S. C. 89; Blackwell v. Ryan, 21 S. C. 121; Kerngood v. Davis, Id., 205; Hammond v. Foreman, 48 S. C. 176, 26 S. E. 212; Farm & Land Co. v. Roseman, 93 S. C. 352, 76 S. E. 979.

For other cases, see Specific Performance, Cent. Dig. § 197; Dec. Dig. ⇐66.]

[*Specific Performance* ⇐100.]

Thirteen years having elapsed since contract was made, before bill filed, and plaintiff, then and now, being unable to make a perfect title, and the land having depreciated in value, *held*, that plaintiff was not entitled to a decree for specific performance, against vendees in possession.

[Ed. Note.—Cited in Blackwell v. Ryan, 21 S. C. 125.

For other cases, see Specific Performance, Cent. Dig. § 309; Dec. Dig. ⇐100.]

[*Specific Performance* ⇐128.]

On a bill for specific performance, by vendor, against vendee in possession, the Court, refusing a decree for specific performance, may decree restitution of the premises, and an account for rents and profits, allowing vendee the value of all permanent improvements.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 413; Dec. Dig. ⇐128.]

[*Adverse Possession* ⇐63.]

A vendee, in possession, under a contract to purchase, cannot claim under the statute of limitations.

[Ed. Note.—Cited in Gillison v. Savannah & C. R. Co., 7 S. C. 181; Blackwell v. Ryan, 21 S. C. 123; De Hihns v. Free, 70 S. C. 351, 49 S. E. 841.

For other cases, see Adverse Possession, Cent. Dig. § 343; Dec. Dig. ⇐63.]

[This case is also cited in Tant v. Guess, 37 S. C. 497, 16 S. E. 472, without specific application.]

Before De Saussure, Ch., at Charleston, May, 1830.

Rowland Rugely, being seized of thirty acres of land, in St. Philip's Parish, near Charleston Gate, by his last will, dated 22d September, 1776, devised one moiety of the residue of his estate, including these lands, to his brother, Henry Rugely; the other moiety to his brothers and sisters, William Rugely, Matthew Rugely, Ann Slaughton, Elizabeth Rugely, and Frances Rugely. The testator died 24th December, 1777, leaving his will in full force.

By deed, bearing date 27th July, 1790, Henry Rugely conveyed the land in question to General C. C. Pinckney and James Gregorie, in trust, to sell and pay the debts of Row-

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land *and Henry Rugely. On the 7th February, 1806, James Gregorie offered the lands in question at public sale, in lots.(a)

When Mr. Gregorie put up the property for sale, he seems to have been under the impression that he could make a title to the whole. It is not clear on what he relied—whether on the alienage of all the devisees

(a) The rights of the parties growing out of the will of 1776, and the assignments prior and subsequent thereto, were never finally settled until 1845, if then. Vide Rugeley vs. Gregorie, 2 Rich. Eq., 157.

except Henry Rugely, or on a resulting trust, as the lands were supposed to have been bought with funds of Rowland and Henry Rugely. But Mr. Gregorie was himself satisfied, after the sale, that he could not make titles, and when the purchasers tendered the money, he declined to receive it, but promised to give them titles as soon as it could be done.

Under the expectation of having the title perfected, the purchasers took possession; but great delay followed, and many afterwards abandoned their possessions.

Mr. Bulow, one of the purchasers, continued in possession, and in 1816 and 1817 made valuable improvements. James Gregorie died, and his estate vested in his sons, Alexander, Fraser and James Gregorie. In 1818, James Gregorie, the son, having obtained, as was surmised, a conveyance of the other moiety from the devisees of Rowland Rugely, tendered a title to the purchasers. But this title was admitted to be defective, and to convey only eleven-twelfths of the land, the title to the other twelfth being still outstanding. Some of the purchasers, however, accepted this title, and paid the purchase money, without interest—others refused. The bill was filed against all the purchasers who refused the title, to compel specific performance, and the case came on to be heard before his Honor, Chancellor De Saussure, in May, 1830.

His Honor decreed that, as to those purchasers who had not put permanent improvements on the lots, the bill should be dismissed: and that those purchasers who had built and improved should comply with the con-

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tract of purchase; and that *one-twelfth of the purchase money should be paid into Court, subject to such order as the Court should hereafter make.

John J. Bulow, one of the defendants, who had put valuable and permanent improvements on the premises, and was willing to abandon them to the vendors, appealed from this decree, and moved that the same be reversed—because

1. A vendor, who cannot make a good title, has no right to a decree for a specific performance.

2. That the defendant, taking possession in good faith, under an agreement to pay whenever legal titles could be made, has not waived the right to require a good title, and the vendors have not entitled themselves to call upon him for the purchase money, because they could not make legal titles.

3. That the defendant improved the premises by buildings, far exceeding the value of the land, and the vendors, who are unable to make a title, cannot be in a better situation than to put an end to his holding, and have all the benefit of his improvements.

4. Because, in justice to the parties, the complainants should be decreed to receive the present value of the land only.

5. And generally, that on the grounds taken in the several answers, the bill should be dismissed.

6. That if complainants have any case against defendant, they must pursue their remedy at law.

B. F. Hunt, for appellant.

The opinion of the Court was delivered by

O'NEALL, J. It appears that Rowland and Henry Rugely were largely indebted to various persons in England, and, to secure the payment of their debts to their creditors, they executed a deed of assignment, conveying all their estate and effects to certain persons. It is alleged that the assignees, confiding in the industry and integrity of the assignors, authorized them to collect the several debts due to them, and which had been assigned; that Rowland Rugely, under this power, made large collections, with which he pur-

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chased thirty acres of land, near *Charleston Gate, in St. Philip's Parish. It appears by his will, dated in 1776, that he devised one moiety of the residue of his estate, including this land, to his brother, Henry Rugely, and the other moiety to his brothers and sisters, Wm. Rugely, Matthew Rugely, Ann Slaughton, Elizabeth Rugely and Frances Rugely. The said Rowland died in 1777. Henry Rugely, in 1790, conveyed the said land to General C. C. Pinckney and James Gregorie, in trust, to sell and pay the debts of Rowland and Henry Rugely. General Pinckney afterwards relinquished his trust, and conveyed all his estate to his co-trustee, James Gregorie, by whom the land was laid off in lots, and sold on the 7th February, 1806, to various purchasers, some of whom are the defendants. Soon after the sale, it was discovered that perfect titles could not be made, and he therefore declined to receive the purchase money, or to execute titles. From that time until 1819, when this bill was filed, attempts were made to perfect the title. At the filing of the bill, it was supposed that a perfect title could be made; but it now appears, as to one-twelfth of the whole land, the legal title is outstanding, and in persons unknown and not parties to this suit. Several questions have been made, but it is only necessary to notice two.

1st. Has the Court of Equity jurisdiction of a cause, at the instance of the vendor, for the specific performance of a contract for the sale of land?

2d. If it has, are the complainants entitled to a specific performance?

As to the first question, there is no doubt entertained by the Court in this case. If the complainants cannot have relief here, it is manifest that they cannot entitle themselves to it any where—for at law they could not recover, on account of their failure to execute titles when required. More than twenty

years have now elapsed since the sale. Many of the purchasers have since transferred their purchases to others, between whom and the complainants there is no privity of contract. But it is thought to be important that

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the question should be decided *generally, in relation to all cases which may arise between vendor and vendee, and that the case of Bacon v. Roche, decided at Columbia, December Term, 1829, should be considered, and at once overruled. That case was on a bill filed by the vendor against the vendee, to compel him to accept titles and pay the purchase money. The defendant had agreed to pay $1200, in three annual instalments, for the land, and to take titles from the Commissioner in Equity. The Court regarded this as a mere money demand, and dismissed the bill, on the ground that there was plain and adequate remedy at law. My respect for the opinion of the judges who decided that cause induced me to suppose that perhaps I had been previously in error, in supposing that the Court of Equity, on contracts for the sale of lands, entertained jurisdiction of a case, at the instance of the vendor, as well as the vendee. But, on reflection, I am perfectly satisfied that the decision in that case is wrong. In coming to this conclusion, it affords some support, that this opinion is now, not only in accordance with the views of this Court, but also with the dissenting opinion of Judge Colcock, and the Chancellor (De Saussure) who tried the case of Bacon v. Roche.

The jurisdiction of the Court of Equity over the specific performance of contracts for the sale of lands, is as ancient as the Court itself. That the party could have remedy at law in damages, is no answer to the claim of jurisdiction. Originally the parties were sent to law to establish their right to damages, before the Court decreed a specific performance. The question, whether the party has a plain and adequate remedy at law, is generally decisive of the Equity jurisdiction. But it is not always so. There are cases of which both law and Equity have jurisdiction, as in cases of partition. It would not then be pretended, that because the party might have proceeded at law, Equity would not give him relief. In cases of specific performance, properly so understood, the Court of law has no jurisdiction. For it has not the power to give relief to both parties, by decreeing titles

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to one, and the purchase money *to the other. It is true, that upon titles being tendered for the whole land sold, and within the time limited by the contract, the vendor may recover his purchase money at law. But this is, at best, a very imperfect jurisdiction. If the titles are not made within the exact time limited by the contract, or if to a small part of the land sold, of even inconsiderable value, the vendor has no title, and does not therefore tender a conveyance for the whole, there can be no recovery at law. If the vendee should happen to be indebted, and there should be judgments outstanding against him to more than the value of the land, if the vendor is obliged to proceed against him at law, the moment his titles are produced on the trial to prove the tender, the defendant may then receive them, and the land becomes liable to all the previous liens, to the entire destruction of the plaintiff's chance of payment of his recovery. If the proceeding is at law, and a recovery is there had, the defendant may enjoin the plaintiff from proceeding until he delivers his title; and until it is reported to be sufficient. At law, the single enquiry, as a condition precedent to the plaintiff's recovery, is, has he tendered a title according to the terms of his contract: if he has, the defendant must show a negative, the plaintiff's want of a good legal estate to convey, in order to defeat a recovery. In Equity all these difficulties are remedied. If the titles have not been tendered within the exact time limited by the contract, but within a reasonable time, and the defendant has not been thereby prejudiced, the Court will decree the specific performance. So if the land, to which the vendor has no title, could not have constituted any material inducement to the contract, the Court will decree compensation to the vendee, and compel him to take the title. If there should be liens on the vendee's property which would endanger the vendor's chance of payment, Equity will give him a specific lien on the property sold, from the contract of sale. In Equity, before the vendee is required to pay, the Court will not only decree the vendor to execute a title, but also refer to the Commissioner his title at the instance of the vendee, to ascertain whether he has a good and perfect title, and

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*if he has not, the Court will not enforce the contract against the vendee. The proceeding by bill for a specific performance of a contract for the sale of the lands is to be encouraged, instead of being discouraged. For in one case, it ends all litigation between the parties; whereas, if the vendor was compelled to sue at law, the vendee might be obliged to resort to Equity for relief, and thus saddle the parties with two suits when one would answer all the purposes. It is conceded, that the vendee may come into Equity to compel the vendor to perform, by executing titles; and that upon his bill, the Court will decree him to pay, or secure the money, according to his contract, before they decree the execution of titles. If the Court has the power to relieve one of the parties on the same contract, must it not, of necessity, possess the same power as to the other? Contracts for the sale of lands in Equity, are regarded as dependent; the vendor cannot be compelled to part with his land until the vendee pays, or secures to be paid, according to the contract, the purchase money: the ven-

dee cannot be compelled to pay until he receives a good and sufficient title in law. Such a contract cannot constitute, by operation of law, a subject matter for two different jurisdictions, depending upon which of the parties demands its performance. I am aware, that in some cases it is said, where the party can be compensated in damages, the Court of Equity will not decree specific performance. But that applies to cases where both parties would, on the contract, be referred to a Court of law. As in the case of a contract for the sale of a horse; there, the price may be recovered by the vendor at law, and the vendee, if the horse is refused to be delivered, may recover his value, which will enable him to buy another; and this is regarded as all that is demanded from justice on such a contract. But to this rule, exceptions have been allowed both in England and in this State. Bills for specific performance of a contract for the sale of a chattel, the possession of which was the only object of the vendee, on account of its rarity, antiquity, beauty, or some quality arising more from fancy than value, and where damages would

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not *compensate the vendee for the loss of his purchase, have been sustained, and the contract decreed. In a country where slavery exists, and where that property is of more value than the land which they cultivate, it may be that this exception is yet to receive a wider extension. (*b*)

But, I apprehend, the case does not exist, where a vendee, on a contract, can come into the Court of Equity for specific performance, and the vendor cannot.

To sustain the conclusion of the Court, that the case of Bacon v. Roche must be overruled, many authorities might be cited. A few, however, will be sufficient, and will be briefly noticed. In 1 Madd. Ch. 361, it is said: "At whatever time the jurisdiction began, it is now very clear that if a contract has been entered into by competent parties, and is in the nature and circumstances of it unobjectionable, it is as much of course in a Court of Equity, to decree a specific performance, as it is to give damages at law." Hall v. Warren, 9 Ves. 608. In Fleetwood v. Green, 15 Ves. 594, the bill was filed by the vendor against the vendee, to compel him to pay the purchase money, which was decreed without even a reference of the title, inasmuch as possession had been delivered, and no objection was made to the abstract of title.

In the case of Hepburn v. Auld, 5 Cra. 262, [3 L. Ed. 96,] it was held, that a vendor might compel a specific execution of a contract for the sale of land, if he is able to give a good title at the time of the decree.

These authorities are conclusive of the point decided in Bacon v. Roche, and are in conformity to a long and well settled practice, with which that case is at war; it must be therefore overruled.

2. It is true, as was said by the Lord Chancellor, (Redesdale,) in the case of Davis v. Hone, 2 Sch. and Lef. 347, "A Court of Equity frequently decrees a specific performance, where the action at law has been lost by the default of the very party seeking specific performance, if it be, notwithstanding,

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conscien*tious that the agreement should be performed." In Crofton v. Ormsby, 2 Sch. and Lef. 603, the Lord Chancellor adds the following qualification or rather explanation of the rule stated in Davis v. Hone: "So in many other cases of this description, Courts of Equity ought to refuse specific performance, where the delay would be very injurious to the party sought to be charged." In 1 Madd. 417, it is said that Lord Alvanley held, that a party cannot call upon a party for a specific performance, unless he has shown himself "ready, desirous, prompt and eager." This, I have no doubt, ought generally to be the rule, but there are many cases which must be exceptions to it, and to them must be applied the rule, as stated by the Lord Chancellor (Redesdale) in the cases of Davis v. Hone, and Crofton v. Ormsby. Maddock says, in the same page, "where a contract has long lain dormant, thirteen years for instance, a specific performance has been refused; and laches of much less continuance is sufficient to dissolve the contract."

In this case, the delay was from the year 1806, until the year 1818, without an offer to execute titles. During this time, the purchasers were of course deprived of the benefit of their purchases; the delay too was well calculated to injure them in another respect. The property depreciated in value; and this, it is fair to presume, might have been anticipated by at least all the purchasers who bought to resell if titles had been executed. As to such of the purchasers, therefore, who had never taken possession, or had abandoned the possession before that time, the complainants could have no ground whatever for specific performance. But as some of the purchasers had then taken possession, and are still in possession, it is supposed, that the complainants may compel them to comply with their purchases. If the defendants were now insisting on retaining their purchases, I apprehend they might do so, and would be compelled to accept such a title as the complainants could give them, and to pay the purchase money. But as they are willing to abandon their purchases, and are now insisting to do so, it remains to be seen, whether the complainants are, as

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against the purchasers *in actual possession, entitled to a decree for specific performance. If the complainants at the filing of their bill in 1819, or even now, could make a perfect

(*b*) Vide Young v. Burton, McM. Eq. 255.

title to the defendants, they might claim, if not an actual specific performance according to the letter, at least a conscientious performance according to such modification as would be equal and just. But it appears that at this time there is an outstanding title to one-twelfth of the whole land, which the complainants cannot convey. This is not a defect in the quantity sold, for which compensation could be decreed. It is a defect in the vendor's title, whereby the vendees may be ousted and deprived of the land purchased. It has been contended, however, that the equitable title is in the complainants, from the supposed fact, that Rowland Rugely invested the funds of his creditors in the purchase of the land, and that, therefore, a trust resulted in favor of his assignees. This is susceptible of two answers. The fact has not been sufficiently proved, and if it had been, the purchaser is not bound to take an equitable title. The defect of title has been supposed to be cured by the possession of the purchasers for more than five years. I have no doubt, that, where there is an actual ouster of a co-tenant, and a continued adverse possession for more than five years before the Act of 1824, and for ten years since that Act, it will bar a recovery. But I am not satisfied that such a title would be forced on a purchaser. In this case, however, there was not five years possession under the sale before the title was tendered and refused. After that time there was no possession against that title, for it was recognized, and attempted by the complainants to be extinguished. During the great delay from 1806 to this time, the property has depreciated more than one-half in value, and it would be unconscientious to not only force the purchasers to comply with the contract, but also to accept a defective title. In the case of Hepburn v. Auld, 5 Cra. 262, [3 L. Ed. 96,] it was held, that the Court of Equity will not compel a specific performance unless the vendor can make a good title to all the land contracted to be sold. Having arrived at the conclusion, that the complainants are not

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*entitled to specific performance, the usual course would be to dismiss the bill, but as this might lead to further difficulty and litigation, and as the bill seeks for restitution of possession, we think that we are at liberty to so decree.

In support of this conclusion, I refer to Costigan v. Hastler, 2 Sch. and Lef., 168; Orr v. Hodgson, 4 Wheat. 463, [4 L. Ed. 613;] the Executors of Bordeaux v. Cave, [1 Bailey, 250,] decided at Columbia, May Term, 1829. The Court ought, if possible, to place the parties, as nearly as they can, in the condition in which they were before the contract. Neither should gain or lose by it, more than is inevitable, from the lapse of time and change of circumstances. It is due to the defendant, Bulow, to say that he has offered to do everything which the Court can decree. Some of the other defendants, and particularly Duggan, objects to any decree of restitution against him. His grounds of objection are, first, possession for more than five years, before 1824; second, that he is a sub-purchaser, and therefore not affected by any of the equities between vendor and vendee. As to the first objection, I concur fully with the Chancellor, that, either at Law or Equity, the statute of limitations could not be pleaded by the vendee against the vendor, while the contract was executory on both parts. If the defendant, Duggan, had purchased without notice of the terms of the first sale, he would have been protected, both by the statute, and as a purchaser for valuable consideration without notice. But he appears to have bought at the sale some of the lots in his possession; and as to the others, he is charged in the bill, which is against him taken pro confesso, to have bought them from the first purchasers, upon an agreement to comply with the terms of sale. He is, therefore, in the same condition, as to all the lots, as if he had bought at the sale in 1806. His objections are untenable, and must be overruled.

It is ordered and decreed, that so much of Chancellor DeSaussure's decree as conflicts with this opinion be reversed; that so much of the bill as seeks a specific performance of the contract of sale be dismissed; that de-

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fendants do restore pos*session of the lots, by them respectively purchased, to the complainants; that such of the defendants as have had actual possession of lots, so improved as to be capable of yielding rents and profits, do respectively account for the rents and profits, without interest on the annual rents and profits; in such account, the defendants must be allowed for the present value of any permanent and valuable improvements made on their respective lots, and if the present value of the improvements made by any one of the defendants, should exceed the amount of rents reported against him, it is declared the lots so improved shall be liable to the payment of any such balance. The costs to be paid as directed by the Chancellor.

JOHNSON and HARPER, JJ., concurred.

Decree modified.

Rich. Eq. Cas. 246

PAUL JAUDON and Others v. EXECUTRIX AND EXECUTOR OF THEO. GOURDIN and Others.

(Charleston. March and April Term, 1832.)

[*Estoppel* ⇐75; *Slaves* ⇐7.]

Permission by one brother to another, to have possession of slaves for a number of years as a loan, and to hold them out to the world, and treat and use them as his own, *held*, under all the circumstances, to be a fraud upon a creditor of the bailee, who trusted him, supposing the slaves to be his, and took from him a mortgage of the slaves to secure the debt; and the mortgage was *held* to be a valid lien upon the slaves, as against the bailor and his representatives.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 192; Dec. Dig. ⇐75; Slaves, Cent. Dig. § 27; Dec. Dig. ⇐7.]

[*Courts* ⇐37.]

[Cited in Eno v. Calder, 14 Rich. Eq. 155, to the point that, where court has no jurisdiction at all, objection to jurisdiction may be made at any time.]

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147–149, 151, 156; Dec. Dig. ⇐37.]

Before Johnston, Ch., at Georgetown, February, 1831.

In 1817, Catharine McDonald, the widow and administratrix of Adam McDonald, deceased, and the children of Adam McDonald, filed a bill against Theo. Gourdin, deceased, to set aside a bill of sale of negroes, made by Adam McDonald to Theo. Gourdin, in 1809, and to have the same declared a mortgage. A part of the negroes had been in the possess-

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sion of *Theo. Gourdin, from the date of the bill of sale; the other part had remained with Adam McDonald. The suit abated by the death of the administratrix, in 1819, and was revived in Nov., 1820. In 1823, the decree of the Appeal Court was pronounced, declaring the transaction to be a mortgage, and directing a reference to the Commissioner to ascertain the amount due, and ordering a sale of the negroes, unless the amount reported was paid. The Commissioner's report under the decree was confirmed, and several of the negroes sold, but not enough to satisfy the amount due to Gourdin.

The Sheriff had seized two of the negroes, which were lodged in jail, and the Commissioner was proceeding to sell them, when a bill was filed, 5th August, 1826, by Paul Jaudon, who had married one of the original complainants, (styling himself also administrator of one Samuel McDonald,) and by the other children of Adam McDonald. An injunction was granted by Chancellor De Saussure, to restrain the sale of the Commissioner, and ordering the Sheriff to deliver up the negroes to the complainants. At this stage of the proceedings, or soon after, Theo. Gourdin departed this life. The bill was revived against his executrix and executor, and several witnesses were examined before the Commissioner. In April, 1829, a motion was made to dismiss the bill, for want of jurisdiction. His Honor, Chancellor De Saussure, refused the motion, and ordered the bill to be retained, and the injunction to remain of force until the trial of the rights of the parties be had at law, to which they were referred, and directed to resort.

Under this decree, neither party could determine what course should be pursued. An appeal was taken, and a decree was made by consent, that the Circuit Court should proceed to the determination of the cause, and should pass on the rights of the parties. The cause was now heard before his Honor Chancellor Johnston. There was evidence, that about the year 1797, Samuel McDonald loaned to his brother, Adam McDonald, a negro woman, from whom those in dispute descended. Saml. McDonald died in 1824 or

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1825. He was apparently in indigent *circumstances all his life, returned no taxable property, and there was no evidence that, during the long litigation between the representatives of his brother and Theo. Gourdin, or at any period, he had interposed any claim to the property.

His Honor pronounced the following decree:

Johnston, Ch. This case comes before me for a trial, after a decree, sustaining the jurisdiction of the Court, has been pronounced by Chancellor De Saussure. That decree was appealed from, and the Court of Appeals ordered, "that the case be sent back to the Circuit Court, with directions to determine on the rights of the parties, in the same manner as if the complainants had instituted proceedings in the Court of Law." If we confine ourselves to the facts stated in the bill, and do not permit ourselves to be led off by the statements, by counsel, of facts which no doubt exist, but of which there is no charge in the bill, I am inclined to think this is a plain case of trover or trespass. The bill simply states that Mr. Huggins is in possession of the slaves of the plaintiffs, as the agent of Mr. Gourdin. There may be some insinuations, but no direct charges beyond this, and, if I were at liberty, I would unhesitatingly dismiss the bill. Indeed, I have hesitated much whether I ought not to do it, for it is plain that the Circuit decree was made, not on a full hearing, although the decree is general enough to apply to the merits, but upon a motion to dismiss the bill. And again, I doubt whether the Court of Appeals intended to make it imperative on the Circuit Court of Chancery to try an action at law, although they have directed it to determine on the rights of the parties, in the same manner as if the plaintiffs had instituted proceedings at law.

All parties pressed me to decide the right

of property; but none of them satisfied me that, in doing so, I would be acting in any other capacity than that of an arbitrator, unless I should regard the question of jurisdiction already decided on.

Authorities were produced, to show where no ground is taken against the jurisdiction

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until after decree, that then it *is too late to take it. Doubtless this is correct, when properly applied. When the Court has general jurisdiction of the subject, but something has occurred to render the tribunal an improper one—in other words, when the jurisdiction has been ousted—the doctrine is not only that the jurisdiction cannot be objected to after a decree, but it cannot be objected to ore tenus, even at the hearing, but must be pleaded to, unless the objection appears on the face of the bill. But when a case is stated, over which the Court has no jurisdiction at all, the objection never comes too late. It need not be pleaded, for the Court is bound to know the extent of its jurisdiction, and needs not to be informed of its limits by pleading.

I have stated this, that if I am wrong in my construction of the previous decrees of the Circuit and Appeal Courts, (which are the only obstacles in my mind to dismissing the bill,) an opportunity may be given to have it dismissed, for want of jurisdiction. If I had dismissed it, I should have also ordered a restitution of the property in the same plight, as far as practicable, as it was in when the bill was filed.

The only question which I am to consider is, whether the slaves in question were the property, not of Adam's, but of Samuel McDonald's estate?

On this point, the evidence leaves on my mind not a shadow of a doubt. It is clear that the property never belonged to Adam. I place no reliance on the declarations of Adam, after he executed the bill of sale to Gourdin. That would be to allow him, by subsequent declarations, to defeat his conveyance. But two witnesses prove a loan from Samuel to Adam, before that time. Mrs. Keels proves, on her own knowledge, the loan in 1796 or 1797.

If the testimony stopped here, there would be little difficulty. But it is said that June, and another witness, prove declarations of Sam, that he had given the slaves to Daniel W. McDonald, his nephew and one of the children of Adam. Be it so. That is of no consequence to the defendants. Whether the slaves belonged to Samuel or Daniel W., their

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mortgage or decree *against them could not make them liable as the property of Adam. But Daniel W. waived his exclusive rights, under any gift which his uncle might have made to him, which it was competent for him to do, and by accepting in partition, as one of the distributees of Samuel, affirmed the right of the latter.

It was contended that the plaintiffs were estopped from setting up the right of Samuel by the decree in the case of Catharine McDonald et al. vs. Theodore Gourdin. It is not clear to my mind that any one is estopped by that decree but Catharine, who, as the administratrix of Adam, was perhaps the only proper party to that bill, which was brought to redeem. The distributees, as such, had no business in Court.

But, at most, a decree is binding only on the parties before the Court, and only on the points directly adjudicated. Nor is it binding on them in any other capacity than that in which they are parties. Now, the question in the present case is, whether the slaves belonged to Samuel or Adam? That question could not have been presented in the former case, by either party—for, if the plaintiffs had averred the right to be in Samuel, he being then alive, they would thereby have shown that they had no right to reclaim the slaves, as the property of Adam; and if Mr. Gourdin had made such an averment, he would have shown that his mortgage gave him no lien on the slaves. The questions, in that case, were simply, whether Adam had mortgaged, and whether any part of the debt was unpaid? We may infer from the decree, that all parties treated the property as Adam's; but a decree concludes only points directly decided, and in issue—not points inferred from it.

The former decree could not bind Samuel McDonald, who was no party to it; nor could it bind those who became his distributees on his death, although they were before the Court, but in such a situation that they could not assert his rights. Com. Dig. Tit. Estoppel (c.); 5 Rep., 32, b.

It was insisted that, as a point of evidence, the declarations of the plaintiffs, in the bill of the former suit, were conclusive that the slaves belonged to Adam. The present plain-

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tiffs, in*cluding Jaudon's wife, were infants, and the declarations were not theirs, but those of their guardians ad litem. But, as I have allowed the plaintiffs to derive their right, in one point of view, through the waiver of Daniel W. McDonald, who was a party to that suit, although he is not to this, it will be necessary to show that his statements in that bill are not evidence against those claiming through his acts, in this case; and I am of opinion that, if he were one of the present plaintiffs, his statements in the former bill would not conclude him. 1 Phil. Evi., 263; 2 Selw. N. P., 635. A bill is only evidence that such a bill was filed, and that certain points are put in issue; it is not evidence of statements contained in it, not necessary to the issues. I have not insisted on the circumstance that Jaudon, as administrator of Samuel McDon-

ald, was not a party to the former suit, because, after the partition of the slaves as the property of his intestate, he cannot come properly into this Court as administrator. As distributee, claiming that half of the estate of Samuel which he purchased from Daniel W. McDonald, he is clearly not bound by the former decree, not being a party, or claiming under a party. As distributee in right of his wife, who was a party, his rights have been already considered by me, in connection with the rights of the other distributees, who were parties.

It is, therefore, ordered and decreed, that the injunction heretofore granted in this case be made perpetual.

The defendants appealed on the grounds:

1. That under the whole statement of the proceeding, the Chancellor should have ordered the negroes taken from the possession of the Sheriff, to be re-delivered, and the complainants' bill to be dismissed.

2. That in the strongest view for the complainants, the decree of the Appeal Court meant only, that the cause should be tried by the Chancellor, without objection to the jurisdiction of the Court, but that in every other respect, all objections could be made, as if no decree had been pronounced by the

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Appeal *Court, and the defendants were entitled to any defence, which they might have made or pleaded at law, if the action had been instituted in that forum.

3. Because if the Court had jurisdiction, the claim of complainants as representatives or distributees of Samuel McDonald, was stale, and should have been rejected.

4. That if his Honor meant to try and decide the rights of complainants, as if a suit at law had been commenced against the defendants, then it is most respectfully submitted, that the claim of the complainants was not sustainable, as the evidence of the original ownership in Samuel McDonald, was vague and insufficient. As it was clear that he had never been in possession of, or exercised any act of ownership over the property, from the year 1797, till his death in 1825, as if he were the owner. The permission for Adam McDonald to possess and use the negroes as his own, for nearly thirty years, to get credit on them, and to mortgage them to his creditors, was a fraud on his creditors, and would defeat the claim of Samuel McDonald, if any he had; that the registry of the mortgage, and the pending of the suit in Chancery, from 1817, till the death of Samuel, was notice to Samuel, and his omission to interpose any claim was a waiver of right, if any existed in him, and the allowance of any such claim at the end of the litigation would sanction a fraud on the litigants.

5. That the possession of Adam McDonald, after the mortgage to Gourdin, was adverse to the claim of Samuel McDonald, and defeated the same.

6. Because if the evidence was believed, a gift was proved by Samuel McDonald to Daniel W. McDonald, and therefore the complainants could not recover.

7. Because the complainants were estopped from claiming the property as Samuel McDonald's, when they had heretofore contended that it was Adam's, and they were bound by the decree made in that case.

8. Because no partition whatever was proved of the estate of Samuel McDonald, and all the reasoning of the Chancellor,

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*founded on that statement, is unwarranted by the evidence, and as it is believed, is unwarranted by the facts as they really exist.

9. That the evidence proved at most, that one negro had been owned by Saml. McDonald, and the decree gives to his representatives about seventeen, without any definite or satisfactory evidence that they were all the descendants of the negro owned by Samuel.

10. Because viewing all the evidence in the light most favorable to the complainants, Samuel McDonald owned the negroes prior to 1797: in that year he delivered them to his brother Adam, in the possession of whom, and of whose family they remained without interruption or claim for thirty years, who mortgaged them for a valuable consideration to defendants' testator, and that no claim was ever made by Samuel in his lifetime, of the property, and that therefore, none should now be allowed on the part of his legal representatives.

Dunkin, for appellants.

Petigru, contra.

The opinion of the Court was delivered by

JOHNSON, J. The controversy between these parties, so far as the merits are concerned, involves the right of property in certain negroes, (nineteen in number,) named in the complainants' bill. The complainants claim them as the legal representatives of Samuel McDonald, deceased, and it is conceded, that if they belonged to him at the time of his death, they are entitled to recover. The defendants derive their interest in them from Adam McDonald, the brother of Samuel McDonald, who made a bill of sale of them to defendants' testator, Theodore Gourdin, to secure the payment of a debt due to him. The bill of sale was absolute on its face, but Gourdin at the same time executed a deed, in which he acknowledges, that it was intended to secure the debt and the right of Adam McDonald to redeem, and in which also he covenants that they shall remain in the possession of Adam McDonald, for the use of his family.

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*The evidence justifies, perhaps, the conclusion, that old Peggy, from whom all the other negroes descended, originally belonged to Samuel McDonald; and one of the questions made in the case was, whether he had

ever parted with the absolute property in them to Adam McDonald? The Chancellor has decided that question against the defendants, and upon that decision has predicated a decree perpetually enjoining the defendants from proceeding to sell the negroes in satisfaction of the debt due to them, according to the tenor of the bill of sale, and the counterpart deed of Gourdin; and if the case depended on that question alone, it might well be doubted, whether the judgment of the Chancellor, on a question merely of fact, would not be conclusive. It is, according to the rules and practice of the Court, generally so regarded, and I am disposed so to consider it. But for myself I find it difficult to reconcile the possession of Adam McDonald, and his legal representatives, for a period of at least twenty-eight years, with the right of property in Saml. McDonald, who during all that period, was utterly destitute of every necessary of life, and the means of support, and lived and died wholly dependent on the bounty and hospitality of his friends.

Conceding, however, to the whole extent, that the property in the negroes, was in Samuel McDonald, and that the possession of Adam McDonald and his representatives after his death, was on loan, the question, which seems to have been overlooked in the Circuit Court, necessarily presents itself, to wit, whether that possession was not such a fraud upon Gourdin as a creditor, as to subject them to the payment of his debt?

The facts out of which this question arises, (and I propose to state them as they are assumed by complainants,) and most strongly against the defendants, are, that Samuel McDonald, being possessed of old Peggy, delivered her as a loan to his brother Adam McDonald, in 1796, or 1797. That Adam McDonald, having become indebted to Gourdin, and continuing in possession of Peggy and her descendants, in 1807 mortgaged them for the payment of that debt. That Adam Mc-

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Donald *retained the possession of the negroes from that time to the time of his death, which happened between 1813 and 1817, and from that time until after the death of Samuel McDonald, in 1824, they remained in the possession of the administratrix, and the administrator de bonis non of Adam McDonald, Gourdin's debt still remaining unpaid. An attempt was also made to prove that Gourdin had notice, that these negroes did not belong to Adam McDonald; and one witness, Mr. W. Smith, stated, that in a conversation with Gourdin, he told him that they did not, and that Gourdin, looking hard at him, replied, "if you know anything about it, keep it to yourself." The precise time of this conversation is not fixed by the written examination of the witness now before me, but it is stated in connection with circumstances which clearly show that it was not until long after the bill of sale was executed, and probably not until after the death of Adam McDonald. This witness also testified as to the admission both of Adam McDonald and his widow and administratrix, not long before their respective deaths, that the negroes belonged to Samuel McDonald, and some of the other witnesses say, that they were understood to be the property of Samuel McDonald; but no notice of the fact was brought home to Gourdin, otherwise than as above stated, and the question then recurs, whether he has a lien on them for his debt?

There is no law which requires a transfer of slaves, or other chattels, to be in writing, and possession, therefore, generally constitutes the only evidence of property. It is to that alone which strangers look in treating with him in possession, and hence the rule laid down in Twyne's case, 3 Co. 80, (1 Smith L. C. 1,) which in some of the cases is said always to have been the law, that the possession of a chattel inconsistent with the right of property, has, in controversies between the creditors of him in possession, and the legal owner, been always regarded as a badge of fraud, (see also Taylor v. Jones, 2 Atk. 600; Russel v. Hammond, 1 Atk. 16; Bates v. Graves, 2 Ves. jun. 292.) In Ed-

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wards v. Harben, 2 T. R. 594–5, Judge *Buller, in the case of a purchaser for a valuable consideration, lays down the rule even more strongly, and as founded on the unanimous concurrence of the Court, that unless possession accompanies and follows the deed, it is fraudulent and void as to creditors, and he remarks, that in Bucknal v. Roiston, Pr. in Ch. 287, Sir E. Northey said, "it had been ruled forty times, in his experience at Guildhall, that, if a man sell goods, and still continue in possession, as visible owner, such a sale is fraudulent and void as to creditors, and that the law had been always so held." If there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent.

Cases where, according to the terms of the conveyance, or contract of sale, the seller is to retain possession for a limited time, do not properly fall within this rule: for there the possession is in conformity to the deed. But even in those cases, when the transaction is perfectly fair in the first instance, it may become fraudulent afterwards, if they are concealed, or if the rightful owner neglects to assert and pursue his claim, and thereby others are drawn in to deal with him in possession, in relation to the property, or trust him on the credit of it. Hungerford v. Earle, 2 Vern. 261; 2 Johns. Ch., 48.

These were all cases of the seller retaining possession after the sale, and do not, perhaps, apply here in terms, for it may be said that the possession of Adam McDonald, under a loan from Samuel McDonald, was a fair and rightful possession; but they point out forcibly the application of the

great principle, that he who does an act which is in itself calculated to deceive, and by which another, trusting to appearances, which he has no means of unveiling, is defrauded, shall himself bear the loss. What is this case? Adam McDonald had had the possession of the negroes for nine or ten years, before he mortgaged them to Gourdin. He had, during all that period, exercised over them all the dominion of the rightful owner, without any interposition on the part of Samuel McDonald: the knowledge that he had them on loan was not brought home to Gourdin, and assuming, as we must, that he was ignorant of it, can there be any doubt

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*that he trusted to them, at least in some degree, as a security for his debt? But that is not all. His debt is yet unpaid, and now, at the expiration of a quarter of a century, during which time the interest must necessarily have accumulated, he is told, not by Samuel McDonald, for during his whole life he never exercised any act of ownership over them, but by volunteers, claiming as his representatives, that Adam McDonald's possession was merely a loan, and that he had no property in them. Now, I am not prepared to say, either that the possession of Adam, per se, at the time he mortgaged, or the lapse of time since, is a legal bar to this claim; but they furnish, in my judgment, an irresistible presumption that Gourdin trusted him on the faith of that possession, and that, confiding in its continuance, he was satisfied with the security which the mortgage gave him, and this, the consequence of a secret act, done by Samuel, calculated to deceive, is, according to the principle before laid down, a fraud in law. This conclusion is greatly strengthened by the consideration, that the proof of the fact of the loan is extremely equivocal, and that the lapse of time, now five and thirty years, may have deprived the defendant of the means of disproving it.

This conclusion supersedes the necessity of considering the other questions raised in the cause. I will remark, however, that we concur with the Chancellor, that the complainants were not barred by the judgment of the Court, in the case of the Administrator of Adam McDonald et al. v. Theodore Gourdin, for although the persons parties to that suit are very much the same, there they sued as representing Adam McDonald, and here as representing Samuel; nor were the rights of Samuel involved in that controversy.

The objection to the jurisdiction of the Court is expressly disclaimed by the counsel, and, notwithstanding the case stated in the bill is the action of trover, as remarked by the Chancellor, we are inclined to think that the evidence makes a case of Equity cognizance, and rather than turn the parties round, the Court would even now suffer an

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amendment by consent, so as *to meet it. The circumstance to which I allude is, that a part of these negroes had been seized by the Sheriff, under a process issued by the Commissioner in Equity, professedly under an order of the Court, and he was proceeding to sell them in satisfaction of Gourdin's mortgage; but, in fact, there was no order justifying such a process, and although that would have been the foundation of an action of trover, I incline to think that, regarding the property in possession of the Court, and under its control and direction, the complainants might have gone there for relief.

It is ordered and decreed, that the injunction heretofore granted, to restrain the defendants from selling the negroes conveyed, by way of mortgage, to defendant's testator, by Adam McDonald, and now in possession of the complainants, be and the same is hereby dissolved. And it is further ordered and decreed, that unless the said complainants shall, within one month after notice of this decree, pay and satisfy the defendants the balance reported to be due by the said Adam McDonald, now deceased, to defendants' testator, Theodore Gourdin, and the costs of this suit, that they do deliver to the Commissioner in Equity, for Georgetown District, to be sold by him, the said negroes mentioned in the said mortgage, and their issue and increase, or so many thereof as will be sufficient to produce, by sale, a sum sufficient to pay the said balance and the costs.

O'NEALL, J., concurred.

Decree reversed.

Rich. Eq. Cas. *259

*HENRY COOPER et al. v. ANN PEYTON et al.

(Charleston, March and April Term, 1832.)

[*Executors and Administrators* ⟸265.]

An administrator cannot retain for a debt of his own, which was barred by the statute of limitations at the death of his intestate.

[Ed. Note.—Cited in Godbold v. Vance, 14 S. C. 473.

For other cases, see Executors and Administrators, Cent. Dig. § 1014; Dec. Dig. ⟸265.]

Before De Saussure, Ch., at Charleston, April, 1831.

The decree of his Honor, the presiding Chancellor, is as follows:

De Saussure, Ch. The bill was filed in this case for the distribution of the estate of the late Mrs. Ann Hutchinson. The rights of the parties claiming distributive shares are not disputed. The only point in controversy, is relative to a claim made on the estate of Mrs. Hutchinson by Mr. Charles Peyton, for a debt due by her, in her life-

time, to him and Ann Peyton, the administratrix. That debt, it is alleged, arose from her receiving a sum of money for them, which she never paid. Some of the distributees object to the payment of the demand, on the ground that it has not been sufficiently proved, and that, if it had been regularly proved, it was barred by the statute of limitations.

The case was referred to the Commissioner, who has made a clear report of all the facts—which report accompanies this decree. The proofs stated of the payment to Mrs. Hutchinson, are entirely satisfactory, but they were not taken in the regular manner by the Commissioner; so that the advantage of a cross-examination has not been had by the distributees. If the demand should not be considered barred by the statute of limitations, the parties opposed to the payment of the claim will have a right, if they choose, to require the demand to be regularly proved under a commission. It seems that the demand comes from Ireland, by Mr. Charles Peyton, a resident there, on behalf of himself and Mrs. Ann Peyton, the administratrix, and the claim was made within the time prescribed by the Court for claims to be made. There is no doubt that demands brought in under such circumstances, are

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subject to all the rules appli*cable to other claims against estates. They must be regularly proved, and if barred by the statute of limitations, may be rejected on that account. And the executor or administrator, would have the same power as in common cases to admit a demand barred by statute, if it was believed just and unsatisfied.

In the case we are considering, the demand comes from abroad, and the claim is of a peculiar nature, amounting to a trust. Great part of the money, according to the proofs, (assumed to be correct for the present,) was paid to Mrs. Ann Hutchinson, for the use and benefit of Charles Peyton and Ann Peyton. The last named person has since administered on the estate of Mrs. Ann Hutchinson. She could not sue herself, and she admits the debt notwithstanding the statute. The question now to be decided is, whether, under these circumstances, there is any thing in the case to take it out of the operation of the statute of limitations. It was learnedly argued by all the counsel. I shall not follow them in the argument, or in the numerous cases cited. It will be sufficient to state briefly the reasons on which my opinion is formed.

It is very certain, that the money paid to Mrs. Hutchinson, in the year 1815, for Charles Peyton and Ann Peyton, as assumed in the argument, was not a direct trust. It was a trust by implication, and the decided cases have settled, that the statute of limitations is applicable to such implied trusts.

And the time elapsed in this case, would operate as a bar, unless prevented by some other circumstances. The demand coming from abroad would not prevent the operation of the statute after the lapse of such a time; more especially as one of the claimants, Mrs. Ann Peyton, resided in this country in the house with Mrs. Hutchinson. The only remaining ground is, that Mrs. Ann Peyton was claimant and administratrix, as well as a distributee. She could not sue herself; and she could exercise, in her own case, her privilege of deciding, whether she would, as administratrix, take or refuse to take advantage of the statute as a bar to the demand. It appears to me it was peculiarly a case, in which she might refuse to apply that bar;

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*not indeed to admit an unjust demand, but to refuse to apply the statute to a just debt. Of the justice and extent of the demand, she, however, is not the exclusive judge.

It is, therefore, ordered and decreed, that the claim in question be established in the regular way by commission, and full proof; and that, if established, the same be paid out of the estate of Mrs. Ann Hutchinson, but without interest till the filing of the bill. The estate, then remaining, to be distributed according to law. Costs to be paid out of the estate.

From this decree, the plaintiffs appealed, and moved the Court, that the same be reversed.

The opinion of the Court was delivered by

HARPER, J. We understand the naked question to be submitted to us, and the plea to depend upon it, whether an administrator may retain for a debt of his own, which was barred by the statute of limitations at the death of his testator? The authorities seem to be clear, that against another creditor an executor is not bound to plead the statute. The only authority in favour of his power to retain for his own debt in such case, is that referred to by Maddock, in his treatise on Chancery, 1 vol. p. 583: Hopkinson v. Leech, decided May, 1819. It is said in the note, "Leach was of opinion he might retain, but directed the opinion of a Court of law to be taken." We are not acquainted with the circumstances of that case, and it can hardly be regarded as authority. The reasoning in the text of Maddock, seems unsatisfactory: that as the executor might have paid a debt to another, without pleading the statute, so he may retain for himself. That confidence is reposed in the executor, because as to others he represents the testator, and is not bound to take an advantage, which it would have been unconscientious for the testator himself to take. He is supposed to be disinterested, or if having any interest, it is to prevent the establishment of debts against the estate. But it would be against the whole spirit of our law, that confidence should be reposed in a man in relation to a matter, in which his

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own *interest is concerned, and where there must be the utmost temptation to abuse that confidence. There would be continual inducement to fraud, by setting up stale demands, and such perhaps as had been actually satisfied; and administration might be often taken out for such purpose. The case Ex parte Dewdney, 15 Ves. 479, may be authority to this purpose. That was a case where claims, against which the statute had run, were presented against the estate of a bankrupt. They were disallowed by the Chancellor. He says, "a commission of bankruptcy is nothing more than a substitution of the authority of the Lord Chancellor, enabling him to work out the payment of those creditors, who could by legal action, or equitable suit, have compelled payment, and that the objection upon the statute is competent to creditors, and may be sustained. I see no reason for holding that it is not competent to the bankrupt, to take this objection, and if he waives it, to creditors." In that case, the creditors were the actual parties litigant. In this case, it is the distributees; against them the administrator's demand must be established, and I have no doubt but that it is competent to them to take the objection.

The Chancellor's decree must be therefore reversed, and the plea sustained.

JOHNSON and O'NEALL, JJ., concurred.

Decree reversed.

Rich. Eq. Cas. *263

*EXECUTORS OF JAMES S. HOPKINS v. MARY MAZYCK and Others.

(Charleston, March and April Term, 1832.)

[*Wills* ⇐587.]

Testator, having a power of appointment under his father's will, devised lands to his sons, respectively, during their lives, with remainder to such children as they might leave at their deaths; and with cross remainders among the sons, "in case of the death of any of them under twenty-one and unmarried." By a residuary clause, he devised "the rest, residue and remainder of my estate, whatsoever and wheresoever, including any estate not hereinbefore particularly devised, which I may have derived under the will of my father, unto my said sons and their heirs forever:" *Held*, that the residuary clause carried the ultimate fee, or reversion, in the lands, to the sons.

[Ed. Note.—Cited in Williams v. Kibler, 10 S. C. 428, 429, 430; McCreary v. Coggeshall, 74 S. C. 48, 53 S. E. 978, 7 L. R. A. (N. S.) 433.

For other cases, see Wills, Cent. Dig. § 1290; Dec. Dig. ⇐587.]

[*Trusts* ⇐366.]

A plaintiff, claiming an interest under a trust deed, must set out the deed in his bill, and make the trustee a party.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 575; Dec. Dig. ⇐366.]

[*Equity* ⇐94.]

The Court will not decree upon the rights of a deceased person, until his executor or administrator is made a party, even although the person entitled to the administration may be before the Court.

[Ed. Note.—Cited in Leroy v. City Council of Charleston, 20 S. C. 78.

For other cases, see Equity, Cent. Dig. § 252; Dec. Dig. ⇐94.]

Before Johnston, Ch., at Charleston, January, 1831.

Johnston, Ch. Margaret M. Mazyck, in contemplation of a marriage with James S. Hopkins, executed a marriage settlement, dated the 24th of February, 1824, conveying the whole of her estate, real and personal, as set forth in a schedule thereunto annexed, to Samuel Wilson and Henry O'Hara, in trust, that if the said James S. Hopkins should survive her, and she should have no children living at her death, the whole of said estate, real and personal, should become the absolute property of the said James S. Hopkins forever. The marriage took place, and she died without issue, leaving the said James S. Hopkins surviving. He subsequently died, leaving a will, and the plaintiffs, Carew and Haig, executors, who proved the will and undertook its execution. Samuel Wilson, one of the trustees in the marriage settlement, has died, and Henry O'Hara, the other, being called on by the said executors of James S. Hopkins, to convey and to deliver to them the property specified in the deed of marriage settlement, replied that he had no such property, but that it was in the possession of Mary Mazyck, widow and executrix of Stephen Mazyck, the father of Mrs. Hopkins.

The schedule annexed to the deed of settlement, and therein referred to, embraces, first, certain claims under the will of Mrs.

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*Hopkins' grandfather, Benjamin Mazyck, the elder, the grounds of which will be set forth hereafter; secondly, a legacy of $6000 and two negro girls, to be chosen by Mrs. H., under the will of her father, Stephen Mazyck; thirdly, one-sixth of all the estate, real and personal, of Mrs. Hopkins' brother, Paul Ravenel Mazyck, conveyed by him, by trust deed, to his mother, brothers and sisters, should the same be adjudged irrevocable; fourthly, all the other property, real and personal in possession, remainder, or reversion, or otherwise, to which Mrs. Hopkins was, at the time of executing the said settlement or might thereafter, become entitled in any manner whatever.

Benjamin Mazyck, the elder, and grandfather of Mrs. Hopkins, by his will, dated the 31st of October, 1796, among other things, provides as follows:

"Item.—To my friends, Peter Porcher, John Cordes, William Mazyck, Dr. Samuel Wilson, Daniel Ravenel, Thomas Broughton, Alexander Mazyck, and Stephen Ravenel, the survivor or survivors of them, and the heirs of such survivor, all that plantation, composed of several tracts, containing, as will appear

by the plats, 1205 acres, which I purchased of my late nephew, Alexander Mazyck; and that small plantation, containing 183 acres, which I purchased of James Rockford; and also that plantation, where I now reside, containing about 900 acres; (these three plantations, being connected together, make in the whole about 2288 acres, and lie on the north side of Foster's Creek, in St. James, Goose Creek,) to have and to hold to the said eight trustees, the survivor or survivors, and the heirs of such survivor, to the use of my son, Stephen Mazyck, and his assigns, during his natural life, and after the determination of that estate, to the said trustees, to preserve the contingent remainders," etc., "but in trust during his natural life, to take the rents for the sole benefit of my said son, Stephen, and his assigns, but so as in no case to be subject to his debts, charges or incumbrances. And from his death, if his present wife, Mary, should survive him, to her use and behoof, and her assigns, so long as she shall remain

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his widow: and from the *decease of my said son, Stephen, or the second marriage of his present wife, Mary, (whichever shall first happen,) to the use and behoof of such child or children of my said son, Stephen, as may be living at his death, or the second marriage of his wife, (whichever shall first happen,) to be equally divided between them, if more than one, and their heirs." A proviso follows, that the children of a deceased child shall take the parent's share: and another, that the share of a daughter of Stephen shall be less, by one-fourth, than the share of a son.

"Item.—I give and devise to my grandson, Paul Mazyck, (present youngest son of my son, Stephen,) and to his heirs forever, my lot of land on the north side of Queen street, (known in the partition between my brother and me as number 18,) containing," etc., "the same to be held and leased, upon a building lease by his father, until he attains the age of twenty-one years: but if he die under that age, then his father shall have the use of it during his life, and at his death, it shall be vested in such person or persons, and for such estate or estates, as shall, upon the death of my said son, Stephen, be entitled to the plantation which I have herein before devised to the trustees for his use."

Then follows a devise to his grandson, Benjamin, son of Stephen, of a lot at the west end of Broad street, on the north side, known in the partition between the testator and his brother as number 6, with the same limitations over, in case of Benjamin's death under twenty-one.

"Item.—It is my will that my lot of marsh land, at the west end of Queen street, containing," etc., "shall be divided into two lots, by a line running east and westwardly," etc., "and then my sons shall draw lots for the same. The lot which Daniel shall draw, I give to him, his heirs and assigns; and the lot drawn by Stephen, I give and devise to the eight trustees, and the survivor," etc., to and for the same uses as are declared concerning the plantations first devised to the said trustees."

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*To this will, the said Benjamin Mazyck, the elder, executed a codicil, dated the 21st of July, 1797, as follows:

"Whereas, on the 31st of October last, I, Benjamin Mazyck, of St. James' Parish, Goose Creek, did make and duly publish my last will and testament, and now it is my intention to make some alterations and additions thereto: now, therefore, I do hereby declare my will, as to such alterations and additions, in manner and form following: that is to say, Imprimis, it is my will, (as far as concerns all the real estate left by my said will to the eight trustees therein named, for the use of my son, Stephen, during his life, and, after his death, under the limitations therein contained,) that my said son, Stephen, shall have full power, notwithstanding any thing contained in said will, to devise and bequeath, by his last will and testament, to be duly executed in writing, the whole, or any part thereof, to any one or more of his children, grandchildren, or great-grandchildren, but to no one else, in such manner and proportion, and under such trusts, conditions and limitations, as he may think fit: but in such manner, nevertheless, as not to defeat the life estate in any part of the said premises, left by my will to Mary, the wife of my said son, Stephen, in case she should survive him."

"Item.—I give and bequeath to the eight trustees herein before named, and the survivor and survivors of them, and the executors and administrators of such survivor, my three negroes, Billy, the driver, Maria, and Mary, and also the half of all my other slaves, not hereinbefore particularly disposed of, together with the future issue and increase of my said slaves, as are females, in trust, to permit and suffer my said son, Stephen, during his natural life, to have, take, and enjoy the use," etc., "thereof, without being, in any wise subject or liable for his debts, charges or incumbrances; and from, and immediately after his death, then in trust for such child or children, or other more remote issue, lawfully begotten of my said son, Stephen, and for such estate or estates, and subject to such uses, trusts, conditions and limitations, as my said son, Stephen, by his last will and testament, in

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writing duly executed, shall give, will, *limit and appoint the same, or any part thereof. But if my said son, Stephen, should depart this life without making and leaving, duly executed, any such will, direction, limitation or appointment, in favor of some one or more of his children, or other more remote issue,

lawfully begotten, then in trust for such child or children of my said son, Stephen, lawfully begotten, as shall be living at his death, to be equally divided between them, if more than one, share and share alike, him or their executors," etc., "forever, without any further condition, trust or limitation whatsoever. Provided, that, if any such child or children of my said son, Stephen, should die leaving issue, lawfully begotten, and living at the death of my said son, Stephen, then such issue shall represent their parents respectively, and take equally between them, if more than one, such share and shares of the said slaves as their parents, respectively, would have been entitled to take, if such parents had survived my said son, Stephen."

"Item.—I give and bequeath unto the eight trustees, herein before named, and the survivor," etc., "all the remainder of my slaves, and the future increase of the female slaves, in trust, to permit and suffer my son, Daniel, during his natural life, to have and enjoy the use," etc., "without being in any wise subject to, or liable for his debts, charges or incumbrances. And from and immediately after the death of my said son, Daniel, then in trust, to permit and suffer my said son, Stephen, during his natural life, to have," etc., "the use," etc., "thereof, without being subject to, or liable for his debts," etc. "And from and immediately after the death of my said son, Stephen," etc., etc., repeating the same limitations and power of appointment.

The rest and residue to Daniel and Stephen, and their heirs.

Stephen Mazyck, the son of the testator, Benjamin, the elder, left a will, dated the 23d August, 1808, containing the following provisions:

1. "My will is, that all my just debts be paid in the following manner, viz., I direct that so many of the negroes whom I have lately purchased, and who are at my absolute

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disposal, be sold *for cash, or a short credit, as shall be sufficient to discharge my debts to the several banks of this State, within six months after my decease. The rest of my debts are to be paid by the appropriation of two-thirds of the nett income or profits of my estate, reserving one-third for the support and maintenance of my family.

2. "I give to each of my three daughters the sum of $6,000, to be paid to them, respectively, at 21 years of age, or day of marriage, whichsoever shall first happen, or as soon thereafter as the circumstances of the case will admit, but without interest.

3. "I give to my three daughters, and to my son, Alexander, to them, their heirs and assigns forever, as tenants in common, all the marsh lot at the upper end of Queen street, one moiety whereof I acquired by my father's will, and the other moiety of which I purchased from my brother, which will be better known by reference to my father's will.

4. "I give and bequeath to my said daughters, each, two negro girls, whom they may choose from among my negroes, not otherwise specifically devised," etc.

6. "I give unto my wife, one-fifth part of the rest, residue, and remainder of my slaves, including those derived under my father's will, for and during her widowhood. And from, and after her marriage, or death, whichsoever shall first happen, I bequeath the same to my sons, Benjamin, Paul and Alexander, as tenants in common, share and share alike: on condition, nevertheless, that in case my said wife shall marry, they pay to her, $5,000.

8. "I give and bequeath unto my son Benjamin, during his natural life, not subject to his debts, six hundred acres of land," consisting in part of the brick barn plantation, and of other lands, (being part of the 2288 acres devised to Stephen, by his father, Benjamin Mazyck, Sr., as aforesaid:) "and from, and immediately after the death of my said son Benjamin, then to and for the use and behoof of such child or children of my said son Benjamin, lawfully begotten, as he shall

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leave living *at his death, to be equally divided among them, share and share alike.

9. A clause devising the remainder of the brick barn plantation, to his son Paul for life: limitation over, as in the case of Benjamin.

10. A clause devising other lands to Benjamin for life: with a limitation over, as in the 8th clause.

11. A clause devising lands acquired under his father's will to his son, Alexander, for life, with like limitation over.

12. "I give and bequeath to my three sons, Benjamin, Paul and Alexander, share and share alike, all the rest, residue and remainder of my slaves, including those derived under the will of my father: provided nevertheless, that the share of my son Benjamin shall not be subject to his debts, contracts or engagements, but that he shall only enjoy", &c. "the same during his natural life. And from and after his death, the same shall be, and remain for like estates, and in like portions as the real estate herein before devised to him.

13. "I give, devise and bequeath the rest, residue and remainder of my estate, real and personal, whatsoever and wheresoever, including any estate, real or personal, not herein before particularly devised and bequeathed, which I may have derived under the will of my father, unto my sons Benjamin, Paul, and Alexander, share and share alike, and to their heirs, executors, administrators and assigns forever.

14. "It is my will that in case of the death of any of my daughters, before attaining twenty-one years of age or day of marriage, her or their share or shares, shall go to the survivor, or survivors, share and share alike, &c.

15. "In case of the death of any of my sons, under twenty-one, and unmarried, his or their shares shall go in like manner, as is provided in the foregoing clause, in like case, in relation to my daughters."

Of this will, Mary Mazyck, wife of the testator, was appointed executrix, and James Wm. Gadsden, and others, executors. But Mrs. Mazyck and Mr. Gadsden alone qualified and acted. *Mr. Gadsden is dead, and Mrs. Mazyck is the sole surviving and acting executrix.

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Stephen Mazyck, the testator, at his death, left his widow, who is yet alive, and six children, surviving him. Of these, Benjamin and Paul, (otherwise called Paul Ravenel) Mazyck, died before the filing of the bill in the present case, having both attained twenty-one years of age; but having never married, left no issue. Alexander, another son, died, pending this suit, having attained full age, but without ever having been married, and without issue. The three others were daughters, of whom one was Margaret M., who, as has been stated, after having been married to James S. Hopkins, died, leaving no issue, but being survived by her husband.

Jane, another daughter, married Arthur O'Hara, whom she has survived: she is now the wife of Geo. Elfe. The third daughter, Caroline, is the wife of Dr. Chas. Desel.

The executors of James S. Hopkins filed the present bill against Mary Mazyck, widow, and sole surviving executrix of Stephen Mazyck, and against Dr. Desel and wife, Geo. Elfe, and wife, and Henry O'Hara, setting forth claims growing out of the said marriage settlement, and the said wills, which will be remarked upon in the following decree.

It was contended by the complainants, that Stephen Mazyck had so moulded his will, as to shew, that he intended to dispose of the property of his father, over which the latter, by his codicil, gave him the power of appointment, and his own property, as one mass, without drawing a distinction between them: that by the term "my estate," which occurs in his will, he meant to include the one, as well as the other: and that the legacy of $6000, which he bequeathed to his daughters, should operate as a charge on the estate of Benj. Mazyck, Sr., at least, if it should turn out that Stephen Mazyck's estate was insufficient to pay it.

The codicil of Benjamin Mazyck gives Stephen the power of appointment, after the expiration of his own and his wife's life estate in the lands, and the expiration of his own

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life estate *in the slaves, to such of his own issue as he may designate, with such limitations, and upon such conditions as he may choose to direct; and it is contended, that if he has effectually executed the power of appointment, by giving the property to others, the legacy of $6000 may be regarded as a charge upon it; being in the nature of a condition annexed to the other legacies out of his father's property. And I think, if he had bequeathed that property, coupled with a clear expression of such a condition, the condition would have been binding. He could have given the corpus to one, with a charge by way of condition in favor of another.

Such an intention, however, ought to be plain and explicit. I see no evidence of such an intention in his will.

In the clause, in which the six thousand dollars are given, he expressly directs, that they are not to be paid until the circumstances of his estate should warrant the payment, and, by the previous clause, he indicates the difficulties which the alteration of his estate might present: He was in debt, for the discharge of which, so far as his honor was more immediately concerned, he directs that part of his own slaves should be sold. The residue of his debts he conceived might be extinguished by one-third of the income of his remaining property. We may conclude, then, that when those debts should be paid, he intended to raise the $6000 out of his property.

It was said, that his property turned out to be insufficient to answer these purposes: and yet it was denied, that his estate was insolvent. But whether it so turned out or no, is not the question: but it is, how did he expect it to turn out? for his expectations might, perhaps, be in some manner an exponent of his intentions. The property may have been wasted. It may have been subject to diminution by death of slaves; but above all, it may have depreciated. Bad crops may have been made. The price of crops may not have been such as he anticipated. The will was made in 1808, during the existence of severe checks upon commerce, sinking the price of property, and the amount of income. But the war, to which our then

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political *relations eventually led, was not yet declared. Who can say, that he anticipated war? Who can say, that he did not look to a speedy restoration of trade, and all its profits? And if he had such expectations, and they had been realized: do we know that he might not well have concluded, his own property would pay all his debts, and meet all the legacies he bequeathed.

But again, I cannot agree, that by the term "my estate," he meant his father's, in all the clauses of his will. When he means to include his father's he does so by express

words. He did not confound the two estates; but distinguished between them.

It was contended again, that the legacy of the two negro girls might be taken out of the estate of Benjamin Mazyck, Sr. But as the argument for this was the same, as that employed about the $6000 legacy, the same answer will apply to them.

It was contended, in the third place, that the will of Benjamin Mazyck gave his real estate, (the brick barn and Rockford, and other plantations, amounting to 2288 acres,) to Stephen for life, then to his wife during widowhood, and then to such children as he might leave living at his death. That such children as he might leave living at his death, and not such as should be alive at his wife's second marriage were under the will entitled: for the remainder was given to such as should be living at the first of those events, which should happen; and that he must die before she could marry a second time. That Mrs. Hopkins was one of the six children who survived him, and therefore upon the happening of that contingency, their interests rested. That although the codicil of Benjamin Mazyck, gave Stephen the power of appointment, as to such estate in those lands, as should remain after the expiration of his own and his wife's interests: yet that he had only effectually appointed a contingent remainder for life to his sons, who had died during their mother's widowhood; so that the appointment failed, and left that property to pass under his father's will.

Were it not for the 13th clause of the will of Stephen Mazyck, I might have agreed to

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this. It is clear from the will *and codicil of Benjamin, that he intended to secure a life estate in his lands to Stephen, and an estate for widowhood to Stephen's wife. By the will, he limits his estate, after those estates, to Stephen's children who should be alive at his wife's marriage or death, (for that is the true construction.) But by the codicil he gives the power to Stephen to devise it, after his own and his wife's interest, to whom he pleases. It was that reversionary interest then, and that alone, over which Stephen had control. That he gives in the first instance to his sons, respectively, during their lives: with remainder over to such issue as they might leave at their deaths. So far there is no limitations over, in case they should die, leaving no issue then living: and as they died leaving none, if the will had stopped there, the appointment would have failed for want of further limitation. But does not the 13th clause itself operate as a further limitation? To the effectual execution of a power of appointment, the intention to execute it is essential. But a reference to the subject matter to which the power relates, is sufficient evidence of such an intention. And when the intention to execute the power is manifest, the estates, limitations &c., created by the person executing such power, are to be judged of by the same rules as if the property were actually his own, and he had created such estates, &c. out of it. Now the real estate of Benjamin Mazyck is expressly alluded to, not only in the clauses of Stephen's will, wherein he devises it for life to his sons, with remainder over to such issue of theirs as might survive them, but in the 13th clause. Let us then suppose, that that estate actually belonged to Stephen in fee simple, and enquire whether he has given it by limitations that have failed. We will first suppose, that, by a deed or other instrument from himself, he had put it out of his power to divest his wife of it, during her widowhood. Being aware of this, he devises it to his sons for life, with limitation over to their children, and then concludes by devising all the rest and residue of his interest in it, not disposed of, to his sons in fee. Here then there are the estate of testator's wife for widowhood, the estate for life of the sons, the es-

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tates of the *sons' issue, and the ultimate fee of the sons themselves, all carved out of the same lands: each of them subject to those which precede them in the order in which they have been named: the second to the first, the third to the first and second, and so on: and the devisees of them, respectively, entitled to take as soon as the preceding estates shall have been extinguished. This may be held to be a true statement of the interests created by Stephen's will, if the 13th, or residuary clause, is sufficient to carry the reversionary interest in the lands. Residuary clauses carry every interest which the testator has not previously disposed of, or which fail: unless they contain provisions not reconcilable with previous dispositions in the will. They extend to, and carry latent reversionary interests: which, whether actually in mind of the testator or not, will be presumed to have been within the scope of his intentions, unless by contrary provisions, he has shown an intention to exclude them. I conclude, then, that the testator, Stephen, after the estate of his wife, his sons and their issue, and subject only to them, has given the fee in the lands in question to the sons themselves. What is the effect of these dispositions? Suppose the fee to the sons had been limited upon the estate to the testator's widow, would there have been any difficulty about it? Suppose, that, after the wife's estate, there had followed, immediately, a contingent remainder to third persons if alive at her death; then this 13th residuary clause in favor of the sons; and the intermediate remainder had never taken effect: would the difficulty have been greater? Would not the sons have taken in fee upon the death or marriage of their mother? In that case their estate would have been liable to be defeated, only by the contingencies of the intermediate remainder man being in esse, and in a condition to take at the

expiration of their mother's estate. So here the sons took a life estate on the expiration of their mother's estate; and also took a fee in the lands liable to be divested, only by the contingencies of their having issue alive at their own deaths. It is true, that the latter interest depended on the contingency of

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their leaving no issue; but *when that contingency happened, it vested in their distributees, unless they had alienated or devised it. It has been said, that it is absurd to suppose, that an interest, which could never be enjoyed by them, being to take effect after their deaths, should be given to them, since it could be of no value to them. It is true, they could not use the land after their deaths; but it does not follow, that it was therefore valueless to them; else it would also follow, that every one who purchases lands, or other property, commits an act of folly in giving more for the absolute and entire interest, than he would for a life estate. The power of alienating for a compensation is valuable, and so is the power of devising. Neither is it absurd, to attribute to this testator the intention of giving not only a life estate, but the fee also upon a contingency to the same persons. The objects of his bounty in the first instance, were his sons; in the second instance their issue. But for the expectation of such issue, he would, in the first instance, have given the fee to the sons. The issue being removed, is it absurd to suppose he would give what he allotted for them to his sons themselves? We may pronounce, confidently, he would, in preference to any other of his children: when we learn from other clauses, that he made the shares of daughters one-fourth less than those of sons. I am of opinion, therefore, that by the 13th clause, the sons took a fee in the lands on the expiration of the mother's estate, upon the contingency, which has happened, that they left no issue. The 16th clause prevents any of the daughters inheriting from the sons, who all died unmarried.

The same claim was set up by the plaintiffs with regard to the slaves bequeathed to Benjamin Mazyck, the younger, by the 12th clause of his father's will: but the answer to it is the same as that just given in relation to the lands, excepting that the widow of Stephen Mazyck has no life estate in the slaves.

Another claim of the plaintiffs, was for the value and hire of one-fifth of the slaves of Benjamin Mazyck, Sr., which were bequeathed by the 6th clause of Stephen's will to his wife, during her widowhood, with remainder over to his three sons, on certain conditions,

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should they be alive at the expiration of *her estate. It is clear, that Stephen, in this legacy to his wife, exceeded his power, which only enabled him to bequeath the slaves to his issue; but the plaintiffs must elect to take either Mrs. Hopkins' legacies under her father's will, or disaffirm them by claiming her share of those slaves. What is the extent to which she had a right to claim? whether an entire, an absolute interest, in a share of those slaves, or only an interest in such share for the time they are bequeathed to her mother? is a question which as it was not agitated, I shall leave open at present, and let it come up in the report hereinafter directed.

On a fifth claim, which seems to arise out of the 3d clause of Stephen's will, nothing was said. It relates to the lot at the upper end of Queen street. It may have been sold or partitioned. I do not, therefore, feel at liberty to found any decree upon it.

It was admitted that the plaintiffs could claim nothing through Alexander Mazyck, who survived Mrs. Hopkins. Neither did they raise any claim as distributees of Benjamin, but they made a question out of the following facts:

Paul Ravenel Mazyck, on the 4th of October, 1816, executed a deed, conveying to trustees all his estate, real and personal, under the wills of his father and grandfather; also several slaves, and all his other property, in trust, for his own use and behoof during his life, and at his death, to his mother, brothers and sisters, who should survive him. By his will, dated the 5th November, 1816, he devises and bequeaths his whole estate, real and personal, to his sister Jane, then unmarried; requests his mother, brothers and sisters to take nothing under the deed, which he declares was executed at their instance, and intended solely for his own protection: and should they claim, he enjoins it upon Morton Wilkes Smith, his executor, to institute proceedings to set it aside. The complainants, seeing that Mrs. Hopkins, so far from relinquishing under the deed, had asserted her rights by settling them on her husband, claimed the benefit of the deed. Some of the defendants, in their answers, show a willingness to comply with the request contained in the will of Paul, and Mrs. Elfe claims under that will.

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*Mr. Legare contended for Mrs. Elfe, that the deed was not so charged in the bill as to be put at issue, or to throw upon him the necessity of setting up the will in opposition to it. The deed is sufficiently referred to in the bill. The bill refers to the exhibit, which describes the deed, leaving it to be produced in evidence. He also contended that the executor should be made a party, or be at liberty, before the decision of this point, to file a cross bill, in order to rescind the deed. This I should have allowed, if the executor had qualified, or interfered with the property, so as to make him liable to be sued, or entitle him to bring suit. But he has not done so. The defendants are, some of them, in possession of the property, and therefore

stand as executors de son tort, and they have failed to impugn the deed. It must therefore stand.

As regards Stephen Mazyck's estate, the plaintiffs are entitled to an account, and they are also entitled to an account as to the share of Mrs. Hopkins, in the one-fifth of Benjamin Mazyck's slaves, bequeathed by Stephen to his wife. They are further entitled to have an inquiry into the value and kind of property left by Paul Ravenel Mazyck, and to have partition of it.

From the schedule annexed to Mrs. Hopkins' deed of settlement, and the answers, there would seem to have been a contest as to certain interests, under the will of Thomas Young, Mrs. Hopkins' maternal grandfather: but it is stated that a satisfactory understanding now exists on that subject. It is, therefore, unnecessary to touch it.

It is ordered and decreed, that the Master do ascertain, and report to this Court, the kind, description and value of the estate, of whatever kind, left by Paul Ravenel Mazyck, in order that the Court may proceed to order partition of the same, under the deed of the said Paul Ravenel Mazyck, or make such other dispositions thereof as may pertain to Equity; that the Master do also report in whose hands the same is, and has been, since the death of the said Paul R., and what compensation should be allowed for the use thereof, setting off necessary expenses; that Mrs. Mary Mazyck do come to an account before the said Master, touching Mrs. Hop-

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kins' interests under her father's will, *and her interests in the value and hire of the one-fifth of the slaves of Benjamin Mazyck's estate, which was bequeathed by Stephen Mazyck to the said Mary, and that the said Master do report an account of the estate of Stephen Mazyck not yet administered, what is due on Mrs. Hopkins' legacy, and what assets there are for the payment thereof, and that he further report the value of Mrs. Hopkins' interest in the said one-fifth of the slaves of Benjamin Mazyck's estate, bequeathed as aforesaid to the said Mary, as well as the value of their hire, and Mrs. Hopkins' share thereof; that the complainants be allowed two months after the several reports, above directed, be made out and filed, to elect in writing, to be filed with the register, between Mrs. Hopkins' legacies under her father's will, and her share in one-fifth of the slaves aforesaid, and their hire, to the one or the other of which they shall be entitled, according to their election, subject, however, to all exceptions which may be put in by either party, to the reports of the Master, and allowed by the Court; and that the costs be reserved until the reports of the Master be brought in.

The plaintiffs appealed from so much of the decree as decided that Benjamin, Paul and Alexander, under the will of their father, Stephen Mazyck, were entitled to the real estate of the testator in fee.

Because the testator first gives them an estate for life in particular tracts of land, then a remainder to their children in fee, and afterwards devises the rest and residue of his estate to them jointly, which evidently refers to property not before disposed of, and has no tendency to enlarge their estates.

The defendants also appealed on the grounds:

1. That plaintiffs did not, in their bill, put in issue the deed of Paul Mazyck, and made out no case for relief thereon, and were, at best, entitled to discovery only.

2. That if relief could have been granted them, under the allegations of their bill, it should have been refused, for the want of parties—the representatives of Paul Mazyck not being before the Court.

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*3. That, at all events, the motion of defendants for leave to file a cross bill, or to amend the answer, so as to effect the same object, by setting up the will of Paul Mazyck, ought to have been granted.

H. S. Legare, for defendants.

The opinion of the Court was delivered by

O'NEALL, J. We concur with the Chancellor, that the sons of Stephen Mazyck, under the thirteenth clause of his will, took a fee, in the land devised to him during life, and after his death to his wife for life, by Benjamin Mazyck, with the power of appointment by his will, among his children, grandchildren, or great-grandchildren, after her death.

The effect of the appointment, as to the quantity of estate created by it, must be judged of by the same rules as if the property had belonged to the person making the appointment.

The estate which Stephen had the power to devise, under the codicil of Benjamin Mazyck, was the reversion in fee after the death of his wife. Out of it he carved, first, an estate for life to his sons; second, to the children of his sons; and third, cross remainders among his sons, upon the contingency of either dying without children;—the ultimate reversion in fee, upon all these estates failing, was, however, not disposed of in the direct devises to the sons.

The thirteenth clause may be properly termed the residuary clause, under his power of appointment. It is in the following words: "I give, devise, and bequeath, the rest, residue and remainder of my estate, real and personal, whatsoever and wheresoever, including any estate, real or personal, not herein before particularly devised and bequeathed, which I may have derived under the will of my father, unto my sons, Benjamin, Paul and Alexander, and unto such child or children whereof my wife may be encient

at my death, who may be born alive, share and share alike, and to their heirs, executors, administrators and assigns forever." The intention to execute the power of appointment, by devising the whole estate in the land, is most obvious, and the only question

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is, does the ultimate reversion in *fee pass under this clause? If it was so intended—and this is manifested by the words used—it will be conceded that it must take effect. It was supposed that this clause had only relation to such parts of the estate as had not been previously mentioned in the will of Stephen. But that construction cannot prevail: for the words used are "any estate, real or personal, not herein before particularly devised and bequeathed." What estate in the land was not, in the will, before particularly devised and bequeathed? The ultimate reversion in fee is the answer. However strange it may appear to us, that he should devise to them the ultimate reversion, upon the failure of their own and their children's estates, yet there is nothing to prevent it from having legal effect. When stripped of the confusion of the different clauses, devising to the sons separate estates for life, and to their children after their deaths, the effect of the whole will, taken together, is, that the sons (for there was no child or children of which his wife was encient at his death) take a joint estate in fee in the land, to be defeated by all, or either, leaving issue living at their or his death, when the estate in fee would be severed, the issue taking in fee the particular lands devised to their respective fathers for life.

In 1 Rob. on Wills, 439, it is said "that a residuary clause will extend to every latent reversion which the testator might have in him, unless it be expressly excluded by devise to some other person." This rule must apply to the construction of a will, making an appointment, as well as to a devise of the testator's own estate. The object, in both cases, is to ascertain, by a fixed rule, what was the intention. The devisor appointing, stands in the place of the person from whom he derives his power, and, if his devise is within its limits, and clearly indicates an intention to devise, its effect must be judged of by the same rule which would have applied to the same devise by his devisor or grantor. If this clause had been found in the will of Benjamin Mazyck, after the devises of estates for life to the sons of Stephen, and after their deaths, to their children, with cross remainders to the sons, the

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latent reversion in him *must have passed under it: for, in the language of the authority, it is not "expressly excluded by a devise to some other person."

The next question relates to the trust deed from Paul R. Mazyck, in favor of his mother, brothers and sisters. This deed is not set out in the bill, as part of the complainants' title to relief; it is referred to in the schedule annexed to the marriage settlement, which is filed as an exhibit. This I do not think was sufficient. It might have been enough in a bill for discovery. But when it is made the ground of relief, it should have been charged in the bill to have been executed, and filed as an exhibit. Unless this is done, it will be impossible to say, from the record, that the complainants are entitled to relief in this respect. It might be that the deed, on being charged and exhibited, would at once appear to be void, or that other parties, not before the Court, were necessary to an adjudication upon it. The latter supposition turns out, in this case, to be true. The trustees named in the deed, or the survivor of them, are parties in interest. For the trust, either entirely or partially, may not be executed, and, if so, the legal estate in the whole, or part of the property conveyed by the deed, is in them, and it follows that they must be made parties, before any decree in the cause can divest it. So, too, I apprehend, the executor of Paul R. Mazyck, or if there is no qualified executor, his administrator cum testamento annexo, must be made a party. For it may be that debts exist against his estate, which would be entitled to be paid out of the property conveyed by the deed of trust: and if so, his executor or administrator can alone bring them before the Court. It is true that these objections are brought to the view of the Court at a very late period of the cause, but still they are such as must be listened to at any stage of the case: for, until remedied, they must prevent a decree for relief under the deed of trust.

In the case of Jones vs. Jones, 3 Atk., 110, the bill charged forgery in a lease, and prayed to be relieved against that; but, by way of inducement, only mentioned there were

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fraudulent *circumstances attending this case, without making it a distinct charge from the forgery, or bringing the trustees, who were parties to the lease, and to whom the fraud was imputed, before the Court, and for the want of this the defendant's counsel objected to the plaintiff's going on with the cause. Lord Hardwicke said, as there had been already a decretal order, and an issue to try the forgery, and brought on now upon the Equity reserved, the only method to assist this case was to let the cause stand over, and to allow the plaintiff, on paying the costs of the day, to bring a supplemental bill, in which he may charge the fraud and make the trustees parties.

This authority, it seems to me, covers two of the objections taken—the necessity of setting out the trust deed, and that the trustees or the survivor should be made parties: for, in this case, as in that cited, the trust deed in this, as the fraud in that, is the ground

of relief, and it is not made a distinct substantive charge; it can be hardly considered as even stated by way of inducement, and the trustees or the survivor are, or is, the party against whom the legal relief is to be obtained.

In the case of Humphreys vs. Humphreys, 3 P. Wms., 349, and of Farley vs. Farley, 1 McC. Eq. 514, the rule is distinctly established, that the Court will not decree upon the rights of a deceased person, until his executor or administrator is made a party, complainant or defendant, even although the person entitled to administration may be a party.

It is ordered and decreed, that so much of Chancellor Johnston's decree as conflicts with this opinion be modified, according to the principles herein contained, and that the cause be remanded to the Circuit Court, and that the complainants have leave to amend their bill, by setting out the trust deed executed by Paul R. Mazyck, in favor of his mother, brothers and sisters, and to make the trustees, or the survivor, and the executor, or administrator, with the will annexed, of the said Paul R., parties to this cause.

JOHNSON and HARPER, JJ., concurred.

Decree modified.

Rich. Eq. Cas. *283

*ROBERT W. BARNWELL, Executor, v. M. A. WARING.

(Charleston, March and April Term, 1832.)

[*Judgment* ⟸876.]

Lapse of time, less than sixteen years, with circumstances, *held* to raise the presumption that a judgment was satisfied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1648; Dec. Dig. ⟸876.]

Before De Saussure, Ch. at Charleston, April, 1831.

De Saussure, Ch. The bill is filed, in this case, to oblige the defendant to account for the estate of John Rhodes, which was assigned to the defendant, Morton A. Waring, and others, who are now dead, to pay his debts. The demand of the complainant is founded on a judgment, confessed for $679, on the 6th April, 1813, by Rhodes and Otis, to the late J. G. Barnwell. Afterwards, on the 16th May, 1816, the said John Rhodes assigned his estate, as a fund for the payment of his creditors, and died soon after, intestate and insolvent. No administration has been taken out on his estate. The assignees possessed themselves of the estate, and have paid many of the debts; but the debt of complainant remains unsatisfied, and the bill seeks relief. The answer admits these facts, and sets up two defences, viz., first, that the demand of complainant is barred by the statute of limitations, or lapse of time; second, that, if not barred, there is a good discount for part thereof, on Mr. Rhodes.

The first question depends on dates. From the confession of judgment in the month of April, in the year 1813, to the filing of the bill, in March, 1829, is not quite sixteen years. It is acknowledged that the presumption of payment, from the lapse of time, arises at the end of twenty years; but the presumption may arise earlier, under peculiar circumstances corroborating the presumption. I do not perceive any such circumstances in this case. Upon the assignment of Mr. Rhodes, for the benefit of his creditors, it was natural that the creditors should forbear till the assignees could sell the estate, and apply it to the benefit of those entitled. If the complainant, or his testator, was late in applying to his assignees, the laches was not so great as to

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*amount to a bar of the demand; but it was so great as to authorize the assignees to make payments to those more vigilant creditors who applied—so that the Court will not disturb the arrangements and payments actually made to other creditors, before this bill was filed, and will direct the payment of what may be due to the complainant, out of the funds remaining in the hands of the assignee.

What remains due to the complainant depends on the second question, relative to a note alleged to have been due by J. G. Barnwell to Mr. Rhodes, or to Rhodes and Otis. The complainant insists that the note has been barred many years. It appears to have been given anterior to 1807, for in that year Mr. Rhodes gave a credit on the note. No demand, no suit has been shown since, and Mr. Rhodes, in confessing the judgment in 1813, would not have forgotten to deduct what was due on the note, if any thing was then due. At any rate, it is plainly barred by the statute.

It is ordered and decreed, that the defendant do pay, out of the assets remaining in his hands, the amount of the debt due on the judgment confessed to Mr. Barnwell, but without interest. The costs to be paid out of the fund.

From this decree, the defendant appealed on the ground:

That the lapse of time, and the circumstances of the note never having been taken up by Mr. Barnwell during his lifetime, and the judgment remaining without being revived, or execution taken out, and without any demand being made, for sixteen years, upon the assignees, (although there were frequent advertisements for demands in the papers of Charleston,) ought to bar complainant's demand after Mr. Barnwell's death.

The opinion of the Court was delivered by

O'NEALL, J. The presumption of payment, when depending on lapse of time alone, can-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

not arise in a less time than twenty years; but if other circumstances exist in a case, inducing a reasonable belief that the party

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would not have suffered the *debt to have remained so long dormant, unless it had been paid, a less time than twenty years, in connection with, and aided by, such circumstances, may authorize a Court and jury, or a Chancellor, to presume payment. What circumstances, in connection with lapse of time, will be sufficient to raise this presumption, must, in some degree, depend upon each case. The settlement of other subsequent demands, the contiguous residence of the parties, the poverty of the obligee and affluence of the obligor, the existence of a demand on the part of the obligor, to the amount of the debt due the obligee, and against which the lapse of time would be a bar, and the necessity that the creditor should have claimed payment out of the fund in the hands of an executor, administrator, or assignee, to prevent its being paid away to others, may all very well, when united with the lapse of a great many years, create a reasonable belief, (which is but another name for a legal presumption,) that the debt has been paid.

In the case of Blake v. Quash and Pinckney, fourteen years intervened between the last payment made by the heir and the institution of the suit. "The heir at law, and the attorney, Lining, in whose hands the bond had been placed for collection, lived in the same street, in the same city." Lining was well known to be peculiarly attentive to the discharge of his professional duty, and "therefore," (says Judge Colcock, who delivered the opinion,) "it is fair to presume that the bond was paid." 3 McC., 340.

In the case before us, upwards of fifteen years elapsed from the confession of judgment to the institution of this suit. During that time, the creditor, Barnwell, and the defendant's assignors, Rhodes and Otis, have died. No attempt was made to enforce collection—not even a fi. fa. was issued on the judgment; no demand of payment was made on the assignee, notwithstanding his advertisements for creditors to present their demands. In his possession is found a note on Mr. Barnwell, payable to Bold and Rhodes, for nearly the amount of the judgment. He swears, in his answer, that when he entered on his

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*duty as assignee, he was told that it was a satisfaction of the judgment, and that he so marked it on the list of debts due by the assignors. It is true that the debt of Bold and Rhodes was not a legal set off to the judgment of Rhodes and Otis; but yet it may have been that it belonged to them, and if so, this would have made it a good equitable set off. The confession of judgment of a different firm could not have concluded the other firm from legally asserting the debt on the note. It appears that it was given in 1807, and was consequently barred by the statute of limitations, before the confession in 1813; but still Mr. Barnwell would, if it had been a just debt, in all probability, have been disposed to pay it, and the presumption arising from suffering his judgment to stand so long without requiring payment, would be, that he considered the note as balancing it.

Taking all the circumstances in the case, in connection with the lapse of upwards of fifteen years, it is a reasonable conclusion that the judgment was satisfied, by an understanding between Barnwell and Rhodes, who lived in the same neighborhood, that the note to Bold and Rhodes should be applied to its payment.

It is ordered and decreed, that Chancellor De Saussure's decree be reversed, and the bill dismissed with costs.

JOHNSON, J., concurred.

HARPER, J. I concur, except as to the expression "reasonable belief, (which is but another name for legal presumption.") I understand legal presumption to come in place of proof, and to be distinguished from actual belief.

Decree reversed.

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*SAMUEL HARVIN et al. v. THOMAS RIGGS, Adm'r.

(Charleston. March and April Term, 1832.)

[*Executors and Administrators* ⇐131.]

R. R. died intestate in 1810, leaving as his distributees, his mother, a sister S. R., and several nieces, infant children of a deceased sister. The mother took possession of the estate, and kept and used it as her own, without administration, until 1828, when she died leaving a will by which she devised and bequeathed her whole estate to S. R. Defendant, husband of S. R., administered with the will annexed, and also administered on the estate of R. R. On bill filed by the representatives of the nieces, the youngest of whom came of age in 1824, *held*, that defendant, as representing the mother, was not protected by the statute of limitations; that he was bound to account from the death of R. R., for rents and profits, with interest from that time on annual balances.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 542; Dec. Dig. ⇐131.]

[*Limitation of Actions* ⇐82.]

Against the representatives of an intestate, the statute of limitations will not run until administration granted.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 425; Dec. Dig. ⇐82.]

[*Guardian and Ward* ⇐44.]

He who takes possession of the estate of an infant, holds as bailiff or guardian of the infant, and shall account for rents and profits from the time the infant's title accrued.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 198; Dec. Dig. ⇐44.]

Before De Saussure, Ch., at Walterboro', January, 1831.

De Saussure, Ch. The case came up on the report of the Commissioner, (and exceptions thereto on behalf of complainants,) that the complainants have established their right; and he has stated the amount for which the defendant is accountable. He charges the defendant with the hire of the slaves in question, from 1811 to 1829, with interest on that hire, together with the amount of sale of the slaves in 1830, and the amount of the land—the whole amounting to $6,630.13; to one-third of which the complainants are reported to be entitled. The first exception insists that the complainants are not entitled to any account as the statute of limitations applies to the case, and operates as a bar. This, however, is a bill for the settlement of an estate among co-heirs, one of whom has been in possession of the estate, and the statute does not apply to such a case; though great laches, for an extreme length of time, might make it a stale claim. The second and third exceptions insist, that the account, if directed at all, should not be carried back further than the fall of 1828, when a demand was first made; or, at all events, not further than four years from the filing of the bill, which was in November, 1829.

The counsel for the defendant, relies upon

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the fair conduct of *the defendant, Mr. Riggs, who frankly gave all the information which enabled the complainants to make out their case, and upon his good management of the property, which was not worth, at first, half the amount now reported; and he assimilated this case to that of Rowland and Best, as reported in 2 McC. Eq. 317.

There is no doubt that Mr. Riggs has behaved himself with great propriety and frankness, and has accounted fairly. This, however, does not establish a right to be exempted from paying to the complainants what they are justly entitled to according to these accounts. The other ground taken by defendant is stronger. There was great laches in pursuing the claims of the complainants, which might have been done by friends, or an administrator, notwithstanding the minorities stated. The case of Rowland and Best, rested on laches, but not wholly so. The defendants in that case, held the property for many years, fairly and bona fide, under an apparent right adverse to the complainants, a right established by the Court of Ordinary, though the same was reversed many years afterwards. And in the interval, the complainants lay by and made no claim. The Circuit Court, therefore, restricted the account to four years before the filing of the bill, and that eminent jurist, Judge Nott, wished that the decree of the Circuit Court had limited the account to the filing of the bill, though he ultimately affirmed the decree.

In the case before us, the defendant administered, and held the property for the use of those interested therein, but never set up, or established a claim adverse to that of the complainants. There has been some laches on the part of the complainants, but not enough, nor of a character, to authorize the Court to cut off any part of the principal. The interest is more under the control of this Court, and the objection of laches may fairly be applied to that. The complainants permitted the defendant to remain in possession of the property for many years, without even a demand for the settlement until the autumn of 1828. It appears to me, that it would be proper to cut off the interest on the annual sums, stated in the account to be due by the

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defen*dant, till four years before the filing of the bill. It is, therefore, ordered and decreed, that the exceptions be over-ruled, except so far as related to the interest, which should not be allowed on the annual amounts till four years before the filing of the bill; and the Commissioner is hereby directed to correct his report accordingly, which, when so corrected, shall stand as the amount due, and to be paid by the defendant to the complainants. Each party to pay their own costs.

The complainants appealed on the following grounds, to wit:

1. Because the complainants are entitled to interest upon the annual balances of the account, from the time of the decease of Richard Rogers.

2. Because the decree is in other respects contrary to law and equity.

The defendant also appealed:

1. Because the complainants are not entitled to any account at all, being barred by lapse of time, and the statute of limitations.

2. Because the account should not be carried back beyond the filing of the bill, or at most beyond four years from the filing of the bill—the parties having lain by for eighteen years, and permitted Mrs. Rogers to use the property as her own.

The opinion of the Court was delivered by

JOHNSON, J. Richard Rogers, the defendant's intestate, died in 1810, intestate, leaving a mother, Tabitha Rogers, a sister, Sarah Riggs, wife of defendant Thos. Riggs, and three nieces, Sarah Ann, Mary and Eliza T. Spears, infant children of his deceased sister Mary Spears. Sarah Ann, one of the nieces, intermarried with the plaintiff, Samuel Harvin, and died in March, 1828, leaving six children, who are represented in this suit by their father, the plaintiff, Samuel Harvin, as their next friend. Eliza T., another of the nieces, intermarried with the plaintiff, Samuel B. Davis, and died in January, 1828, leaving three children, who are represented

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in this suit by the plaintiff, *their father,

Samuel B. Davis, as their next friend. Mary, the third niece, died in 1819, without issue, unmarried and intestate.

At the time of his death, Richard Rogers, defendant's intestate, was possessed of a considerable estate, consisting principally of lands and negroes, and his mother took possession of it immediately after his death, and retained and used it as her own, without administration, until her death in 1828. By her will, she devised the whole of her estate to her daughter Mrs. Riggs, wife of defendant: and the executor therein named having refused to qualify, administration of her estate, with the will annexed, was granted to defendant. Administration of the estate of Richard Rogers, was also granted to the defendant, not long before the filing of this bill, none having before been granted.

From this statement of the case, it is apparent, that the complainants, representing Mary Spears, the sister of the intestate, Richard Rogers, were entitled, under the Act of distributions, to one-third part of his estate; and the Chancellor has directed distribution accordingly, and that the defendant, as the representative of Tabitha Rogers, shall account for the rents of the lands, and hire of the negroes, during the time she had them in possession, but that interest, on the annual accounts, shall be calculated only for the four years immediately preceding the filing of the bill.

The plaintiffs appeal on the grounds:—That they are entitled to interest on the annual accounts during the whole time Tabitha Rogers had possession of the estate.

And defendant appeals on the grounds:

1. That the whole account is barred by the statute of limitations.

2. That if plaintiffs are entitled to an account, it ought not to be carried back further than the time of filing the bill; or, at most, to four years immediately preceding that time.

The statute of limitations is very clearly no bar to this account. If there was ever any

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doubt about it, the case of *Geiger v. Brown, 4 McC. 418, is decisive, that technically, it would not run until administration granted, and it is not pretended that it is barred according to this rule, for here it was not granted until very shortly before the filing of the bill, and there is nothing in the case to take it out of the general rule.

The remaining questions on both sides will be more conveniently considered in one general view. From what time is the defendant liable to account for rents and hire? and from what time ought the interest to be computed on the annual accounts? are the only points involved in them.

At the time that Tabitha Rogers took possession of the estate, Sarah Ann, wife of complainant, Harvin, and Eliza T., wife of complainant, Davis, were infants, and unmarried; the former came of age in 1818, and the latter in 1824, (when they were married, does not appear.) The rule laid down in Dormer and Fortescue, 3 Atk. 130, is, that he who takes possession of the estate of an infant, holds as bailiff or guardian of the infant, and shall account for rents and profits from the time the infant's title accrued, and so, in Bennett v. Whitehead, 2 P. Wms. 645, the father as defendant knew the title was in the infant. Every one who possesses himself of the property of another, and uses it for his own benefit, is bound, according to the universal principles of natural right, to account to the owner for the profits; and this rule is nothing else than the rigid application of the principle to the cases of infants, to whom negligence will not be imputed. In other cases, exceptions are sometimes allowed, of which Rowland v. Best, 2 McC. Eq. 317, is an instance. There defendant took possession, under a nuncupative will, proved and allowed in the Court of Ordinary,—thus having the sanction of a Court of competent jurisdiction that the property was in himself. Under these circumstances it was unreasonable to expect, that he would keep an account of rents and profits, or be able to make up an account after a great lapse of time, and, in analogy to the statute of limitations, he was ordered to account for the four years immediately preceding the filing of the bill, within which

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period, it was presumable, evi*dence of the rents, profits and expenditures might be obtained. When we know that we are bound to account, we are more attentive to the minutiæ which go to make up the business of the year, and the evidences of the receipts and disbursements are put in a form to be preserved for future use; but in the management of our own concerns, planters, particularly, generally concern themselves but little about anything but the general result of years put together; and, as was said in Phaelon v. Perman, 2 McC. Eq. 423, an account, under these circumstances, after a long period, would for the most part prove ruinous.

The defendant states in his answer, his confident belief that Tabitha Rogers thought the property her own: she mixed it up with, and used it as her own, without keeping any account at all. She spoke of it, and undertook to dispose of it by will, as her own, and the acquiescence of the persons entitled, for so long a period, had the effect, it is said, of deceiving her into the belief that it was her own.

Tabitha Rogers could not have been ignorant that the estate belonged to her deceased son, Richard Rogers, and that he died intestate. She knew, too, that besides herself, his mother, he left a sister, and the children of a deceased sister, surviving him, and the law presumes that she knew the es-

tate was distributable amongst them, and that she was bound to account with the infant distributees, when they should attain full age. She had all the means of being fully informed as to the rights of all concerned. If she was, in truth, ignorant of the law, she was wilfully so. The rule for the distribution of the estate is prescribed by an Act of the Legislature, in plain and unequivocal terms, and is well known and understood, not only by the profession of the law, but by the community at large, and it was her folly or misfortune, that she did not take care to be advised. But suppose her, in fact, ignorant of the law, that could not, under any circumstances, deprive the complainants of any legal right. Besides that, at the time the rights of Sarah Ann and Eliza T. accrued, they were infants, in the one case for eight years, and the other for

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fourteen years after, and during that *period, at least, their acquiescence in her possession could not be imputed to them as laches: as infants, they had neither the will nor the power to assert their rights. This was the state of things at the time the possession of Tabitha Rogers commenced, and, according to the rule, she must account during the period of their infancy; and, if it is practicable to make an account during that period, it is equally practicable for the subsequent period. We are, therefore, of opinion with the Chancellor, that defendant is bound to account for rents and hire of negroes, for the whole period Tabitha Rogers had possession of the estate.

We are unable to see any principle, or rule, which will sustain the Circuit Court in refusing to allow interest on the annual accounts. It appears to us necessarily to follow the liability to account. It constitutes a substantive part of the annual profits: as much so, in legal contemplation, as the rents and hire themselves; and it is the less objectionable on account of the length of time, because it is ascertained, by a rule that cannot err, and which is alike applicable under all circumstances, when the debt is ascertained. As a rule of right, the Court has no discretion over it. In this respect, the decree of the Circuit Court must, therefore, be reformed, and it is ordered and decreed, that, in making up the accounts between the parties, the Commissioners do charge defendant with interest on the annual accounts, according to the usual practice of the Court.

We are of opinion, also, that the costs should be paid out of the estate of Richard Rogers, and it is so ordered. The estate, probably, could not have been settled satisfactorily without suit. It was, at best, involved in such confusion and uncertainty, as to excuse the defendant in contesting the plaintiffs' claim to the account for the whole period. This, too, was the only mode in which partition could be effected, and it is but reasonable that the parties should contribute to the expenses of the proceedings, in proportion to their interest—and that is the effect of this order.

O'NEALL, J., and EARLE, J., sitting for HARPER, J., concurred.

Decree modified.

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*HESTER TIDYMAN v. HUGH ROSE, Ex'or of Catharine Coffie.

(Charleston. March and April Term, 1832.)

[*Life Estates* ⇐15.]

Testatrix, under a power to limit and appoint, after the death of her husband, who was tenant for life, bequeathed three slaves, by name, to H. T.; all the slaves, except the three named, "and all the issue and increase of the female slaves," she bequeathed to her son. Husband survived the testatrix many years, and during his life, two of the three slaves named, being females, had issue:—*Held*, that testatrix's son, and not H. T., was entitled to the issue born during the life-time of the husband.

[Ed. Note.—Cited in Boyd v. Satterwhite, 12 Rich. Eq. 492, 494.

For other cases, see Life Estates, Cent. Dig. §§ 21, 34, 35; Dec. Dig. ⇐15.]

[*Life Estates* ⇐15.]

A bequest of slaves in remainder, after an estate for life, generally carries to the remainder-man the issue born during the estate for life; but the testator may, if he thinks proper, make a different disposition, and separate the issue from the parent.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 34; Dec. Dig. ⇐15.]

[*Wills* ⇐573.]

The principle decided in Haynesworth v. Cox, Harp. Eq., 117) and Gayle v. Cunningham, (Id. 124,) that the issue of a female slave born between the making of the testament and the death of the testator, passes under a bequest of the mother, re-examined and dissented from.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1246–1251; Dec. Dig. ⇐573.]

[*Accession* ⇐1.]

The issue of a female slave cannot be regarded as accessories according to the principles of the civil law.

[Ed. Note.—For other cases, see Accession, Cent. Dig. § 9; Dec. Dig. ⇐1.]

[*Wills* ⇐481, 578.]

As a general rule, the time of the testament is to be referred to, for the purpose of ascertaining what passes under the bequest; and though a testator may dispose of personal property to be afterwards acquired, yet his intention so to do must, in some manner, be expressed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1005, 1258; Dec. Dig. ⇐481, 578.]

[*Wills* ⇐573.]

A bequest of a female slave, without more, does not carry her issue, born between the making of the testament and the death of the testator; otherwise if she be bequeathed with her issue; semble.

[Ed. Note.—Cited in Boyd v. Satterwhite, 12 Rich. Eq. 492, 494.

For other cases, see Wills, Cent. Dig. §§ 1246–1251; Dec. Dig. ⇐573.]

Before De Saussure, Ch., at Charleston, April, 1831.

De Saussure, Ch. By a marriage settlement between Barnaby Coffie and Catharine Carne, dated 15th June, 1793, the estates of Mrs. Carne were settled to the use of the intended husband and wife, during their joint lives, remainder to Mr. Coffie for life—remainder to such persons as Mrs. Carne, by her last will, notwithstanding her coverture, might limit and appoint. The marriage was had, and Mrs. Coffie died in the life-time of her husband. By her last will, dated 7th March, 1805, among other things, she gave as follows: "I give, devise and bequeath to my niece, Mrs. Hester Tidyman, and her executors, administrators, etc., my negro woman slave, named Elsy, and her two children, Mary and Syphax." All the negroes, except the wench, Elsy, and her two children, "and all the issue and increase of the female

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slaves," she gave to her son, *Major Samuel Carne, of Danbury, in Essex, in the kingdom of Great Britain, with limitations over. Mrs. Coffie died soon after the execution of her will. Mr. Coffie survived her, and died in the year 1830. During his life, a son of Elsy, called Joe, and two children of Mary, called Ann and Nancy, were born, who are at this time of mature age; and Elsy, the grandmother, died in the life-time of Mr. Coffie.

The question is between Mrs. Tidyman and the legatee of the general legacy of all the testator's other negroes, besides Elsy and her two children. This question is decided by the authorities. Milledge v. Lamar, 4 Desaus. Eq. Rep., 640, settled the point between the legatee for life and the legatee over, that the issue of female slaves, born during the estate for life, belong to the remainder-man. This was in conformity with the decision in the prior case, of Ellis v. Shell, 4 Desaus. Eq. Rep., 611, and has been followed by the subsequent cases. In Gayle v. Cunningham, (Harp. Eq., 124,) the question turned on the birth of issue after making the will and before the death of the testator, and it was held that the issue passed to the legatee. The issue was born in the life-time of the testator, after making his will. It was held that the issue passed to the specific legatee. The authority of these cases is direct, and disposes of the question before me.

It is, therefore, ordered and decreed, that the defendant deliver to complainant the slaves, Mary, Syphax, Joe, Amos and Nancy, and account for their hire from 1st January, 1831; costs to be paid out of the estate of Mrs. Coffie, the testatrix.

From this decree the defendant appealed.

The opinion of the Court was delivered by

HARPER, J. We have no doubt but that the rule has been correctly settled by our Courts, that in case of a bequest of slaves for life, with remainder, the slaves born during the continuance of the life estate go to the remainder-man. The remainder-man has a present vested interest, though his possession

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*be postponed, and the issue belong to him, on the same ground that the absolute and exclusive owner of female slaves is entitled to the issue. It would be otherwise, indeed, if the issue of slaves could be considered in the nature of profits. The tenant for a limited time is entitled to the profits or use. But there is a distinction in the nature of things, and in the common understanding, which the civil law has adopted, between the issue of slaves and of animals. The profits of a flock or herd consist in the increase—the legatee of them cannot fully use them, without destroying individuals,—he may, therefore, take the increase, only keeping up the stock. If a blooded mare be given for a limited time, the intention will be understood, that the donee may breed from her. All this has no application in the case of slaves, and the general rule of law applies, that the owner of the parent is entitled to the offspring.

In the present case, if there were nothing more than a mere bequest to Mrs. Tidyman of the slaves Elsy, Syphax and Mary, in remainder, after the life estate of Mr. Coffie, I should think her entitled to the issue, on the principle referred to. But the testator may make a different disposition, if he thinks proper, and separate the issue from the parent—and we think the words of this will do express such an intention. The bequest is of all the negroes included in the marriage settlement, "except my wench Elsy, and her two children, Syphax and Mary, and all the issue and increase of the female slaves, to my beloved son, Major Samuel Charles Carne," etc. The obvious signification of this is, to give to the legatee all the negroes, with the exception of the individuals mentioned, and all the issue of the females without exception. I am aware that these words, "issue and increase," are sometimes used, in making a transfer or bequest of slaves, merely to signify the quantity of interest, and to import absolute property; but they are not necessary for that purpose. It is possible that they may have been so used in this instance. But it is to be observed that the testatrix does not use these words in her bequest to Mrs.

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Tidyman, but the *more appropriate ones limiting to executors and administrators, and we cannot conjecture a meaning for her, contrary to the plain import of the words themselves.

It has been thought that the case comes within the principle of the cases of Haynesworth v. Cox, Harp. Eq., 117, and Gayle v. Cunningham, Harp. Eq. 124, which decide that the issue of a female slave, born between the making of the will and the death of the testator, pass under a bequest of the

mother. Though it may not be absolutely necessary to the decision of the present case, yet we have thought it of importance to the public, that the principles of those decisions should be re-examined. I believe that the profession and the public have not been fully satisfied with these decisions. We have examined them with the deference which is due to the respectable authority by which they were decided, and it seems to us that they involve a departure from the most firmly settled principles, and constitute an anomaly in our system, and may introduce further uncertainty. The first case was decided by three against the opinion of two of the judges of the late Court of Appeals. Under these circumstances, we feel it to be our duty respectfully to express our dissent from the principles of those decisions.

The true principle is a very simple and obvious one. Nothing passes under a bequest but what is included under the description of the subject of the bequest. We are not to conjecture a man to have given what he has not expressed his intention to give. It would be difficult to imagine how Joe (an adult when the bequest was to take effect,) and the two children of Mary, could be included under the description of "Elsy and her two children, Mary and Syphax." The cases do not distinctly put it on the ground, that they are accessories, according to the meaning of the civil law, and it is plain that, even according to the civil law, they could not be so considered—certainly they are not part of the principal legacy.

What is said by Lord Hardwicke, in Downing v. Townsend, Amb. 280, is quoted in the case of Gayle and Cunningham: "The general rule as to testaments is, that the time of

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the *testament, not of the testator's death, is to be regarded; but that this rule admits of many distinctions and exceptions." It is meant that the time of the testament is to be referred to, for the purpose of ascertaining what passes under the bequest. In general, the property which then answered the description, and which the testator must have had in his mind, is to pass by the will. This admits of distinctions and exceptions: but I cannot conceive that the present instance comes within any of them. It is no exception when a piece of land is given, on which a house is afterwards built, or a house, to which columns and porticoes are added. The thing which answered the description at the time of the testament passes, and the accessions are inseparable from it. The case of the bequest of a flock can hardly be regarded as an exception. The flock is the same at the death of the testator as at the time of the testament, though the individuals composing it may be changed. It may be said, in general, that nothing but what answered the description at the time of the testament will pass. This is sufficiently indicated in the case of all a testator's pictures, or slaves, or personal estate. The aggregate of personal estate, in general, or of any particular description of personal estate, is of a fluctuating character—the constituent parts of it are changed from day to day—and a bequest of this sort is supposed to bear an analogy to that of a flock: the same estate or collection is given, though the parts of it are changed. So in the case of the devise of a plantation, with the stock and slaves. A testator may, by his will, dispose of personal property, to be afterwards acquired; but he must, in some manner, express his intention to do so. If a female slave be given, with her issue, this will include all the issue she may have, up to the time of her death.

The construction in question, has been referred to the civil law. I am not at all disposed to detract from the merit which is ascribed to that admirable system. It is of excellent use to aid us where the common law is obscure or doubtful; not only as being the reason of enlightened men, but the source from which much of the common law

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is drawn. But still it is not *our law: the Court has no legislative power; and where the common law is not doubtful, we have no right to supersede it by provisions, which may appear to us better and more reasonable. But indeed I do not perceive that the rule referred to, is the doctrine of the civil law. With the exception of a single expression in the commentary of Vinnius, which may be of doubtful interpretation, the various authorities relied on, do not appear to me to have relation to this matter:

"Si quis ancillas cum suis natis legaverit, etiamsi ancillæ mortuæ fuerint, partus legato cedunt."

"Hoc paragrapho et tribus sequentibus docetur, quid juris sit, si rei legatæ, vivo testatore, vel decesserit aliquid vel accesserit. Si aliquid decesserit, ita jus est ut neque legatum extinguitur, nisi quod decessit, sit principale, reliquum accessorium; neque hæres teneatur supplere, quod decessit, sed præstatione ejus quod superest, liberetur. Hæc res quatuor exemplis declaratur: legati ancillæ cum suis natis; servorum ordinariorum cum vicariis, hoc §. legati gregis: §. seq. legati peculii, §. 20. Cæterum, ut dixi, ita quod superest, legato cedit, si id quoque principalitur legatum sit, non si ut accessio ejus, quod decessit; nam perempta re principali, etiam legatum accessionis extinguitur; quod ostenditur hoc §. exemplo legati servi cum peculio: item fundi, cum instrumento legati. Si quid accesserit, placet etiam illud legato cedere: cujus rei tria exempla proferuntur, legati gregis, cui postea adjecta plura capita, §. seq. legati aedium, quibus adjectæ columnæ et marmora, §. 19. legati peculii, cui deinde aliquid accedit, d. §. 20. Late autem hic locus patet. Nam huc etiam pertinent fructus, usuræ, pensiones prædior-

um, partus, fœtus, alluvio, insula in confinio nata, et plura alia, quæ hic non tangit Justinianus."

In speaking here of "partus," the issue of a female slave, as an instance of accession, it seems to me that Vinnius, has reference to the case put in the text, of the bequest of a female slave, expressly, with her children; in which case, if a child be born after the testament, and before testator's death, no doubt it will be added to the legacy. And

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the passage which follows, *seems intended to prevent any chance of misconceiving his meaning. Speaking still of the bequest of a female slave with her children, he says: "Poterat videri unum hic esse legatum principale; alterum, natorum scilicet accessorium; quod etiam Servio visum fuit, qui ob id, mortua ancilla, negabat partum deberi. Sed revera liberi matris accessio non sunt; statim enim ut sunt editi, separatam plane habent existentiam, et ideo recte Paulus scribit, duo hic esse legata separata, hoc est æque principalia." Vinn. in Inst. Lib. 2. Tit. xx.

Certainly, if there be any such rule, it is plainly to be taken with great qualification, and confined to the case of an infant, to whom the care of the mother may be still necessary, and can never apply to a case like the present, where the issue are of mature age, at the time when the devise is to take effect. Weight has properly been attributed to what is said by Sir Samuel Romilly, in the case of Norris vs. Harrison, 2 Mad. R. 481: "Suppose a female slave is bequeathed, and she has afterwards a son, who grows up to man's estate, and then testator dies, does the bequest of the mother pass the son? or if a mare be bequeathed, which afterwards has a foal, that grows up to a horse, and then testator dies, does the gift of the mare pass also the horse? Surely not." The expressions of Sir Samuel Romilly, are clear with respect to the son grown to manhood, or the colt grown to a horse; and there may be room to conjecture from his words, that a different rule would obtain, if they were still in infancy or immaturity. This is no more, however, than vague conjecture. The cases of Haynesworth vs. Cox, and Gayle vs. Cunningham, however, make no distinction of this sort, and it might be inferred from them, that though the children were grown up, or had families of their own, all must still pass under the bequest of the female ancestor. And indeed, by what authority could we make a distinction, and lay down any rule on the subject. Shall we say, that when the son has arrived at full manhood, he shall no longer pass as accessory to the mother? or at the age of puberty, when the parent's superintendence may be less necessary? or at

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the age of weaning, *when the mother's care may be supposed no longer indispensible? In this uncertainty, we have only to resort to the rule of our own law, that nothing shall pass, which was not intended to be given. Considerations of humanity might be of weight in a doubtful case, but apart from the decisions in question, I cannot regard this as a doubtful case. It is little that legal decisions can do to enforce humanity; this must depend on public opinion, and I do not fear that a single infant will be left to perish by being prematurely separated from its mother, in consequence of our present determination.

The maxim "partus sequitur ventrem," applies to the condition of these persons as slaves or free. It is a rule of property also, so far as to indicate, that the owner of the mother, and not of the father, shall be entitled to the children: but it can have no application to a disposition made by the owner, both of the parents and the children.

The principal case of Norris vs. Harrison, may serve to illustrate the rule, that the time of the testament is to be regarded in determining what passes under the bequest. In that case, the testator bequeathed £11,000 Bank Stock. After the making of the will, the Bank, under the authority of an Act of Parliament, in respect of profits accumulated, declared an additional capital, by which the Stock was increased to £13,760, and it was held, that the additional £2,750, did not pass under the bequest.

The decree of the Chancellor is reversed, so far as respects the slaves Joe, Amos and Nancy, children of Elsy and Mary.

JOHNSON and O'NEALL, JJ., concurred.

Decree reversed.

Rich. Eq. Cas. *302

*JOHN J. ALEXANDER et al. v. WILLIAM R. MAXWELL et al.

(Charleston. March and April Term, 1832.)

[*Chattel Mortgages* ⇐225.]

W. M. purchased negroes from R. W., and gave bond for the purchase money. The negroes had been mortgaged by R. W., and after they had been for some time in the possession of W. M., they were seized and sold under the mortgage, and at the sale, W. M. purchased them for a less amount than he had agreed to pay R. W.:—*Held*, that W. M. was not bound to pay any part of the purchase money, but only interest or hire during the time he had the negroes in possession before the sale for foreclosure.(*a*)

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 468; Dec. Dig. ⇐225.]

[*Sales* ⇐391.]

Where the eviction is under a legal incumbrance, as a mortgage, the consideration fails from the day of the eviction, and up to that time the vendor is entitled to rent, hire, or interest, if the contract bears interest.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1110–1127; Dec. Dig. ⇐391.]

(*a*) Moore & Nesbitt v. Lanham, 3 Hill, 299.

[*Judgment* ⟸665.]

A recovery in detinue by the donee, against the executrix of the donor, does not preclude the creditors of the donor from making the question, whether the gift is valid as to them.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1179; Dec. Dig. ⟸665.]

[*Fraudulent Conveyances* ⟸76.]

Vendee agrees to give a higher price than he otherwise would have given, if his bond for part of the purchase money is made payable to a trustee for his, vendee's infant daughters. Vendor takes the bond payable to the trustee and retains it until his death. The bond is good against the creditors of vendor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 192–196; Dec. Dig. ⟸76.]

[*Appeal and Error* ⟸1009.]

The entire responsibility of a decision on viva voce testimony is devolved on the Circuit Chancellor, as on a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. ⟸1009.]

Before De Saussure, Ch., at Georgetown, April, 1831.

De Saussure, Ch. The bill is filed by a judgment creditor of the late R. F. Withers, on behalf of himself and other creditors, in order to make his estate liable to their demands, according to their respective liens or rights. It appears, that the late R. F. Withers, on the 21st March, 1822, being justly indebted to Mr. J. J. Alexander, executed his bond in the penal sum of $24,000, conditioned to pay him $12,000; on which bond some inconsiderable payments have been made; but on the 28th April, 1828, there were upwards of $14,000 due. Judgment was obtained on the bond on the 24th March, 1827. R. F. Withers died soon after, in the same year, and his widow qualified on his will, and possessed herself of his estate. The bill alleges, that it was soon ascertained, that the estate of R. F. Withers was insufficient to satisfy his judgment creditors; whereupon a bill was filed in this Court, for the purpose of marshalling the effects of the said

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estate, which was decreed; *and the estate was sold by order of the Court, and the proceeds appropriated to the creditors, according to their respective legal priorities. The bill states, that among the vouchers, evidences of debt, found in the possession of said Withers, at the time of his death, were two bonds of W. R. Maxwell, one of the defendants, both dated 1st March, 1824—one of them conditioned to pay $4,400 to the said Withers, on or before the day of 182. (blank in the brief,) the other conditioned for the payment of the sum of $4,200 to Andrew Johnston, another of the defendants, in trust for Esther A. Maxwell, and Maria J. Maxwell, the infant daughters of said Wm. R. Maxwell, at the expiration of fifteen years from the date of the bond; the interest to be paid annually. The bill alleges, that the consideration of these bonds, was the sale and conveyance of certain slaves by said Withers, to the said W. R. Maxwell, at the time of the dates of said bonds, and it is distinctly alleged, that at the time of the transfer of said slaves, Withers was entirely insolvent. The bill states, that eleven of the slaves sold by Withers to Maxwell, were previously mortgaged by Withers, and on his death, they were seized and sold by the mortgagee: And Mrs. Withers, the executrix, in consequence thereof, surrendered up to Maxwell, one of the bonds for $4,400, improperly; and that Andrew Johnston, trustee of the bond of $4,200, brought suit at law against the executrix for said bond, and obtained verdict and judgment in detinue. The bill prays relief, and that the said W. R. Maxwell may be obliged to pay the said bonds, which were found in the possession of Withers at his death, in order that the same may be appropriated to the payment of his several creditors, according to the order established by the decree of the Court; and that Andrew Johnston, trustee as aforesaid, may be restrained from enforcing his judgment in detinue, recently recovered against the executrix of Withers, for the bond of $4,200, payable to him as trustee.

The answers of the defendants set up the following defences:

Mr. W. R. Maxwell insists that eleven of the slaves which he purchased from Mr.

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Withers, having been taken from him, *under a mortgage executed prior to the sale to him, and sold towards the satisfaction of that mortgage, he was entitled to reimbursement, to the amount of the purchase money, and that the executrix of Mr. Withers, being satisfied of the justice of his demand, delivered him up, to be cancelled, one of his bonds, conditioned to pay the sum of four thousand four hundred dollars, which she had a right to do, that being the price of eleven slaves, at four hundred dollars round, which was the price contracted to be given for them.

The defendant, Mrs. Withers, the executrix of Mr. Withers, states in her answer, that of the slaves sold by her testator to said W. R. Maxwell, it appeared afterwards that eleven had been mortgaged to the trustees of Mrs. Allen, and in the latter part of January, 1828, they were sold under said mortgage, (as defendant understood,) and purchased by Mr. Maxwell at $225 per head. That the bonds of said Maxwell had been left by defendant, with other papers of her testator, in the hands of Mr. Waterman; and soon after the sale above mentioned—to wit, on the 8th February, 1828—Mr. Waterman, under the advice of the counsel of Maxwell, surrendered to him one of the bonds, that for $4,400, on which two years interest was also then due, in consequence of the fact that the said

Maxwell had been dispossessed of the said eleven slaves. But he, at the same time, also gave to the said Waterman a written engagement to protect him, if the opinion should prove erroneous. The executrix of Withers also states, that one of the bonds of Maxwell, for $4,200, was made payable to Mr. Andrew Johnston, as trustee for the two infant daughters of W. R. Maxwell, and is claimed by Mr. Johnston for those two young ladies. He instituted a suit at law, in detinue, for the recovery of the bond itself against this defendant, and obtained a verdict and judgment for the same. Defendant cannot state the motive which induced the testator to have the bond drawn in that way, for he retained the bond in his own custody. She supposes the testator may have originally intended to leave this amount to the said minors, who were his near relations, and he

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was then *unmarried, and without children; but these intentions may have been changed by subsequent events. The defendant admitted that, at the time of said transaction, her testator owed large sums, and subsequent investigations render it most likely that his property was, at that time, insufficient to pay his debts. Yet she is satisfied this was not the impression he then entertained, and that, if he were disposed to make such gratuity, he would not have considered the just rights of his creditors affected by it.

The defendant, Andrew Johnston, admitted, that on the purchase of slaves by William R. Maxwell from Mr. Withers, one of the bonds for $4,200 was drawn, payable to this defendant in trust, for the two Miss Maxwells, daughters of the said Maxwell; that about the beginning of the year 1824, the said Maxwell contracted with the said Withers, for the purchase of forty-three slaves. The treaty was pending a considerable time; Withers proposed the sale at $400 for each slave; Maxwell objected to the price. Withers urged it, representing that the family of Maxwell should be benefitted by it. The defendant heard Withers tell Maxwell, if he acceded to his terms, he would do something for his family; and he believes these suggestions had great weight with Maxwell, to induce him to enter into the contract; and the defendant has no doubt that Withers, in taking a bond for about one-fourth of the purchase money, payable to the defendant, as trustee for Mr. Maxwell's daughters, was fulfilling, in some degree, the confidence raised by his assurances in the mind of Maxwell; that the slaves were not worth more than $300 per head, and Mr. Maxwell, he believes, would not have entered into the contract, (by which the slaves were valued at $400 per head,) but for the assurances of Withers; that Maxwell gave his bonds to Withers for $13,000 (which is a little more than $300 a head) for the slaves, besides the bond of $4,200, made payable to this defendant in trust. Defendant admits that he never had possession of the bond, in the life-time of Withers; but Withers often mentioned it to him, and told him he had made him a trustee thereof. Since the

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*death of Withers, this defendant has, as trustee, brought suit at law against the executrix of Withers, for the bond, and obtained a verdict and judgment, and he hopes to be allowed to have the benefit thereof.

At the hearing of the cause, Mr. Dunkin, counsel for the complainants, produced in evidence the mortgage from W. R. Maxwell to R. F. Withers, dated 1st March, 1824, to secure the payment of three bonds, one for $4,300, a second for $4,300, and a third for $4,400, making $13,000. The mortgage was for forty-three slaves (whom Maxwell had purchased from Withers) and a tract of land. Also another mortgage, from Maxwell to Andrew Johnston, dated 1st March, 1824, to secure the payment of a bond of $4,200 to Andrew Johnston, as trustee for the two Miss Maxwells, daughters of William R. Maxwell. The mortgage was of the same property as in the other mortgage. The counsel also produced a letter from Mr. Maxwell to Withers, of 29th Dec., 1823, in which he offered $400 a head for the slaves, one-half workers, on a long credit, without interest for the first year. The affidavit of Maxwell, of 31st Jan., 1828, was produced, to show that only eleven of the slaves were taken away from him, a twelfth died before that took place. In consequence of these negroes being taken away, Mr. Waterman, the agent of Mrs. Withers, the executrix of Withers, was induced to deliver up to Mr. Petigru, counsel for Maxwell, the bond for $4,400, on Mr. Petigru's giving a written memorandum, to indemnify Mr. Waterman. This paper was produced, and bore date 8th February, 1828. The counsel for the complainant also produced a list of judgments against R. F. Withers, which is in evidence. Some of the debts were as early as the year 1805. The great portion of the debts of Withers were before the sale of the slaves to Maxwell, in the year 1824. The debt due to Mr. Alexander, the suing creditor, was before the sale. It was $12,000 in the year 1812. Mr. Waterman made a statement in writing, (which he confirmed by oath in Court,) in which he stated that Withers died in the year 1827, insolvent to the amount of at least $40,000. That Withers sustained

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*losses, since 1824.

By the Weyman purchase, of.....	$16,000
Purchase of farm near it.....	1,400
" " Goose Creek plantation..	1,800
To unnecessary disbursements in traveling, in the year 1826.....	5,000
	$24,200

Mr. Waterman was satisfied that Withers was insolvent. Mr. Waterman stated also, that Withers was the owner of many bonds

which were due, to wit, Mr. William Johnson's, in 1805; Shackelford's, in 1808 and 1812; Goddard's bonds, in 1822. Withers passed a bond of Mr. Alston's, for $27,000, to the Bank, in 1825. Withers sold property to Mr. Munnulyn. Withers bought property at Columbia, which was sold after his death for half the money.

On the part of the defendant, Mr. Petigru produced the written notice of Mr. Maxwell to Mr. Waterman, agent for Mrs. Withers, executrix of R. F. Withers, as to the eleven slaves taken away from him, under mortgage of Withers to the trustee of Allen; the notice dated 13th December, 1827; also the bill of sale by Withers for the forty-three slaves, dated 1st March, 1824, $17,200. The certificate of Bee & Carter was produced in evidence, stating sales by them of several gangs of slaves, in 1823 and 1824. In 1823, they sold slaves at different times, average, $268; in 1824, do. do., average $290. Statement by Commissioner in Equity: in 1824 he sold 83 slaves, average, $261.59; in 1825 he sold 117 slaves, average, $257.22. The credits were short. Mr. Payne testified that the average of slaves in 1824 was $263, and about the same in 1824. The terms were part cash. Mr. Gantt testified of a sale in February or March, 1824; slaves of Mrs. Fell's estate; terms a third or fourth cash, and balance in one, two, three and four years—average, $210; sold by Park Lee; about ordinary price; slaves sold low then. Witness has since sold some slaves, at an average of $300.

There are two main questions in this cause

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which require our *consideration: 1st. As to the eleven slaves who were included in the sale of the forty-three slaves made by Withers to Maxwell, and taken from him by virtue of a mortgage of a prior date, to a third person. There can be no doubt that Mr. Maxwell was entitled to be made safe as to the price of these slaves. It would be an act of gross injustice if he were not. Mrs. Withers, the executrix, acting through her agent, Mr. Waterman, therefore, did right in giving up this bond. But it is contended that, instead of giving up the whole amount of the bond, which was $4,400, with two years interest thereon, no more should have been deducted from the bond than the price at which the eleven slaves were sold, when taken away under the mortgage; and as Mr. Maxwell himself became the purchaser, at a diminished price, (about $280 round,) he ought not to have a larger deduction than the price so paid. This argument has been powerfully urged in another cause, in which this question arose. It was put in this shape. If Withers, or his executrix, had gone and purchased these at a diminished price, from the mortgagee, and taken up the mortgage, and thus secured a good title to Maxwell, would he have had any ground to complain, and would he not have been obliged to pay the full amount of his bond? The answer is, that it would have been so. But, in point of fact, the executrix did not pay the money and take up the mortgage, though she had notice from Mr. Maxwell, but left the purchaser, Mr. Maxwell, to get out of the difficulty as well as he could, and he might have been obliged to pay a great deal more, to preserve these slaves, who were intermixed and amalgamated with his own gang of slaves. Or he might have lost all his money by the insolvency of Withers, had he received the money on this bond, or passed it away to a third person, for a valuable consideration. To which it must be added, that there is a great difference between a case in which this difficult subject occurs, where a man, having slaves whom he honestly believes to be his own, clear of all incumbrance, makes a sale of them to a third person, for a full price, and an unexpected claim springs up, and a

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better title is *established, and between a claim like the present, where the vendor knew, at the time he was making the sale, that the slaves were under mortgage to a third person, and that he could not make a good title. This was not dealing in good faith, and it would be shocking that he should make a great profit out of the person he had injured; and it is this feature in the cause which distinguishes this cause from that of Scott v. Woodsides, (3 Rich. 428, [note.]) In that case Judge James put it properly on the ground of the bona fides of the vendor and the ill conduct of the vendee, who gave no notice of the defect, but endeavoured to make an advantage out of the vendor. Besides, the Legislature by its Act has declared the rule to be, that in all cases of eviction, the party injured shall recover back the price he gave and interest; and that principle applies indirectly to this case; for if Maxwell had paid the money he would have been entitled to recover it all back. I am, therefore, of opinion, that the bond for $4,400 was rightfully delivered up by the agent of the executrix to Mr. Maxwell. But it does strike my mind, that having had the use of the eleven slaves, from the time of the sale in March, 1824, till they were taken away in February, 1828, Mr. Maxwell ought to pay hire for their use and labour, and it is ordered and decreed accordingly.

The next question relates to the bond which was executed by Mr. Maxwell, conditioned for $4,200, to be paid to Mr. Andrew Johnston, in trust for the two young daughters of Mr. Maxwell. The complainants allege, that there was no valuable consideration moving from Mr. Maxwell or his daughters to Mr. Withers, to induce him to cause this bond to be made payable to Mr. Johnston, in trust for the children of Mrs. Maxwell. That, therefore, this was a mere gift from Withers to these young persons; and that being then in debt to insolvency, Mr.

Withers had no right to make such a gift: therefore the debt secured by this bond ought to be considered as part of the estate of Withers, and applicable to pay his debts. Various answers were given to this claim on the part of the creditors. The first is that Andrew Johnston, the trustee, brought a

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*suit at law against the executrix to recover this bond, and has obtained a verdict and judgment. That this judgment of a competent Court is conclusive, for the executrix of Withers represented his estate and the creditors, and that there is no pretence of fraud in obtaining the judgment, and no allegation of newly discovered evidence which could not have been had and obtained on the trial at law. There is certainly great weight in this; but it will be more satisfactory to put the decision on the merits of the case. Before we go into the examination of the evidence and the arguments founded on it, it is proper to remark, that on the face of the bond Mr. Withers' name does not appear. It is a bond from Maxwell to Andrew Johnston, to pay him a certain sum of money for the use and benefit of two minor children of Mr. Maxwell. Prima facie then, Mr. Withers had nothing to do with the business. It is only by evidence that we get at the fact, that this bond was one of four, which Mr. Maxwell was to give on the purchase of forty-three slaves from Mr. Withers. That evidence has been admitted, and, of course, all the evidence connected with the contract, and the inducement to make it in the form and manner it was made. On a careful examination of that evidence, it is clearly established that Mr. Withers was desirous to sell a number of slaves, and he offered them to Mr. Maxwell; he asked $400 round for them. That price was objected to as too high; he then urged the purchase on Mr. Maxwell, assuring him that he meant to make some provision for his family, who were connected with him, and that such a sale would enable and induce him to do so. This was perseveringly and repeatedly pressed on Mr. Maxwell, who at length yielded to these representations, and became the purchaser of the slaves at $400 round. It was fully proved that the slaves were not worth more than $300 round, and it was proved by several witnesses that the market price in 1823, '4 and '5, did not come up to $300 round; nor does it appear that the long credit on this bond could have been the inducement to give so great a price; because Mr. Maxwell's minor children were to

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have the *benefit, and whatever was the credit on the bond, short or long, the money would not be wanted in their minority. This was one transaction. The inducement, the purchase in consequence of that and of that alone, the taking the bonds and mortgages, (for a separate mortgage was taken in the name of the trustee as well as a separate bond,) all make but one transaction. The taking the bond and mortgage, in the name of the trustee for the children of Maxwell, was the performance in part of the assurances held out to Maxwell to induce the purchase. But it was urged, that Mr. Withers' keeping the bond was evidence that this was not a real bona fide transaction, and that he still held the control over it. To this it was answered, and I think conclusively, that this is not so. Mr. Johnston, the trustee, happened not to be present at the execution of the bond and mortgage. Withers, therefore, kept it. But he informed Mr. Johnston of it, and that he had made him a trustee. Nor did he exercise any act of ownership over it, nor could he, for he could not legally assign or transfer it, and Mr. Johnston has actually recovered the bond at law. It was urged, with great force and ingenuity, that a person in debt, and as it appeared ultimately insolvent when these transactions took place, (March, 1824,) though not known to any persons, and apparently not to Withers himself, had no right to be generous at the expense of his creditors and to their prejudice. This maxim is sound both at Law and Equity. But how was the fact? Are the creditors injured by this transaction? I think not. It is clear that they get the full value of the property of Withers, their debtor, for they get the amount of $300 round for the slaves, which it was proved was their full value. The price contracted to be given, which was above the value, was on inducements and grounds in which they have no concern. But for those inducements no larger price would have been given for the slaves than $300 round, which was their value. It would be unjust and inequitable in the creditors to ask that benefit over and above the value. And this Court will not lend its aid to give them this inequitable ad-

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vantage to the prejudice of other *persons, who would be deeply injured by giving the creditors that advantage.

I am, therefore, of opinion, and it is so ordered and decreed, that the complainants are not entitled to relief on this part of the case. The bill must be dismissed as to this bond, but without costs. It is proper to add, that the testimony of W. R. Maxwell as to his inducement to make the purchase, which was taken provisionally at the urgent instance of the counsel, was rejected on consideration, and forms no part of the evidence on which I have made up my judgment on that point.

The complainants appealed on the grounds:

1. Because his Honor should have directed the amount due on the bond of $4,400 to be paid, deducting the sum paid by Mr. Maxwell on the resale under the mortgage.

2. Because his Honor erred in dismissing the bill as to the bond of $4,200.

Dunkin, for appellants.
Petigru, contra.

The opinion of the Court was delivered by

O'NEALL, J. We concur with the Chancellor, that upon the purchaser with a warranty of title, express or implied, being evicted by either a paramount title or an incumbrance, the consideration of the contract must be regarded as having entirely, or partially, failed, according to the nature of the recovery had, either at the time the contract was entered into, or at the time of the recovery. The effect of an entire failure is always to entitle the party to recover back the price paid, with or without interest, or if unpaid to be protected against its payment. If the consideration of the purchase has been paid, the right of the purchaser to recover it back, with interest, depends upon the nature of the title by which he has been evicted. If it was a paramount adverse title he is entitled to interest from the time the purchase money was paid, for his title fails from its commencement. If it was an incum-

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brance merely, as an exe*cution or mortgage, his title only fails from the time the lien is enforced, and hence he is only from that time entitled to interest. For until then he has had the actual possession, and could have sustained no injury or loss. If the purchase money is not paid, but remains in a security, then in the case of eviction by a paramount adverse title of the whole property sold, the whole consideration having failed, the contract is regarded as nudum pactum. If the eviction is by a legal incumbrance of the whole property sold, it then operates as a failure of the consideration from the day of eviction, and the vendor is entitled to rent, hire or interest to the day of eviction, if the contract bore interest. If the failure is only partial, then, unless it goes to defeat the whole object of the purchase, the party is entitled to recover, if the price has been paid, or, if unpaid, to have a deduction made for the relative value which the part recovered bore to the whole in the purchase.

In the case before us, the eleven negroes, upon which the mortgage was foreclosed, were rated in the contract of purchase at $400 each; they were, therefore, the exact consideration of the bond given up by the executrix to her co-defendant Maxwell, and hence he was entitled to have that much deducted from his purchase. But this deduction can only be allowed to be made at the time of the foreclosure. The defect or failure of title in consequence of it, does not go back to the commencement of his title. As the vendee of the mortgagor, he was entitled to hold possession until the mortgagee thought proper to demand it. Up to the day of the foreclosure he had the benefit of his purchase, and must either pay interest or hire, (as the bond bore interest from its date.) The Chancellor has directed him to account for the hire, and I see no reason to be dissatisfied with his decree in this respect.

The recovery in the action of detinue, for the bond by A. Johnston, trustee, against the executrix of Withers, cannot conclude the complainants. She could not, in that case, make the question, that the bond must be

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considered as a gift by Withers *in fraud of the rights of his creditors. For she only represented the rights of her testator, and if his gift was good against him, it must of necessity be so against her. The right of the creditors to make and investigate the question, whether it was or was not a fraud on their rights, is a right against the executrix as well as the donee. They may, therefore, make the question, notwithstanding the right of property may have been judicially determined between the donor, or his executors, and the donee.

Upon the facts in relation to the bond to A. Johnston, in trust for the Misses Maxwell, I confess that I should have been better satisfied, had the Chancellor arrived at a different conclusion.

Did Withers promise to make this donation to the Misses Maxwell of $4,200, as an inducement to their father, Maxwell, to enter into the contract for the purchase of the forty-three slaves, at an advance of about $100 each, over and above their value? is the only question. If he did, the decree is right: if he did not, it is wrong. For the $4,200, if it was voluntarily and without valuable consideration, secured to them, is as plain a fraud upon the rights of creditors, as the gift of ten or eleven slaves would have been.

The evidence is conflicting; but if I had been trying the case in the first instance, I should have found great difficulty in getting over Maxwell's letter offering $400 round for the slaves, and pressing for the contract. But as there was a great deal of testimony heard viva voce on the trial, which satisfied the Chancellor that the prospect of benefit to his family from this purchase by Maxwell, was held out by Withers as an inducement: and that this procured from the defendant the purchase at a sum greatly beyond the real value of the slaves; and as the opportunity of judging correctly of facts is much better in the Circuit Court than in the Court of Appeals; and as the entire responsibility of a decision on viva voce testimony is devolved on the Chancellor, as on a jury, I

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am con*tented to affirm his decree. The motion to reverse the circuit decree is therefore dismissed.

JOHNSON, J., concurred.

Appeal dismissed.

Rich. Eq. Cas. 315

THOS. and J. LOWNDES, Trustees of Mrs. Brown, v. JAMES LADSON, Executor of Judith Ladson, et al.

(Charleston. March and April Term, 1832.)

[*Husband and Wife* ⟸11.]

Testator being indebted to a married woman, his executrix gives her own bond to the husband for the amount of the debt:—*Held*, that this was such a reduction into possession by the husband of the wife's chose, as barred her equity.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 53; Dec. Dig. ⟸11.]

[*Assignments* ⟸50.]

An order drawn on a particular fund, whether for the whole or only for a part of it, will, as between drawer and holder, be enforced in equity as a specific appropriation of the fund to the amount of the order, whether the drawee accepts or not.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 99; Dec. Dig. ⟸50.]

To a bill to enforce such a lien the statute of limitations cannot be pleaded.

Before De Saussure, Ch., at Charleston, December, 1831.

De Saussure, Ch. Prior to the marriage of Major James Ladson to Miss Judith Smith, in the year 1778, a marriage settlement was executed, in which it was recited that Miss Smith was entitled to £100,000 currency, which, on the marriage, would come into the possession of her husband. In consideration of which, Major Ladson covenanted with the trustees of the settlement, to charge his whole estate with the payment of the said sum on the trusts of the settlement, and among them it was stipulated that, if Mrs. Ladson should survive her husband, and leave issue of the marriage also surviving him, one-half of the amount settled, should become the property of the said issue. Mrs. Ladson did survive her husband, and so did eleven children, issue of the marriage. After the death of her husband, Mrs. Ladson, being in possession of the whole settled estate, executed a bond, payable after death, which has since

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*accrued to John Simons Bee, who married one of the surviving children of the marriage, for his wife's share of the settled estate. Mr. John Simons Bee assigned this bond to Mr. Cripps, as security for the loan of certain shares in the Santee Canal Company. Mr. Cripps died, and Mr. Daniel Ravenel administered on his estate, and recovered a judgment against the executor of Mrs. Ladson, on the assigned bond, the amount of which, however, is more than sufficient to repay the estate of Mr. Cripps. There is a balance due, which the executor of Mrs. Ladson refuses to pay to Mr. Ravenel, and claims as the property of Mrs. J. S. Bee and her children, under a decree of the Court of Equity, made in 1826, settling the estate of Mrs. Ladson and ordering the share of Mrs. Bee to be settled on herself and children. In 1830(*a*) Mr. J. S. Bee, being indebted to the trustees of Mrs. H. L. Brown for house rent, gave an order on William and James Ladson to pay $1400, which, by the terms of the order, was to be discounted from the aforesaid bond. The order was not accepted. The bill claims the order as an equitable assignment of the bond. The answers of Mr. Bee, and of Mr. James Ladson, the executor of Mrs. Ladson's estate, deny that this is an assignment, and plead to the demand the statute of limitations.

Without deciding upon the right of Mrs. Ladson to pay to Mr. Bee his wife's share of the settled estate, which, for aught that appears to the Court, may have been real estate, since the estate of Major Ladson, a part of which was real estate, was charged with the repayment of the sum settled on his marriage with Miss Smith; and, considering the bond of Mrs. Ladson to Mr. Bee as a debt from her to him, the question may be easily disposed of, by examining the true character of the order of Mr. Bee on Mr. William and Mr. James Ladson.

It is not pretended that it is a legal assignment. It is a mere order, not under seal,

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to pay a simple contract debt. To the *debt and the order the statute of limitations is pleaded; and there is no evidence to avoid the plea, which is supported by the length of time that has elapsed since the debt was contracted and the order given. I am, therefore, of opinion, that it is unnecessary to examine beyond this point, as the statute is a bar to the claim, though there would be great, if not insurmountable, difficulty, even if the statute were not a bar, in subjecting this property to the demand of the complainants.

It is, therefore, ordered and decreed, that the bill be dismissed with costs.

The complainants appealed on the following grounds:

1. That the order drawn by John S. Bee in favor of the complainants, was a valid equitable assignment of the bond of Mrs. Ladson to the amount of said order.

2. That the complainants, as assignees claiming on the said bond, could not be barred by the statute of limitations.

3. That the decree of the Chancellor in the court below was, it is respectfully submitted, in other respects, contrary to law and equity.

Peronneau & Finley, for appellants.

The opinion of the Court was delivered by

JOHNSON, J. The bond given by Judith Ladson to the defendant, John S. Bee, was confessedly in consideration of his wife's portion of £50,000, secured to the children of James and Judith Ladson, by their marriage

(*a*) This date is certainly wrong. It is probable that the order was given in 1820.

settlement, with the payment of which, the whole estate of James Ladson was charged by his last will and testament, in which Judith Ladson was appointed executrix; and the questions which arise, are:

1st. Whether the taking of this bond was such a reduction of the wife's interest into possession, by the husband, as to bar the wife's equity?

2d. If it is, whether the order drawn by defendant, John S. Bee, on William J. and

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James H. Ladson, the executors of *Judith Ladson, for a part of the amount of the bond, was a good equitable assignment, pro tanto?

3d. If it was, whether the demand is barred by the statute of limitations?

1. The right of the defendant, John S. Bee, to receive and give a discharge for the debt due to his wife, is not called in question; and the general rule seems to be, that any act done by the husband, which operates to change or divest the wife of the property or choses in action, is a reduction into possession, and makes them the husband's, and bars the wife. Upon this principle it was held in Oglander v. Baston, 1 Vern. 396, that an award, made in pursuance of a submission made by the husband of the wife's interest in an estate, vested the right in him and went to his executors, (the wife surviving,) because the award was said to be a sort of judgment and changed the property; and it would seem, from the reasoning of Sir Wm. Grant, in Wall v. Tomlinson, 16 Ves. 413, that transferring stock, which belonged to the wife, into the sole name of the husband, was such a reduction into possession as changed the property. But this case is too clear to admit of any doubt. The bond given to the defendant, John S. Bee, was an extinguishment of the debt due to his wife. He alone was entitled to sue upon it, and if he had died, the wife surviving, it must have gone to his executors. The wife's equity is, therefore, very clearly barred.

2. An order drawn, on either a particular or general fund, does not, technically speaking, operate as an assignment, but, as between the drawer and the holder, equity will give effect to it, on the same principles precisely, that the specific performance of other agreements is enforced; and those cases belong to that branch of the equity jurisdiction. It is apparent, therefore, that it is wholly immaterial whether the drawee accepts or not. If the fund is in his hands, the agreement cannot be specifically enforced, but by compelling him to disburse it in payment of the order. The cases cited at the bar in support of this position were very nu-

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merous, and all *on the same side, but I will only refer to Smith v. Everett, 4 Bro. Ch. Rep. 64, as bearing a striking analogy to this in other respects. In that case the order was drawn on a fund which the drawee had not, but expected to receive on account of the drawer, from the treasury, and was for a part only of the fund; and the question growing out of the bankruptcy of the drawer, was, whether this was an appropriation of, and lien on, the fund, and the Lord Commissioner Eyre said there cannot be the smallest doubt about the matter. There could not be a stronger appropriation of the fund, and, in a note to that case, it is said, that the court declared that the assignees of the holder, (for he, too, was a bankrupt,) had a specific lien on the money received, or to be received, from the Lords of the treasury.

The general principle is conceded, but it is contended here, that this being only a partial assignment of a particular fund, equity will not enforce it, and the opinion of Mr. Justice Story, in Mandeville v. Welch, 5 Wheaton, 286, [5 L. Ed. 87,] is relied on. But in Tierman v. Jackson, 5 Peters, 598, [8 L. Ed. 234,] Judge Story evidently concedes that the position cannot be maintained, to the extent which it imports, and if we recur to the principle upon which the court proceeds, it is evident that it is immaterial, either as a matter of convenience or right, whether the order is for a part or the whole of the fund. It is not strictly a suit against the drawee, but against the drawer, to compel the specific execution of a contract, which cannot be done without making the drawee a party, and, if he has been blameless, he will be protected from the consequences of his creditor's splitting up his demand.

I was, on the first view, somewhat embarrassed by the previous assignment made by John S. Bee, of the whole amount of the bond, to John Cripps; but on looking into the assignment, I find that, although, in point of form, it is a general assignment of the whole bond, it was intended to secure a debt due to Cripps of an amount much less

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than the bond, and that he *was to pay the balance to Bee, so that, in effect, that also was an equitable assignment of a part only.

3. Having thus disposed of the preceding questions, no doubt can remain that the statute of limitations does not operate as a bar. The order, operating as an assignment, transferred Bee's interest, to that extent, to the complainants, and if the defendants are bound to pay, the complainants, and not Bee, are not entitled to receive it.

It is, therefore, ordered and decreed, that the decree of the Circuit Court be and the same is hereby set aside and reversed.

The defendants, the executors of Judith Ladson, claim to set off against this demand certain sums of money due and owing to her by the said John S. Bee, before the assignment made to the complainants, and they are very clearly entitled to have the same set off and discounted; and it is referred to the Commissioner to ascertain to what those

sums amount; and it is further ordered and decreed, that the said defendants, the executors of Mrs. Ladson, do pay to the complainants the balance due on her bond to the said John S. Bee, after deducting therefrom the amount so to be set off and discounted, and the sum due to Daniel Ravenel, as the administrator of John Cripps, on account of the assignment of the said bond to the said John Cripps, if, upon stating the account, there shall be found to be so much due to the said complainants. The costs, except the costs of defendant, John S. Bee, must be paid out of the fund. He must pay his own costs, and the court would have decreed the whole costs against him but for his insolvency.

O'NEALL, J., concurred.

Decree reversed.

Rich. Eq. Cas. *321

*SARAH MARIA DRAYTON v. THOMAS S. GRIMKE et al.

(Charleston. March and April Term, 1832.)

[*Wills* ⇐634.]

Testator bequeathed slaves to his son W. H. for life, and, "after his death, to such son as he shall leave living at his death," and should he leave no son, then to testator's two grandsons, T. and J., "on their arrival at the age of twenty-one years, and assuming the testator's name at that period, their executors," &c.: W. H. died without issue, T. and J. being, at the time of his death, under twenty-one years of age —*Held* that the legacy to T. and J. was contingent, and that they were not entitled to the profits accruing before compliance with the conditions.

[Ed. Note.—Cited in Magee v. O'Neill, 19 S. C. 182, 45 Am. Rep. 765; Shuman v. Heldman, 63 S. C. 492, 41 S. E. 510.

For other cases, see Wills, Cent. Dig. § 1497; Dec. Dig. ⇐634.]

Before Johnston, Ch., at Charleston, January, 1831.

Thomas Drayton, the defendant's testator, among other things bequeathed as follows:

"I give and bequeath my driver, Dick, and his family, to wit, his wife and children, also my carpenters, Robert, Joe and Jim, and my house servants, George and Daniel, with the future issue of the females from this date, to my son William Henry Drayton, during his natural life, and after his death to such son lawfully begotten of his body as he shall leave living at his death, his executors, administrators and assigns:—But should my said son Wm. Henry leave no such son, but should leave one or more daughters of his body lawfully begotten, or if he should leave such son, but he should die before he attained the age of twenty-one years, then I give and bequeath one-third part of the said slaves to and between such daughter and daughters, her or their executors, administrators and assigns, if more than one as tenants in common, and the residue of the said slaves I give and bequeath in the following manner, to wit: one moiety thereof I give and bequeath to my grandson Thomas Grimke, on his arrival at the age of twenty-one years, and assuming the name of Drayton, as his surname, at that period, his executors, administrators and assigns; and the other moiety I give and bequeath to my grandson John Grimke, on his arrival at the age or twenty-one years, and assuming the name of Drayton, as his surname, his executors, administrators and assigns."

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*William Henry Drayton, the testator's son, survived the testator, and died unmarried and without issue. The testator's grandsons, Thomas and John Grimke, survived him and were still under age. Under the above clause in their grandfather's will several questions were made, viz: whether the minors took any, and if any, what estate in the legacy contained in this clause of the will? When did the legacy become vested in them, respectively? And whether the minors would be entitled, after a division, to the profits until they came of age, or whether these profits should sink into the residuary estate? The Chancellor, without noticing John, decided, that Thomas Grimke was not entitled to the possession of his part of the legacy until he reached twenty-one and changed his name; and that the administrator, with the will annexed, should retain the profits of the legacy, and use them to the best advantage until the contingencies happened that would take them out of his hands.

On the part of John Grimke an appeal was taken, on the ground that the Chancellor should have decreed equally on his rights, they being the same as those of his brother. On the part both of Thomas and John Grimke an appeal was also taken, on the ground that they were the substitutes of Wm. H. Drayton: that he was entitled immediately on testator's death to all these slaves, or at all events to such of them as were not productive property, within the meaning of the decree in this cause, pronounced by the Appeal Court at 182 in Charleston, that they are, therefore, entitled to them immediately in possession on the death of W. H. Drayton. They also appealed, on the ground, that if they were not entitled to the possession of all the slaves, or of a part only, until they actually attained the age of twenty-one, and complied with the condition of taking the name of Drayton; yet on so doing they were entitled to all the intervening profits from the death of W. H. Drayton.

King, for appellant.

Holmes, Grimke, Petigru, contra.

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*The opinion of the Court was delivered by

HARPER, J. There can be no doubt but that a legacy to Thomas and John Grimke, upon their arriving at the age of twenty-one

years and assuming the name of Drayton, is contingent and does not vest till the conditions be complied with, and that, in general, the legatee is not entitled to interest on such a legacy till it becomes vested. A difference is supposed to be made in this case, from the circumstance of the property's having been given, in the first instance, to the testator's son William Henry Drayton, in whom it vested, and limited to Thomas and John Grimke, in the event of his dying without children. We think the case must be governed by those of Wyndham v. Wyndham, 3 Bro. C. C. 58, and Shawe v. Cunliffe, 4 Bro. C. C. 144; in the latter of which the rule is thus laid down by Lord Commissioner Eyre, "if there be a fund, whether residuary or particular, given to A. for life, and afterwards upon a contingency, which does not take effect upon the death of the tenant for life, the intermediate interest is an interest undisposed of, and, therefore, falls into the residue." The circumstances in the case of Wyndham v. Wyndham, were, that a fund was given to trustees, in trust to pay the interest to the testator's wife for life, then to his niece for life, and, at her death, he gave the fund to the younger children of Helgar Wadham Wyndham, if he should have any, and if not to Wadham Wyndham. The interest was paid to the wife and niece during their lives—at the death of the niece, H. W. Wyndham was living, but had no children, and afterwards died not having had any. The question was respecting the interest which had accrued in the life-time of H. W. Wyndham, after the death of the niece. Lord Thurlow "thought it surprising that there was no case in which this question had occurred; but said, where interest till an event arrived was not disposed of, it must fall into the residue." The case of Shawe and Cunliffe was similar in circumstances. The authority of Wyndham v. Wyndham, is said to have been approved in Descrambes v. Tomkins, 1 Cox, 133.

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*It was further contended, that the testator had put himself in loco parentis with respect to these legatees, and that they may be entitled to the interest as maintenance: under the rule, that in case of a legacy by a parent to a child, interest will be allowed as maintenance, though the legacy be not yet payable, or even not yet vested. There is no ground whatever for this claim. The doctrine is founded upon the natural obligation of a parent to provide for his children, and a presumed intention that they should be maintained. In Harvey v. Harvey, 2 P. Wms. 21, which was the case of legacy vested, though not yet payable, the Master of the Rolls says, "it would be extremely hard that the children should starve when entitled to so considerable legacies." In Incledon v. Northcote, 3 Atk. 438, interest was given to children for maintenance, though the legacies were contingent, being given only to such children as should attain twenty-one, and Lord Hardwicke said it had often been done. But the cases respecting a person putting himself in loco parentis stand on a different footing. They are founded on an intention, inferred from the whole of the provisions of the will, that the legatee shall have the interest, and I am not aware of any case of this sort, in which interest has been given on a legacy not yet vested. In Beckford v. Tobin, 1 Ves. Sen. 310, the bequest was to a natural child, with an express direction to apply the interest to education and maintenance, and the question was whether the legatee should have the interest from the death of the testator, or from the end of the year. Lord Hardwicke held that the direction for maintenance meant maintenance throughout, and gave interest from the death of the testator.

In Lowndes v. Lowndes, 15 Ves. 301, which was a direct vested legacy, in trust for natural children, they were held not entitled to interest from the testator's death, there being no such intention to be collected from the will. Hill v. Hill, 3 Ves. and B. 183, was a bequest to apply the interest to the maintenance, education and advancement of natural children, and they were held entitled to in-

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terest from the testator's death. *In Acherly v. Vernon, 1 P. Wms. 783, the legacy was vested though not yet payable. As the fund was separated from the residue, and the interest would not pass under the residuary bequest, the Chancellor decided, upon the intention, that no one but the legatee of the fund could take the interest. It seems clear that grand-children are in this respect considered as strangers, and that if a contingent legacy be given to them, with a limitation over if the contingency does not happen, they cannot take the interest till the contingency happens and the legacy vests. Haughton v. Harrison, 2 Atk. 329; Butler v. Freeman, 3 Atk. 58; Lomax v. Lomax, 11 Ves. 48. There are other cases to the same effect.

In the present case the legatees are not children for whom the testator was bound to provide: the application is not made on the ground that they need the interest for maintenance, and privately we know they do not. The testator could not, of course, have intended it for maintenance: he gave the whole to another, and only limited the property to these legatees upon an event which he must have hoped would never happen. The Chancellor's decree is affirmed and the motion dismissed.

JOHNSON and O'NEALL, JJ., concurred.

Appeal dismissed.

Rich. Eq. Cas. *326

*ROBERT OSWALD et al. v. CHARLES GIVENS et al., Executors.

CHARLES GIVENS v. ROBERT OSWALD et al.

(Charleston. March and April Term, 1832.)

[*Wills* ⟸634.]

Bequest of negroes to "be divided equally among the children generally of M. G., the children of J. O. generally, the children of W. O. by name B. and R., and the children of J. S., together with any child or children which M. G. might have previous to such division, all share and share alike among such as shall be living at the time of such division, and not otherwise; and that the division shall take place as soon as all the debts are paid; and the executors to act as trustees to each child, individually, until they receive their portion at such time as each one shall come of age, or marriage of the females"—*Held*, to postpone the vesting of the legacy until the period of division arrived; and that all those who were in esse at that time, and only those, were entitled to take.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1499; Dec. Dig. ⟸634.]

[*Executors and Administrators* ⟸296.]

Held, also, that the legatees could not demand a division until one year from the testator's death, and that a division actually made, within the year, and before the debts were all paid, was premature and illegal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1185–1198; Dec. Dig. ⟸296.]

[*Wills* ⟸740.]

Held, further, that such of the legatees as were adult and consented to the division, or being minors, were femes covert, having husbands who were of full age who consented, were bound by it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1892; Dec. Dig. ⟸740.]

[*Executors and Administrators* ⟸104.]

When an executor is not chargeable with interest on funds retained in his hands.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 427; Dec. Dig. ⟸104.]

[*Equity* ⟸204.]

No one but a party to the original bill can be made a party to a cross-bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 467; Dec. Dig. ⟸204.]

Before De Saussure, Ch., at Beaufort, January, 1831.

Robert Oswald and others, who were entitled, under the will of George Stephens, deceased, to a distributive share of a legacy of a large number of slaves, filed their bill against Charles Givens and Wm. B. Oswald, surviving executors of the said will, to obtain an account of their administration of the estate of their testator, and to have partition made of the said slaves, or otherwise to compel payment or satisfaction of the respective shares of complainants in the said legacy. Charles Givens, one of the executors, filed a cross-bill against certain of the legatees who were said to have been paid, to compel contribution for the payment of debts, and to this bill the unpaid legatees, and the executrix of Richard Reynolds, deceased, one of the executors of the testator, Stephens, were made parties, with a view to a general adjustment of the rights and liabilities of all parties interested, and for the purpose of settling the estate. The matters of account were referred to the Commissioner, who,

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*after a full examination of the account, and taking much evidence in writing, with a view to facilitate the settling of the accounts, and to speed the cause, with the consent of parties, submitted a report, asking the instruction of the court on certain points involving the principles on which the account was to be framed.

The points submitted by the Commissioner were as follows:

1. Was the sale of the estate of Stephens in April, 1817, such a division of his estate as can be referred to, to fix the interests of the legatees, and ascertain the number of persons entitled under the will? Facts. The testator, by his will, directs that no part of his estate shall be divided until his debts are paid; and, by a subsequent clause, that all his negroes shall be divided among the children of certain persons therein named; to use his own language, "among such as shall be living at the time of the division and not otherwise, and the division to take place as soon as the debts are paid." The difficulty with the Commissioner, in relation to the above question, arises from a doubt, whether, as a general rule, an estate in which minors are interested may be divided without the interposition of some court, and whether, if such be the rule, the above case is not made an exception by the testator.

The Commissioner is satisfied that the fact of a division has been sufficiently proved, but submits whether that division was legal or not, and he submits also the testimony thereon.

2. Whether, if the sale in 1817 was not a division, the executor can be allowed to charge the estate with sums paid to the husbands of some of the female infant legatees, on account of their wives' shares?

Facts. In 1817, and before the sale, J. Scanlan, B. Dews and T. Skellon were the husbands of three of the infant legatees. William Ricard married a fourth in the latter part of the same year. Scanlan and Ricard have died since 1817. Mrs. Dews is also dead, and Mr. Skellon has left the State, and has not been heard of for more than seven years.

3. Whether the executor, Givens, should be

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charged with *interest upon a balance of $8,307 17, from the year 1817, said to have been retained to pay whatever decree one Beckham and wife, who had commenced a suit in this court against the executors of Stephens, might finally obtain?

Much testimony was also offered upon this question, which the court is referred to.

4. Whether the share of James Oswald, who died before the testator, in the house and lot and household furniture in Beaufort, and in a tract of land on Ladies' Island, ought to be regarded as a lapsed devise, and subject to the payment of debts as a part of the testator's estate undisposed of by his will?

5. Whether, if subject to testator's debts as descended real estate, the executors are chargeable with the value in 1822, when Beckham's execution for $10,153 was taken out against the executors of Stephens; and for the rents and profits, upon the testimony, before that time?

6. Whether the executors are to be liable generally for the amount of the sale of the house and lot and household furniture in Beaufort, with interest according to the directions of the will, or only the executors, William B. Oswald and Charles Givens.

Facts. Mrs. Caroline Reynolds, executrix of Richard Reynolds, who was one of the executors of Stephens, has been made a party to one of these suits. In her answer she denies the right of the executors to call her to account for her testator's administration of the estate of Stephens: because she has already been compelled to answer to the same matters and things in a former suit instituted by the said executors, in which a decree was had against her for $1,269—which sum she has paid according to the decree. This is insisted on as a bar to any liability for the proceeds of the house and lot and furniture in Beaufort: and the Commissioner submits the question to the consideration of the Court.

His Honor, the presiding Chancellor, pronounced the following decree:

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*De Saussure, Ch. These are causes of very great extent. The briefs form a volume: and the Commissioner has also furnished a manuscript volume of twenty-two pages.

Certain bonds and mortgages were also given in evidence, on which much stress was laid in the argument of the case, and will be remarked upon hereafter.

There are also certain endorsements on these bonds, which Mr. Wm. Joyner, (now the Commissioner,) who acted as auctioneer and agent of the parties, testifies, that he made on them, with the knowledge and consent of the legatees. It was admitted at the hearing, that the negroes of the estate of George Stephens, which Mr. Charles Givens bought in for his family, at the sales of that estate by the executors, were afterwards levied upon and sold under an execution to pay a debt of the estate to Beckham and wife. Mr. Verdier was examined in open Court as to the value of the Ladies' Island tract. He testified, that he would not have given five cents an acre for the land as a plantation, as there was very little planting land on it: not exceeding thirty acres. He offered ten dollars an acre for that part which contained planting land, and the landing, which he wanted. The land has since been sold for about fourteen hundred dollars. The cause was referred to the Commissioner, who, in his report of January, 1831, states, that he had taken a great deal of testimony, but that, in consequence of the numerous law questions which had arisen, he found it impossible to make a final report, until the opinion of the Court is pronounced on certain questions, which he submits for the determination of the Court. The first of these questions is, was the sale of the estate of Stephens, in April of the year 1817, such a division of the estate as can be referred to, to fix the interests of the legatees and to ascertain the number of persons entitled under the will of George Stephens? The Commissioner attaches to the question a statement of facts, which follow. The testator by his will directs, that no part of his estate shall be divided until his debts are paid; and, by

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a subsequent clause *that all his negroes shall be divided among certain persons therein named. "Among such as shall be living at the time of the division, and not otherwise: and the division to take place as soon as the debts are paid." George Stephens made and executed his last will and testament on 13th June, 1813, so as to pass real estate. He died on 7th February, 1817. His executors, Charles Givens, Wm. B. Oswald and Richard Reynolds, qualified and acted on the estate. The testator devised his house and lot in Beaufort, and the furniture, to and for the use and benefit of the male heirs of Martha Givens: and those of William Oswald and of Joseph Oswald. He devised his plantation on Ladies' Island to be equally divided among the male heirs of Martha Givens and James Oswald, son of Joseph, and their heirs: each share to be allotted as each comes of age. The devisee, James Oswald, died in the lifetime of the testator. The testator also devised his land on St. Helena Island to Benjamin Oswald and Richard Oswald (sons of William): also to William Oswald, (son of Joseph,) to be equally divided, for their joint use and benefit, under direction of the executors, until William comes of age: then to be equally divided among them and their heirs. Testator bequeathed all his slaves to be divided equally, among the male and female children generally of Martha Givens; the children of Joseph Oswald, together with any other children which Martha Givens might have previously to such division; share and share alike among such as shall be living at the time of the division, and not otherwise. The division shall take place as soon as the debts are paid. The executors to act as trustees for each child, until they

receive their portions, as soon as each one shall come of age, or day of marriage of the females. It appears that at the death of testator, he left money in hand and in possession of factors, sufficient to pay all the known debts; which were trifling. But there was a rumor of a large claim outstanding, of which the executors had no notice till the time of the sale of the slaves in April, 1817. That sale was made about three months after

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the *death of testator: a number of the legatees being then minors. At the time of the sale Mrs. Givens had six children by her husband, Charles Givens; five of them have died since.

We come now to the consideration of the question submitted by the Commissioner to the judgment of the Court. Was the sale of the slaves of the estate of Stephens, in April, 1817, such a division of the estate as can be referred to, to fix the interests of the legatees and ascertain the number of persons entitled under the will?

I feel this to be a very difficult question. The circumstances are very complicated and anomalous. The executors and trustees do not appear to have followed exactly the directions of the will. There are two distinct examinations to be made to form a correct judgment. We must examine the conduct of the executors, and determine the consequences which flow from that conduct. It is imputed to Mr. Charles Givens, one of the executors, that he insisted on making a premature sale before the debts were paid; and that all the irregularities and inconsistencies which have occurred, are to be ascribed to him; and that the acts done should be set aside, and the losses fixed on him. I have examined the evidence carefully, and I cannot find any ground to impute blame to him. It is in evidence, that soon after the death of George Stephens the testator, Charles Givens directed land to be prepared for planting, and upon which Mr. Reynolds, another executor, said there was no occasion, as a division of the negroes should be made. It is further in evidence, that Mr. Reynolds and Mr. Oswald, a third executor, applied to Mr. Robertson, a counsellor at law, to know whether a division could be made, under the circumstances, and by a sale; and upon his opinion that a division could and might be made by a sale, they resolved to make the sale for a division. It is further in evidence, that the said Oswald and Reynolds made application to Mr. William Joyner, then an auctioneer, to make sale of the slaves. Mr. Joyner testified, that the executor, Mr. W. B. Oswald, first spoke to him to sell the estate of Stephens; and he wrote out

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the advertisement for *the sale at the direction and request of W. B. Oswald, and he thinks Mr. Reynolds. Mr. Givens concurred, for he stipulated with witness to make the sale for two hundred dollars. Mr. Robertson told witness he thought a division could be effected by the sale. Mr. Joyner also testifies, that he was auctioneer and agent of the parties, and he made out the bills of sale to the purchasers of the slaves, and the bonds and mortgages, which were required from all the heirs who purchased negroes. Endorsements were also made on the bonds and mortgages. The endorsements on the bonds were in these words—"This bond is given as a security in case of any demands against the estate, or till a final settlement takes place." The endorsements on the mortgages were in the same words. These bonds were given by all the legatees who purchased (except as hereafter stated) to the three executors, except where an executor was himself a purchaser, and then he gave his bond and mortgage to the other two executors. From the transactions after the sale between the heirs and the executors, Mr. Joyner understood that they all deemed a division of the estate to be effected by the sale. All the heirs, he supposed, were taking their portions, each of them being entitled to one-seventeenth portion, and purchased accordingly. He heard no objections from any of the heirs to the sale at which they were present. All the heirs fell a little short of their portions to which they were entitled. The witness never heard of any objection to the division and sale, until some time afterwards, when Charles Givens had lost five of his children. He then heard it contended that there was no division. All the executors were present at the sale, and he heard no objection by them.

Being cross-examined, Mr. Joyner testified, that he heard none of the legatees say any thing of a division except Oswald. Does not know whether Oswald spoke of it as a division, or merely as a sale. He is only induced to believe that the legatees regarded it as a division at the time, from their giving bonds. He thinks the parties understood that it was a division, at the time, and that it was not

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a sale with a view to a further *division. Wm. B. Oswald said nothing to him after the commencement of the sale. Witness heard nothing of Beckham's demand until after the sale.

Mr. Joseph Jenkins testified, that he was present at the sale of the estate of Stephens. He understood that the sale was to effect a division among the heirs. This was the understanding among them generally with whom he conversed. The witness purchased at the sale, as nearly as he could, one-seventeenth, being the proportional part to which he was entitled. The other heirs did so also. He never heard of any objection, either before or after the sale, to the division, or the manner in which it was effected. Sometime after Mr. Givens' children died, he then heard that the division was objected to.

All the legatees who were of age, were at the sale and purchased. He did not hear the notice of Beckham's demand or claim on the estate, at the time of the sale. The two executors, Oswald and Reynolds, had called on witness and his brother (another legatee) immediately after they had qualified, to know from them, as heirs of Stephens, whether they had any objection to an immediate division; and Reynolds gave, as a reason for the sale, that many of the legatees were poor and needed their portions of the estate. There were then seventeen legatees living; at present, only ten.

Mr. David Turner was examined and testified, that the sale of the slaves of Stephens' estate took place in April, 1817. He applied to Mr. Oswald and Mr. Reynolds to get the sale as auctioneer. They expressed their wish to have the sale immediately, because Mr. Robertson had given it as his opinion that they could force Mr. Givens to the sale. The husbands of two of the legatees, Ricard and Scanlan, were present. Don't remember if R. Oswald was present. They all expressed a wish to have the property sold for a division, and gave as a reason that unless the business was pushed Mrs. Givens might have another heir. They stated that the sale was a division. The witness asked if the debts were paid? They answered that the cotton and money in hand was sufficient

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to pay all the *debts. He understood from the legatees that each was to buy in, upon his claim, to the amount of his respective share. Witness was present at the sale, and saw all the adult heirs present, as he thought. They all bought, but does not know to what amount. He understood from Reynolds and Oswald that they had to force Givens to a sale. Heard no objection by any of the legatees at the sale. He never heard any objection by any of the legatees to the sale as a division. From what passed in conversation with the legatees and the executors before and after the sale, he understood that the sale was a division of the estate. He heard some of the legatees say that they had bought to an amount over their shares, and would have to pay up. Witness heard no objection to the sale being considered a division until his return from the North, in November afterwards. During his absence five of Givens' children and Charlotte Dews (another legatee) had died. Knows nothing of the subsequent settlement after the sale. Heard the parties say on being asked "why a release had not been executed," that on the day of sale, or a day or two before perhaps, a notice had been given of a demand against the estate on account of Beckham and wife.

Against this evidence is the answer of the defendant, the executor Oswald, in which he states that the executor Givens urged on the sale for a division; and that he himself was not willing to have a division when it was made. This was qualified by a subsequent explanation, that he had been willing at first, but altered his mind, afterwards, when he learned of the demand by Beckham and wife against the estate of Stephens, immediately before the sale. To support this answer there is no material evidence. The great weight of evidence is on the other side; and we are obliged to conclude that Mr. Oswald, after so great a lapse of time, has forgotten what really took place. It appears, then, the executor Givens was not of the party urgent for the sale. That the other executors, Oswald and Reynolds, were urgent, and prevailed on Givens to concur, after they had obtained advice from counsel. That the

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lega*tees who were of legal age also concurred, and desired a sale for a division; which accordingly took place, and the legatees purchased according to their respective interests. Even as late as October, 1818, Oswald writes to Mr. Givens to pay Ricard, who had married one of the heirs, the sum of fourteen hundred dollars, and to take a mortgage to protect themselves. And the whole weight of testimony goes to prove that all these parties, by these and subsequent acts and declarations, looked upon this as a good division under the will of the testator, and that no complaint or dissatisfaction existed, until the unfortunate and unexampled death of five of Mr. Givens' children, within a very short time, made a most material difference on the subject; for if the division was not considered good which took place in their life-time, then the shares of these five legatees would, under the terms of the will, fall into the estate and augment the proportions of the other legatees. The apprehension of Mrs. Givens' having another child before the division, made the parties anxious to hasten a division. The sudden death of five of her children now makes them desirous to set aside the division they had procured. It is objected, however, that whatever were the wishes and acts of Oswald and Reynolds, and however the adult legatees may have all concurred, yet the division by way of sale or otherwise, was contrary to the will of the testator, because the debts were not paid; and that consent could not make the division lawful; and that it should have been a specific division and not a sale. For the executor Givens it was contended, and certainly with great force, that consent could and did bind all who were of age and concurred in the sale, and that included all who were of age. To this it is added there was really no land of the estate to plant, for the legatees of the slaves were not all devisees of the land. That with regard to the known and acknowledged debts, they were small and most abundantly provided for, and paid with the cash and cotton left at the testator's death. That with respect to Beckham's demand, it was not a debt such as testator alluded to in his will, but an un-

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certain and contingent claim on the *estate of

Stephens, which was eventually established in Chancery, first at a sum of $23,000, and afterwards reduced by the Court of Appeals to $10,000. If the sale for division be not established as the parties own act made it, then there would be great difficulty in fixing the time, and would unsettle and derange settlements interminably. The delivery of the slaves sold, the death of some of them and the births from the females, would make it most mischievous to set aside this division. How could they be collected and sales made, or even a new division? It appears to be impracticable. The Court is asked to do this too, after a lapse of many years possession given, the property scattered and gone into other hands. Great injustice and excessive inconvenience would arise from setting it aside. The Court is called upon to lend its extraordinary powers to do this thing; but it will not be active to produce so many inconveniences.

It is true, as was argued by the counsel for the complainants, Oswald and others, that regularly no act of the trustee shall prejudice the cestui que trust. In Fonblanque's treatise of Equity, this whole subject, with its rules, and exceptions, and modifications, is well stated. The rule is that the trustee shall not change the estate to the prejudice of the cestui que trust. But there is a distinction between those cases in which the cestui que trust is sui juris or not. If he is sui juris, the trustee cannot change the nature of the estate without his consent, at least not so as to bind and exclude the cestui que trust from remedy against the trustee personally. But if the cestui que use is not sui juris, it is frequently necessary that the trustee should have such power; and the criterion is, whether the interests of the cestui que trust required the conversion. So as to the trustee's postponing or accelerating the sale of the trust estate, see the cases collected in 2 Fonb. 167, 168, 458–'9, in note (*a*).

I am bound, therefore, to consider the division made by a sale by all the executors, with concurrence of all the legatees who were of age, and the parents representing

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others and buy*ing slaves for them, as sufficient, under such circumstances, to establish a division binding on the parties, more especially as the Court will protect executors for doing what the Court would have authorized.

And it is so ordered and decreed: of course the share of the slaves, or their prices, of James Oswald, who died in the life of testator, went over to the survivors.

Should any of the minor legatees, for whom no purchases were made by parents, guardians, or husbands of females, remain unpaid, (of which the Commissioner will inquire and report,) all three of the executors, and their estates, will be liable to satisfy their just and proportionate share of the sales of the slaves.

The second question submitted by the Commissioner in his report, is answered by the decision on the first question.

The third question submitted, is one of interest on a balance of $8,308.17, which the executor Givens retained to pay whatever decree Beckham and wife, who had commenced a suit in Equity against the executors of George Stephens, might finally obtain. There is a good deal of testimony, but not sufficient perhaps to enable me to make an entirely satisfactory decree. But as the claim was a doubtful one, and the executors could have had the direction of the Court to have invested the money till the decision of the claim, which was likely to be long depending, I am of opinion that Mr. Givens, the executor, shall be chargeable with the interest on the money actually in his hands and unemployed. I confess that I do this hesitatingly and doubtfully.

The fourth question submitted by the Commissioner is, whether the share of James Oswald, who died before the testator, in the house and lot and household furniture in Beaufort, and in a tract of land on Ladies' Island, ought to be regarded as a lapsed devise, and subject to the payment of debts as a part of testator's estate undisposed of by will. The terms of the devises have been stated. James Oswald, one of the joint devisees, died in the life-time of the testator.

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The remaining *devisees survived the testator. The share to which James Oswald would have been entitled if he had survived the testator, either lapsed, or survived to the codevisees. This question has been argued, and I will say briefly, without going over the decided cases, that the share of the deceased devisee, James Oswald, in these real estates, lapsed on his death before the testator. The rule is different as to legacies of personal estate, for there if a bequest is made to two or more, the legacy is not extinguished by the death of one, but will vest in the survivor. As the other estates are particularly disposed of, the value or amount of the real estate so devised to James Oswald and lapsed, is applicable under the circumstances of this case, to the payment of debts, if the undisposed residuary estate be inadequate thereto.

The fifth question submitted by the Commissioner is, whether if the real estates devised to James Oswald, and lapsed by his death, are subject to the debts as descended real estate, the executors are not chargeable with their value in 1822, when Beckham's execution was taken out against the executors of Stephens, and for the rents and profits before that time. It appears to me that as the negroes were disposed of, and the renting lands a difficult and uncertain thing in this country, (and many persons consider the injury to land by hiring greater than

the benefit of the small rents which are given,) and as the rights of the parties were in some uncertainty, and their proper course of conduct doubtful, it would be dealing hardly with the executors, to make them liable, as proposed by this question. I shall not, therefore, decree them to be liable.

The sixth question is, whether the executors are to be liable, generally, for the amount of the sale of the house and lot, and furniture, with interest according to the directions of the will, or only the executors Oswald and Givens? The Commissioner states that Mrs. Reynolds, the widow and executrix of the deceased executor Reynolds, sets up in bar to the liability of her late husband's estate, that she has been sued and compelled to answer to the same matters and

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things, by said executors, who *obtained a decree against her for $1,269, and the money has been paid. To this it was replied, that the suit and decree, relied upon, had no relation to the present demand. The questions, interests and parties are different; and so it appears to me as far as the lights furnished me will enable me to judge.

It is, therefore, ordered and decreed, that the case be sent back to the Commissioner, with instructions to report conformably to the points decided by this decree, and on all the other matters in the causes before him.

I do not know whether it was expected of the Court to decide, at this time, on the question of contribution, in the case of Givens v. Oswald and others, as that point was not fully argued. But, perhaps, it will be as well to decide on that question, that the whole case may be decided upon and carried up.

In common cases the rule is, that where executors voluntarily pay legacies prematurely to the prejudice of creditors, these creditors may pursue and recover from the legatees to whom the payments have been made; but the executors who made the mispayments cannot. The circumstances of this case, however, are not such as will justify the application of that rule. There are no creditors. The executor Givens, at the urgency of the two other executors, whose families were legatees, and at the desire of the adult legatees, consented to make a division through the forms of a sale of the slaves of the estate, at which they purchased according to their respective interests, reserving funds more than enough to pay the known debts. One uncertain demand remained, the result of which could not be known until a long and sharp litigation—the result of which they were unwilling to wait for. It would have been madness in the executors to have made a division without looking ulteriorly to that demand. All the transactions and proof shew that those who shared in the division, looked to and understood there was to be contribution if necessary.

The division was made in 1817, and in 1822 a large demand was established; first of $23,000, and afterwards cut down, by further litigation, to $10,000. Beckham and his

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wife urged *their execution under the decree, and levied on and sold the slaves of one of the executors, Mr. Givens. It would be a strange perversion of justice to say that he alone should bear this burthen. His co-executors are most unquestionably bound to contribute; and I think the legatees who were paid also, as the acts were done at their instance, and upon an understanding to contribute: and it is so ordered and decreed that this point may be carried up to a higher tribunal.

The legatees appealed from so much of the decree as declared the sale in April, 1817, a division, ascertaining and vesting the rights of the legatees, and that the payments to the husbands of the infant legatees were valid payments, binding on the legatees, and chargeable to the estate, on the following grounds:

1. That admitting the sale in April, 1817, to have been a division, yet as the said sale was made within two months after the death of the testator, and after the executors had notice of the large claim of Beckham and wife, it was wholly ineffectual to ascertain and vest the rights of the legatees: it being respectfully submitted, that under the will no division could be made having that effect within a year and a day after the death of the testator, especially when the executors were apprised of the existence of a very large debt which remained unpaid; and that it could not be made even after that period, until the said debt was fully paid.

2. That admitting the authority of the executors to make such a division with the assent of the legatees, yet there is no evidence whatever of such assent, each and every of the legatees having denied that they ever regarded the sale as a division, and there being no evidence that it was so regarded by any but the executors.

3. That several of the legatees being minors, were incapable of assenting; nor could any premature division affecting their rights be lawfully made, save by the authority and under the sanction of the Court of Equity.

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*4. That if the sale in 1817 was intended for a division, yet in fact it was not a division, inasmuch as the purchases by the legatees were not regulated by the amount of their respective interests, nor were any purchases whatever made for most of the infant legatees; and the division of the fund being arrested by the intervention of the claim of Beckham and wife, no adjustment was or ever has been made of the balances due on the purchases made by the adult legatees, but bonds and mortgages were taken for the amount of their respective pur-

chases; and although the debt to Beckham and wife was paid off in 1822, yet no settlement has ever been made, and to this day the minor legatees are unpaid.

5. That all payments made by the executors to legatees, or the husbands of legatees, who died before the rights of the several legatees vested, were payments in their own wrong, and are not chargeable to the estate.

6. That payments to the husbands of legatees, who died before the interests of their wives vested, were unauthorized, and are not binding upon the wives surviving them.

Mrs. Reynolds, the executrix of Richard Reynolds, also appealed on the grounds:

1. That she is not liable to the complainants, having been called to account and a decree had against her by her husband's co-executors.

2. That the loss of the debt arising from the sale of the house and lot, ought to be charged exclusively on the other executors.

3. That she ought not to be charged with any interest.

Charles Givens, the defendant in the original and complainant in the cross-bill, also appealed from so much of the decree as ordered him to pay interest on the balance in his hands from 1817 to 1822, on the ground—

That an executor has no right to invest money for the benefit of creditors: that if

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Givens had invested the funds while *Beckham's bill was pending, the same would have been done at his own risk: that the Court would not have authorized the investment without the consent of Beckham, and consequently the executor is in no default by keeping the money in his own hands, and as he did not use it he is not liable for interest on it.

Treville, Bailey, for the legatees.
Grimke, for Mrs. Reynolds.
Smith, for Charles Givens.

The opinion of the Court was delivered by

O'NEALL, J. These cases are involved in more difficulty from the mass of testimony brought before the Court than any other circumstance. When divested of all superfluous matter, and properly understood, they present a few plain questions, about which it is perhaps more difficult to reason satisfactorily than it is to decide upon them. The questions may be stated in the following order:

1. When did the legacies in the slaves vest in the legatees?

2. Are any of the legatees bound by the alleged division at the sale of the personal estate, and, if any, who are so bound?

3. Is the executor Givens bound to pay interest on the sum which he retained to pay the debt of Beckham and wife?

4. Is the former recovery of the executors against Mrs. Reynolds, as executrix of a deceased co-executor, a bar to the account now claimed against her by the complainant Givens?

1. The question, when did the legacies vest, depends upon a construction of the testator's will. The clause upon which it must be decided is in the following words:—"It is also my will and desire that the whole of my negroes be divided equally among the male and female children generally of Martha Givens, the children of Joseph Oswald generally, the children of William Oswald of St. Helena, by name Benjamin and Robert Oswald, together with any child or children which Martha Givens, wife of Charles Givens, might have previous to such division, all share and share alike among such as shall

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be liv*ing at the time of such division, and not otherwise. And that the devision shall take place as soon as the debts are paid, and the executors to act as trustees to each child, individually, until they receive their portion at such time as each one shall come of age, or marriage of the females." After the attestation clause is the following:—"Just naming that the children of James Oswald, which I previously unintentionally omitted, should share equally with the other legatees in the distribution of the whole of my negroes." The general rule in the construction of a will is, that the intention, if not contrary to law, must prevail. That intention, if there is any doubt or uncertainty in a particular clause, is to be collected from the whole will and not from detached parts. But if there is no doubt on the meaning of the testator as to a devise, from the words which he has used, there is no room for either construction or reasoning, to ascertain his intent. It is true the leaning of the Court is in favor of the vesting of legacies; but that leaning cannot be allowed to do away the express words of the testator, unless they should postpone the vesting to a period which the law will not permit.

Where a legacy is left to the children of another person, as a class, and no time is fixed when distribution is to be made, the legacy vests at the testator's death, and none can take under it but such as are then in esse; but where a future time is fixed for distribution, then all who are in esse at the period of distribution will be entitled to take. These positions were fully considered in the case of Myers v. Myers, 2 McC. Eq. 214, [16 Am. Dec. 648,] and that decision constitutes the rule by which all succeeding cases of a similar character must be decided. This rule is, however, said by all the books to be an artificial one, created by the Courts in order to prevent the indefinite postponement of the vesting of a legacy. It is one of convenience merely, and never was intended to defeat the expressed intention of the testator; it is a rule of construction,

applicable to cases where we might as fairly conclude that the testator intended a present, as a future interest, to pass by his will. It is supposed that the testator intended that the children in esse at his death, should

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*take a vested transmissible interest, and that that is the effect of his will. We might possibly come to this conclusion, if we were at liberty to reject the words "among such as shall be living at the time of such division, and not otherwise." But this we cannot do. They are the indicia of the testator's intention and must have effect. There is nothing in the clause which will apply them exclusively to the children of Mrs. Givens to be born after the testator's death. They apply to the whole of her children, the children of Joseph and William Oswald mentioned before in the same clause; and they also apply to the children of James Oswald, who were accidentally omitted, but are given the benefit of the provision of this clause by the memorandum at the foot of the will. The effect of that is to insert them in the proper part of that clause; so that it would read "among the male and female children generally of Martha Givens, the children of Joseph Oswald generally, the children of William Oswald of St. Helena, by name Benjamin and Robert, and the children of James Oswald generally."

It cannot well admit of a doubt, that if the words, "among such as shall be living at the time of such division, and not otherwise," have any meaning, they restrict the division of the slaves, among the persons who might be alive, at the time when, according to the will and the operation of law, it ought to have been made. It may be, that under the clause of the will devising the real estate, the devisees take a vested interest; and, upon looking carefully into that part of the will, that does appear to be the true construction. Yet that cannot alter or destroy the sense of plain and unambiguous words employed in the bequest of the personal estate. The testator had an unquestionable right to dispose of the whole or any part of his estate, to any persons whom he thought proper to make the objects of his bounty. Conjecturing as to his intention, I should conclude that it was likely he intended that the real and personal estate should be divided upon the same rule; but then it would be just as fair to permit the restriction annexed to the bequest of the personalty, to control and fix the construction

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of *the devise of the land, as it would be to permit the clause in relation to the land to give construction to the bequest of the personalty.

In cases of doubt as to the testator's meaning, many means of ascertaining whether a vested or future interest was intended to pass, have been resorted to. If the legatee, between the testator's death and the time at which he was to have the enjoyment of his legacy, was entitled to the interest, it has been held that this would make it a vested legacy. But that is by no means an infallible criterion, for there are cases where the interest on a legacy purely contingent, has been allowed to the legatee. In this case the testator constitutes his executors trustees for each of the children who were the objects of his bounty, and this has been supposed to be equivalent to a devise of the rents and profits to each between his death and the period of the division. This might be so, and not affect the question of construction. But it may admit of a doubt whether he intended that they should act as trustees for each child before a division was made. Before that time, they were trustees for the whole; and although legally they were, as executors, trustees for all and each, yet the testator seems to have intended, after the division, to create something like a separate trust in favor of each legatee.

The rule of construction, as to whether a legacy shall be considered vested or contingent, seems to be well settled, that where time is of the substance of the gift, and not a mere direction as to the time of payment, the legacy is contingent; otherwise that it is vested. 2 Salk. 415. This rule applies in all cases where there is a doubt, from general phrases used. But if, in a bequest to two, to be paid at twenty-one years of age, the testator should add, if either die before that time, the one who should survive and attain that age, should have the whole, it could not be pretended that the one who died had a vested and transmissible interest. The testator's qualification of the bequest, prevents any rule of construction from defeating his intent. Rules of construction are nothing more than

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the means *by which we are enabled to solve a doubtful question of intention. The words of the testator, evincing his intention, is the first rule, to which all others must yield. Looking to the words used by the testator, it is plain that he intended his slaves to be divided among such of the children of Martha Givens, Joseph Oswald, William Oswald and James Oswald, as might be living at the time when, according to the will and the operation of law, a division ought to be made, and that intention, whatever hardship it may work, must have effect.

2. It now becomes important to inquire, when could the executors legally make the division? and what is the effect of the sale, and the acts of the parties at or after that time?

The direction of the will is, "that this division shall take place as soon as the debts are paid." The testator owed at his death a few known debts, to the payment of which the cash on hand and other available funds were

amply sufficient: these were paid before the sale. But on the day of sale, the executors received notice of a large demand in favor of Beckham and wife, which, after a long litigation, terminated in a decree in their favor for upwards of $10,000.

The words of the will plainly point out the payment of his debts as a condition precedent to a division. But if they receive a literal meaning, the executors had the power, by postponing payment and resorting to the shifts and devices of legal delay, to prevent the vesting of the legacies to any period they might think proper. On the other hand, if the words are restricted to such debts as the executors pleased to acknowledge and to pay, they had it in their power to hasten the period of division and vesting, and thus favor a division to the injury of the legatees. Such uncertainty, arising from an arbitrary discretion, is, if possible, to be avoided. If all the testator's debts could have been immediately ascertained and paid, and this had been actually done, a division made as soon as the debts were paid, might have been sustained: but when one very large debt was demanded, and remained unpaid, it would be sporting with the testator's directions to say that a

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division could be made, *because his admitted debts were paid. He had the right to require, if he chose so to do, that his estate should be unincumbered before it went into the possession of his legatees. And such a direction was not, perhaps, without value or wisdom. A division before the payment of his debts might have created a capital for his legatees, of which subsequent events might have deprived them, and in thus defeating a reasonable expectation, might have been the means of producing misery and want, instead of happiness and plenty. It was the duty of the executors, within the time allowed by law, one year from the testator's death, to have ascertained the amount of his debts. P. L. 494. And, if possible, it was their duty to have paid them within the same time. At its expiration, the legatees had the right to demand that the division should take place. If it had been sooner demanded, no Court would have ordered a division on being informed that there were outstanding debts. At the end of that time, a sufficient sum for the payment of the debts, if any had remained unpaid, might have been left in the executors' hands, and the balance distributed. In all events, that was as soon as the legatees had a legal right to demand partition; and if made before, it could only be sustained on a full and clear shewing of the payment of all debts. In this case we are, therefore, driven, necessarily, to say, that a division, before the expiration of one year from the testator's death, was premature and illegal. Such of the legates as were then in esse, were alone entitled to a share under this part of his will. But notwithstanding this legal conclusion, I am satisfied that all of the adult legatees are bound by the division, if any was made. For it cannot be denied, that they could, if they chose, make a division which would bind them, although it might be inoperative as to the minors. For, if an infant and adult contract together, the adult is bound, although the infant may not be. Some of the infants were femes covert, and although their interest was a mere possibility, yet as the husbands were sui juris and capable of receiving their shares, any act of theirs which would go to confirm the sale and division may have the same effect

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against their wives. *Their interest was a mere chose in action, which this act of the husband reduced into possession; and however hardly it may operate upon the females, yet it is one of the necessary incidents of the relation of husband and wife. The wife's separate legal existence is merged in the coverture, and if she could have been bound by a division made by her consent, when of full age, it follows that she is legally bound by one made by the consent of her husband, notwithstanding her minority. The husband and wife could have demanded partition, and the consent to division is, as to their rights, the same thing as if they had demanded and obtained partition by operation of law.

Having stated these preliminary principles, it is necessary to see what are the facts before any conclusion can be arrived at. The sale, it appears on all hands, was forced on by the other parties against the wishes of Mr. Givens. There appears to be no doubt that the sale was intended to ascertain, in money, the amount to be divided, and that each of the legatees who were capable of so doing might buy, if they chose, the amount of his or her share. At the sale, there were seventeen persons alive who were supposed to be entitled to shares, viz: six children of Mrs. Givens by her husband the defendant, all minors; four children of Joseph Oswald, all infants but two of them, Charlotte Dews and Martha Scanlan, who were then married; three children of James Oswald, all infants —one of them, Susan Skellon, was married; the children of Wm. Oswald of St. Helena, William B. and Robert Oswald; and Joseph and John Jenkins, children of Martha Givens by a former marriage, all of whom were of full age. Since the sale and before the period of division, five of the children of Mrs. Givens, and Charlotte Dews, died.

The proof clearly establishes that Wm. B. Oswald, Robert Oswald, Joseph Jenkins, John Jenkins, and the husbands of the females, Dews, Scanlan and Skellon, considered the sale and their purchases in effect a division of the estate into seventeen shares. On the bonds given for their purchases, is endorsed a memorandum—"This bond is giv-

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en as security, in case of any *demands or suit coming against the state, or till a final settlement takes place." This had the effect to make them bonds to refund; and shews that the parties intended, when the bonds were equal to, or less than one-seventeenth, that each should retain what he had, unless some debt should be established against the estate. Upon the bonds of William B. and Robert Oswald, who each purchased more than one-seventeenth, is endorsed a receipt of the same date with the bonds, and signed by the executors. The receipt on the bond of William B. Oswald is in the following words: "Received, 16th April, 1817, from William B. Oswald, Esq., the sum of nineteen hundred and sixty-nine dollars seventy cents, being his proportion of the negroes belonging to the estate of George Stephens, sold this day." That on the bond of Robert is only varied by the use of his name instead of that of William B. This is not only evidence of a division, but is the division itself. An actual division by a sale, and the appropriation of the proceeds to each one having been established, it is binding upon all such as were legally capable of assenting to it. The legatees, William B. Oswald, Robert Oswald, Joseph Jenkins, John Jenkins, Mrs. Skellon and Mrs. Scanlan, are only entitled to one-seventeenth, and must each contribute from their said share one-seventeenth of the debt recovered by Beckham and wife, to the defendant Charles Givens. Any payments or purchases made to or by the husbands of each of these femes covert, were pro tanto legal satisfaction of her share, and must be deducted from it. The same thing would be the case with Mrs. Dews, but for her unfortunate death before the period of division. Her death, as against the minor legatees, forfeited her share. She will be entitled to one-sixth of the residuum which may be left of the estate, after satisfying to the surviving child of Mrs. Givens, Wm. Oswald, Sarah the wife of Slowman, Sarah the wife of Ricard, and Mary the wife of Freeman, each one-eleventh of the sales of the slaves, deducting their shares of the debt due to Beckham and wife. These persons being minors, and not

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bound by the division, are *entitled to shares, according to the number of persons who were alive at the time when the executors were legally liable to make a division. The consequence of this mode of division, will be to leave a surplus of the estate divisible into six equal parts, between and among Mrs. Dews and the five deceased children of Mrs. Givens. It is the consequence of holding the adults to be bound by the division made by their consent, and it gives to the minors the benefit of an advantageous contract. I rejoice to be enabled legally to produce this result, for it enables us to visit, with just punishment, the avarice of adults who would seek advantage from such an awful dispensation of Divine Providence to parents, as the bereavement of five children in a few months. The payment to or purchase by Mr. Dews, if it does not exceed his wife's share of this residuum, was legal and proper, and must be allowed to the executors. If it exceeds it, the excess must be paid by them to the estate. The same remarks apply to the payment to Mr. Ricard on account of his wife's share, and the same rule will govern it.

3. Generally, executors or administrators are liable for interest on balances in their hands. It is their duty to make interest upon the funds when they can do so. But if a fund in the hands of an executor be claimed by two or more persons, and he holds it in his hands without using it, or making interest upon it, until they have legally settled their rights, he is a mere stakeholder and not liable to interest. Bulows & Pope v. O'Neall, 4 Desaus. 394. So if a debt is claimed against an estate, the justice of which is doubted, and the executor litigates the question in good faith, but retains a sufficient sum in his hands for its payment, which he does not use and from which he does not make interest, he will not be chargeable with interest on it, Pace v. Burton, 1 McC. Eq. 247. If, however, it should be that the sum which he alleges he retained, was his own debt for property bought at the sale, he would, in that case, be liable for interest. For he has the use of the property purchased, and its use is equivalent to the interest to be paid on the

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purchase mo*ney. As the facts on this part of the case are not well ascertained, the Commissioner must ascertain them, and allow or disallow the interest according to the rule which I have stated.

4. A former recovery, between the same parties and in the same right, concludes all questions which ought then to have been made. We have no right to look into the decree of the Court of Equity to ascertain the items of the account. If the liability to account existed before the filing of the bill, the decree concludes the parties from setting it up. In this case, Mrs. Reynolds' liability to account for the matters for which she is now required to answer, did not exist at the time of the filing of the former bill. Her liability to account to the other executors, will depend upon the fact whether, in the eventual decree in the first of these cases, they should be charged with any act of maladministration in which her testator concurred. If they should, then their right to a contribution from her will arise. They could not have demanded any such account in their former bill, for until they were required to account for it, they had no cause of complaint against her testator. It is even now questionable whether the claim to contribution is

not prematurely made. It would, perhaps, have been more regular to have postponed this bill until the final decree was rendered: but as the object of the parties is to have this litigation terminated, and as the question was not made, her plea was properly overruled by the Chancellor, and she must account for her testator's equal share of any act of mal-administration which may be established against the surviving executors, and in which he concurred.

Another objection raised in the argument to the liability of Mrs. Reynolds, is, that she is not a party to the original bill, and that she cannot be, therefore, made a party to the cross-bill. "A cross-bill is," (as Mr. Mitford, in his treatise on Equity Pleadings, 64, says,) "a bill brought by a defendant against a plaintiff or other parties in a former bill touching the matter in question in the bill."

It is, therefore, clear that none but a par-

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ty to the original bill *can be made a party to a cross-bill. If the objection had been raised by way of demurrer, I should have been disposed to think it must have succeeded. But it cannot arise under a plea of a former recovery.

It is ordered and decreed, that the decree of Chancellor De Saussure be modified according to the principles contained in this opinion, and that the cause be remanded to the Circuit Court, with instructions to the Commissioner to make up the accounts between the parties according to the rules herein-before laid down.

JOHNSON, J., concurred.

Decree modified.

Rich. Eq. Cas. 352

A. R. MAIN v. W. HOWLAND.

(Charleston, March and April Term, 1832.)

[*Partnership* ⇐⇒311.]

Plaintiff and defendant had been copartners: they dissolved and had a settlement intended to be in full: no account was stated and signed, but the firm being in debt each agreed to give his individual note to the creditor for a certain portion of the debt: the notes were given and afterwards paid:—on bill filed, *held* that the settlement was a bar to any further account, there being no charge of fraud or mistake.

[Ed. Note.—Cited in Executors of Schmidt v. Lebby, 11 Rich. Eq. 341.

For other cases, see Partnership, Cent. Dig. § 721; Dec. Dig. ⇐⇒311.]

Before De Saussure, Ch. at Charleston, April, 1831.

De Saussure, Ch. The object of the bill is that an account may be taken of the copartnership dealings and transactions between the complainant and defendant, in various copartnerships (which are named,) from the commencement thereof, and also an account of the monies received by the complainant and defendant in regard thereto, and of the stock in trade and debts due to the firms of Main & Co., and Howland & Co., respectively, at the dissolution of the copartnership, and that defendant may be decreed to pay the

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complainant the amount stated *to be due him by exhibit A. To the bill of complaint the defendant pleaded in part, and answered in part. The plea is in bar to the demand of an account, on the ground that subsequent to the dissolution of the copartnership, to wit: on the 27th June, 1829, the complainant and defendant accounted together for the transactions of the said copartnership, and an account stated was drawn out in writing, examined, discussed and mutually agreed to by and between the said complainant and defendant. That on the said accounting and final settlement, it appeared that the amount of the debts due by the said concern was the sum of $2,896.98-100 to Howland, Ward & Spring. And that after the claims and counter-claims of the complainant and defendant, as between themselves, had been satisfactorily adjusted and the account stated, it appeared that of the above sum the complainant was bound to pay $2,012.38-100, and the defendant the sum of $884.60-100: and, on the same day, a note was given in the name of the firm, to Howland, Ward & Spring, for the above sum of $2896.98-100, and the several notes of the complainant for $2,012.38-100, and of the defendant for $884.60-100, of the same date in favor of Howland, Ward & Spring, were given to them, and an endorsement entered on the original note of $2,896.-98-100—that it was held only as a collateral security for the payment of the several individual notes given as aforesaid, which individual notes have been long since paid: defendant relies on this settlement as final and conclusive, and insists upon it is a bar to complainant's demand. The defendant answers to the rest of the bill.

At the hearing, the counsel for the defendant offered evidence to prove the plea. This was objected to by the counsel for the complainant, on the ground that the plea was insufficient, because it does not state the balance between the parties as it ought to do except argumentatively. This question was argued by the counsel on both sides. The Court determined to receive the evidence.

William Procter, Benjamin Howland and

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Anthony Willis, *were examined as witnesses, and gave full and particular evidence as to the transactions of the parties, and the nature and circumstances of the settlement which took place between the complainants and defendants in June, 1829. They state it to have been full and particular, and final and conclusive. So understood by both parties; repeatedly declared; acted upon and notes given by them for the balances due by each of them respectively.

A very able and elaborate argument was then made by the counsel upon the sufficiency of the plea in bar supported by the evidence. I will not follow the counsel through the positions taken in their argument, but merely state the result. It appears to me that the examination of the transactions of the parties, and of the books of the concern, to which both parties had unlimited access, was full and satisfactory: and that the settlement was made with the full knowledge of the affairs by both parties, and was intended to be, and actually was, final and conclusive by and between the parties. That it was a losing concern, and the only question was how much was due by them to others, and how and by whom to be paid. That it was ascertained to the entire conviction of both, that the copartnership was indebted to Howland, Ward & Spring the sum of $2,896.98-100, of which Main was bound to pay $2,012.38-100, and Howland $884.60-100, and that each of them gave his separate note for the respective sums, which have since been paid and the business ended.

It is true the formalities of a regular settlement were not gone through, but, in substance, it was a full settlement, and said to be in the usual mode of settling among merchants in Charleston: and it strikes me that a settlement between copartners, each of whom had complete knowledge of the transactions and access to the books, need not have all the formalities of a settlement between strangers. The notes stating the balances to be paid by each were signed, and this substantially was a signing of the accounts. For it was by an examination of the accounts alone that the results could have

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been obtained *how much each partner was to pay of the debt due by the concern, and this settlement was acknowledged repeatedly by both parties to be correct, and acquiesced in and acted upon by both, for each paid his note for the balance decided to be due by him, and for which he gave his note after several renewals thereof. The bill does not charge fraud or surprise in obtaining the settlement, and there is not a title of such proof, nor is there any error on the face of the accounts shewn. I am satisfied that it was a fair and just settlement, and I cannot consent to open it on a mere technical objection, notwithstanding the very forcible arguments of the Attorney-General on this point. It appears to me that it would be merely to open and prolong litigation to no useful purpose. It is, therefore, ordered and decreed, that the plea in bar be sustained and the bill dismissed.

The complainant appealed on the grounds:

1. Because the answer overruled the plea.

2. Because there was no proof of an account stated sufficient to preclude further inquiry.

Legare, for appellant.

Dunkin, Grimke, for defendant.

The opinion of the Court was delivered by

JOHNSON, J. The rule very clearly is, that if the defendant plead and answer to the same matter in the complainant's bill, the answer overrules the plea, or, in other words, the plea stands as a part of the answer. Cooper Eq. Pl. 229; Beam. Pl. in Eq. 37. But, under the circumstances of this case, I cannot perceive what difference it will make, whether the case is determined on the assumption that the plea is overruled by the answer, or whether it is entitled to stand as part of the answer. In either view the question presented is, whether the plaintiff is concluded by having stated an account with the defendant: for the determination of that

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question against him *is a bar to the account, whether it come under the plea or the answer.

The signing of an account stated, it is conceded, is a bar to the claim of either party to a subsequent account, although the party complaining may, upon the ground of mistake or fraud, be permitted to come in and surcharge and falsify any or all of the items: and the rule proceeds on the principle, that signing the account is evidence of the assent of the parties to the correctness of all the items. It is evidence of their admission that it was true, and to repel that there must be proof of fraud or mistake. Upon this principle it has been held that the signing of a security on the foot of an account stated, although the account itself is not signed, will bar an account.

And, I apprehend, that upon the same principle, proof of any other act, clearly and unequivocally showing an account between the parties of all matters between them, and regarded and considered by them as a final settlement, would also be considered as a bar. Suppose, for example, that these parties had come to a settlement, professedly, of all their accounts, and divided their funds or their responsibilities, and instead of signing an account stated, or a security on the foot of it, they had mutually agreed to destroy all the books and vouchers from which the accounts were made up—surely, upon the principle, that would also bar a subsequent account. How are the facts here? The witnesses, Wm. Procter and Benj. Howland, both men of business and eminently qualified for the office, state unequivocally that they were called upon by these parties to make a full and final settlement between them, and that upon a thorough examination of all their accounts with their assistance and in their presence, they made a settlement, the result of which is exhibited in the summary produced on the trial, and that they understood both were satisfied with it, and upon the faith and in

pursuance of it, each gave their notes for the sums due by them, according to this settlement, to their creditors; and the defendant

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states in his answer, that, in the belief *that this was a final settlement, he neglected to preserve the books necessary to enable him to make another account.

Now it does appear to me, that their giving their separate notes to the creditors, is in exact conformity to the rule which regards the signing of a security on the foot of an account as equivalent to the signing of the account itself. There can be no difference in principle between a security given to a stranger, founded on the result of an account, and one given to the party. The one is as much the evidence of assent to the account as the other.

Wrong may have been done to the complainant in the settlement, either by mistake or the fraud of the defendant, but to entitle him to relief, it was incumbent on him, according to the rules of law and the practice of the Court, to show it. He has failed to do so, and his bill was, therefore, properly dismissed.

The appeal is dismissed and the decree of the Circuit Court affirmed.

O'NEALL, J., concurred.

Decree affirmed.

Rich. Eq. Cas. 357

W. J. BOONE v. W. B. BARNES, W. FLURRY, et al.

(Charleston, March and April Term, 1832.)

[*Wills* ⟸594.]

Testator bequeathed negroes to W. B., his executors, &c., "and in case he should die leaving no children, then," over; and provided, that until W. B. arrived at the age of twenty, or, if he should die before twenty, until such time as he would have arrived at that age, E. and M. should have one-third of the profits of the negroes:—*Held*, that W. B.'s interest was defeasible in the event of his dying without children at any time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1311; Dec. Dig. ⟸594.]

Before De Saussure, Ch., at Charleston, April, 1831.

De Saussure, Ch. The bill is filed by the complainant to obtain the judgment of the Court on the will of his uncle, Mr. John Edmondston. That will, executed on the 5th

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day of *October, 1817, was proved before the Ordinary, and, it is to be presumed, duly executed to pass real estate, because the Ordinary certifies on the official copy presented to the Court, that it was probated by John A. Dodsworth, one of the subscribing witnesses: yet there are no names of witnesses to that copy. By that will the testator bequeathed four slaves, by name, with the increase, to his nephew W. J. Boone, his heirs, executors and administrators, qualified by a proviso, that the testator's mother, and sister Maria Boone, should have one-third of the profits arising from the hire of the negroes, until he (the legatee,) comes to the age of twenty years. And he also devises to his said nephew, his heirs, &c., the tract of land on which he resided. Then he adds, "in case my said nephew W. J. Boone should die, leaving no children, then I give, devise and bequeath to the children of my sister Beatrix Flurry, the said four slaves, with the increase of the females, and the said tract of land." The devisee and legatee, W. J. Boone, has attained twenty-one years of age, and believing himself the absolute owner of the slaves bequeathed to him, has made a contract for the sale of two of the said slaves, and the purchaser, W. B. Barnes, is willing to complete the purchase if he can be made safe. But the children of Mrs. Beatrix Flurry insist, that, upon a sound construction of the will of the testator, they have a contingent interest in said slaves, depending on the possibility of W. J. Boone's dying, leaving no children, and that he is not the absolute owner thereof, and cannot make an absolute sale of said slaves. They ask the protection of their interests, and security for the slaves. The question has been fully argued by the counsel. In considering the question, I lay out of the case the provisions of the will which direct, that the mother and sister of the testator were to have and receive one-third of the profits of the hire of the slaves to the time W. J. Boone should attain twenty years of age, even if he died before he attained that age. For in another part of his will he directs, that if his said nephew should die before he reached twenty years of age, his, the testator's mother, and sister Maria,

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should *receive the third part arising from the hire of the said negroes until the estate is divided, each of the children to receive their part of the estate as soon as they arrive of age. These provisions were a mere temporary arrangement for the mother and sister, and have no bearing on the question of the quantity of estate bequeathed to the nephew W. J. Boone, and the limitations thereon. The question, thus stripped of extraneous matter, is simply whether the limitation over to the children of Beatrix Flurry is a good one. The devise and bequest of the slaves and land is to W. J. Boone, his heirs, &c., and in case he dies, leaving no children, then to the children of Beatrix Flurry. The limitation is not too remote. It is not upon an indefinite failure of issue. If at the time of the legatee's death, or (by indulgence of construction within nine months after,) there be no children of his living, the estate vests in the remainder-men. The contingency cannot be prolonged beyond that, which is with-

in the limits prescribed. It appears to me to be a plain case, and with that impression I must decide for the defendants. But it does not follow that the devisee, W. J. Boone, may not dispose of his interest in the slaves subject to the rights of the remainder-men. Nor is it a matter of course that the person holding the slaves under the bequest, is bound to give security for the forthcoming of the slaves. That is not ordered unless a case of danger be made out, which has not yet been done.

It is, therefore, ordered and decreed, that the estate in the land and slaves in question is in the legatee W. J. Boone, subject to be defeated and to go over to the remainder-men in the event of his dying leaving no children. It is, further, ordered that it be referred to the Master to examine and report, whether there be any just ground of apprehension which would entitle the defendants to security for the forthcoming of the slaves, in the event of their devolving on the remainder-men.

Complainant appealed on the ground:

That from the whole tenor of the said

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will, the testator's *manifest intention was to limit the property first devised and bequeathed to his said nephew W. J. Boone, and over to the children of his said sister Beatrix Flurry, only in the event of his said nephew's dying under twenty years of age and without leaving children, as a contrary construction would have deprived his nephew's children of the property, (had he had children and died before twenty,) which would have passed over to other persons than the first object of the testator's bounty; and as his nephew W. J. Boone did arrive at twenty years of age, the said property then vested absolutely in him.

Lance, for appellant.

The opinion of the Court was delivered by

HARPER, J. The question made in the case only regards the slaves bequeathed by the will of John Edmonson. The bequest to Wm. John Boone, his heirs, executors and administrators, "and in case he, my said nephew, W. J. Boone, should die leaving no children, then I give and bequeath to the children, of my sister Beatrix Flurry, (including Julia Sandford, her daughter by her former husband,) the four several negroes," &c., would no doubt give him an absolute property in the slaves, with a good executory devise over in the event of his dying without children living at the time of his death, at whatever time of his life the death should happen. It is contended, however, that from the subsequent words of the will, the devise over must be restricted to the event of W. J. Boone's dying without children, and under twenty years of age. I do not think that conclusion can be drawn from the words of the will. The testator provides that his mother, and sister Maria Boone, shall have one-third of the profits of the slaves until his nephew arrives at the age of twenty. To prevent a difficulty that might arise, however, he provides that if his nephew should die before twenty, the provision shall still be continued till such time as he would have arrived at that age. Testator also provides that if his sister, Maria Boone, should remain the widow of her deceased husband un-

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til the division of his estate be*tween the children of his sister Beatrix Flurry, she should take an equal share with those children. There is nothing in all this inconsistent with the intention to devise over on the event of the nephew's dying without children, at whatever time of life he might die. The decree of the Chancellor is therefore affirmed.

JOHNSON and O'NEALL, J., concurred.

Decree affirmed.

Rich. Eq. Cas. 361

JOHN BELL v. JOHN TALBIRD.

(Charleston, March and April Term, 1832.)

[*Life Estates* ⇐⇒8.]

If husband of tenant for life of slaves holds over after the death of his wife, his possession is adverse, and may, after the time limited by the statute of limitations, bar the remainderman, or reversioner.

[Ed. Note.—Cited in Rice v. Bamberg, 59 S. C. 507, 38 S. E. 209.

For other cases, see Life Estates, Cent. Dig. § 25; Dec. Dig. ⇐⇒8.]

[*Husband and Wife* ⇐⇒16.]

If the wife dies after the first of March, the possession will not be adverse until the end of the year.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 100–106; Dec. Dig. ⇐⇒16.]

[*Evidence* ⇐⇒273.]

There is a wide distinction between promises to revive a debt barred by the statute of limitations, and admissions giving character to possession: in the latter, any admission of the party in possession, which goes to show that the possession was not intended, in its commencement or continuance, to defeat the other party's title, will generally prevent the possession from being considered adverse.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1115; Dec. Dig. ⇐⇒273; Adverse Possession, Cent. Dig. § 670.]

Before De Saussure, Ch., at Beaufort, January, 1831.

The bill states, that complainant is surviving legatee under the will of Thomas Bell. That said Thomas Bell, being seized and possessed of considerable real estate and personal property, made and published his will, dated about August 15, 1795, and, amongst other things, gave to his wife (complainant's mother) certain negroes, by name, during her widowhood, with one-sixth of his

stock, etc., with a provision, that should she marry, said negroes, etc., to be equally divided among his then surviving children; but in case she should not marry, said ne-

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groes to be *equally divided at her death among his then surviving children. Testator further gave to his daughter, Elizabeth, half of a tract of land and one-fifth of his slaves, etc., to her and the lawful issue of her body forever: and, (after providing for his eldest son, Thomas,) he gave to his daughter, Mary, the other half of the said tract of land, with a limitation over of each half to his daughter Sarah, in case of the death of Elizabeth or Mary without issue. Testator further bequeathed to Mary one-fifth of his negroes, stock, etc., and by a subsequent clause of the will (having first devised and bequeathed certain property to complainant, and otherwise provided for Sarah) directs that if any of his sons or daughters should die without leaving lawful issue of their body alive, then their portion of the estate should be equally divided among his then surviving children. Bill further states the death of Thomas Bell, the testator, about 7th September, 1795, leaving said will in full force. His family then consisted of his wife, three daughters, viz. Elizabeth, Mary and Sarah, and two sons, Thomas and complainant. Sarah died, an infant and unmarried, soon after; by which event, her share of the personal property became divisible among the other children. Elizabeth, having intermarried with defendant John Talbird, was put in possession of her share, as were also the widow and other children of full age. Elizabeth died about the ——— day of ——— 182—, leaving two children, who are parties defendants. Shortly after this, the defendant, J. Talbird, married Mary, then the widow of one Palmer; and from thenceforth, possessed himself of and held, by the marital right, all the property bequeathed to Mary, and one-fifth of the property bequeathed to the widow, (then dead,) and also the property derived to Mary from Sarah. Bill states that Mary, soon after this marriage, to wit, on the ——— day of November, 1825, died without issue—the complainant being the only child surviving her. There were then also living, two children of Elizabeth, and Thomas, the son of Thomas Bell, the testator's eldest son. Bill states that John Talbird, ever since his intermarriage with Mary, has been in constant pos-

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session and enjoyment of the *property (with the increase) bequeathed to her by her father immediately, and by way of remainder, subject to the limitations and restrictions before mentioned; and since her death, has continued in the possession and enjoyment thereof, with full and perfect knowledge of testator's will and of complainant's claim thereunto, receiving and disposing of the rents and crops of the real estate, and the hire, wages, etc., of the personal property, and now continues to receive and dispose of the same. That complainant, being the only surviving child, and therefore entitled, upon the death of Mary without issue, to the whole personal property of Mary under the will, and, together with the three grandchildren, to a part of the land, with an account of rents and profits, but being ignorant and uninformed of the number and names of the negroes devised to Mary, has often applied to J. Talbird for an account of the personal property of said Mary bequeathed to her by the will, and for a discovery of the names of the negroes and number of the cattle, and for an account of the profits of the land. Complainant has also applied to the other defendants for partition. Bill states that Talbird has refused all satisfaction and discovery under various pretexts. Bill prays discovery and relief.

Defendant, by protestation, not confessing all or any of the charges of the bill, or things contained therein—for plea to said bill, says, that if complainant ever had any cause or right of action against this defendant, on account of the matters contained in the bill (which is not admitted), the same did accrue more than four years before the filing of the bill or service of process in this or any other suit. And defendant avers that he made no promise touching the matter in the bill within four years before filing the bill or the service of any process. Therefore, defendant pleads the Act of Limitations, etc.

De Saussure, Ch. The brief of the bill states the case fully and clearly, and accompanies this decree as part thereof.

The right of the complainant to the property in question, under the will of the testa-

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tor, is not now disputed; though a ques*tion may arise hereafter, as to a part of it, as is stated below. The defence set up, is the Statute of Limitations, which is pleaded. The complainant's counsel insist, that even if the statute of limitations should be decided to be applicable to the case, the defendant has deprived himself of the benefit of it by certain acknowledgments made to a witness who has testified in the cause. But it is also denied that it is a case to which the statute of limitations should apply.

As to the first point, I have perused carefully the evidence referred to. It was given cautiously and candidly, and is in writing, and accompanies this decree. I cannot be satisfied that the facts stated in the evidence make out such an acknowledgement or promise as will take the case out of the statute. Mr. Fuller's argument is, I think, conclusive on this point. He shows clearly, that by a series of decisions, the operation of the statute had been frittered away, until the Judges felt alarmed and dissatisfied, and have retraced their steps. It seems now to be set-

tled that nothing but a clear acknowledgement or unqualified promise will take a case out of the statute. It does not appear to me that the evidence relied upon, establishes such a clear unequivocal acknowledgement, or unqualified promise, as ought to be allowed to produce that effect. Indeed, whatever took place was really conditional. It was rather an offer of a compromise on certain terms; which not having been accepted, or completed, falls to the ground. On this point, therefore, my opinion is with the defendant.

The next question is, whether this is a case to which the statute applies. The arguments of the counsel on this question are full and able, and the Court is under obligations to them for the pains taken to bring out all the law on the subject. On a careful consideration of the arguments, I am satisfied, that the statute does not apply to such a case. There are, among other things, certain devises and bequests to testator's daughter, Mary, but if she dies without leaving issue, then the property bequeathed is to go over to such of his children as may be living at the time of her death. The daughter mar-

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ries and dies without *having issue. Her husband came into possession of the property subject to this limitation over. It was a trust estate in the construction of this Court, as appears by the decided cases, and he held it as much subject to the trust as his wife had. Mr. Treville's argument is, I think, conclusive on these points. In my judgment, therefore, the plea of the statute cannot be sustained. It must be overruled, and the defendant is directed to answer over.

The defendant appealed, and moves to reverse this decree, on the ground—

That admitting the possession of J. Talbird to have been that of a trustee during the life of his wife Mary, yet, upon her decease, in November, 1825, the fiduciary relation clearly determined. His possession became adverse, and the Act of limitations commenced its operation.

Evidence.—R. De Treville sworn and examined, states, that in February, 1830, he was requested by complainant, Bell, to learn of Jno. Talbird, the defendant, what was the nature or object of the paper, he, Talbird, wanted him, complainant, to sign. He (witness) saw Talbird a short time afterwards, in Coosawhatchie. Witness then told him the request that Bell had made of him. After some conversation by way of explanation, Talbird said, that he Talbird, and Mr. Bell, were the only two entitled to any part of his (Talbird's) wife's property, under Tom Bell's will, because John Bell was the only one who had survived his wife, and for that reason, he had understood, that little Tom Bell could not claim. He said, that as to the land, of which his wife died possessed, he would give it up, because he had not had it sufficiently long; but as to the negroes, he would not give them up, because he had had them more than four years. Witness then asked him if he would insist on the statute of limitations under such circumstances. He replied and shook his head, that he did not know. Talbird then left witness, and about the 2nd of April, 1830, he came to witness in his office, and after a desultory conversation,

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witness alluded to *the agreement which Talbird wanted Bell to sign, and asked him to explain more fully his wishes, and told him that he had been instructed by Bell to enquire exactly the nature of his wishes and to act for him, and asked him if he had ever delivered to Bell the negroes of which his second wife died possessed. He replied that he had not delivered them, because Bell had never demanded them. Witness asked, where they were. He said they were all in his possession, except a few, sold by Mrs. Talbird, or by him and Mrs. Talbird, in her lifetime —that he understood, that by or under Tom Bell's will, his wife's father, he, Talbird, was entitled to one-half of his wife's negroes, or property, and said, if John Bell, the complainant, would release all claim which he had upon the second Mrs. Talbird's land and negroes, that he, Talbird, would release a claim which he had against Jno. Bell for a legacy of $1,000, and procure Mrs. Henry, his daughter, to release a legacy for $1,000 under Paul Bell's will (of which John Bell is the only executor); that if that were done, he thought that he and Bell would be about square.

The demand of the negroes, before filing bill, was proved. Talbird did not positively decline at first, but said that he would think of it, but never gave an answer.

The opinion of the Court was delivered by

O'NEALL, J. That tenants for life are trustees for the remainder-men or reversioners, as the case may be, and their possession, or the possession of any one claiming under them, cannot be adverse during the continuance of the particular estate, to rights in remainder or reversion, is too clear to admit of a question. But on the determination of the particular estate, the trust is also determined; and the holding over of a tenant per autre vie, must be adverse. His possession is no longer referrible to the title by which he came in; if he uses the property, it is tortious against the remainder-man or reversioner: and for it an action will lie against him. It is true, if he chooses, he can hold the property as a mere stakehold-

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er, by either not using it, or by *giving notice to the right owner that he is ready to deliver it to him; and, in such a case, he would not be liable to an action. But if he uses the property at all, it must be as a wrong doer, and the wrong then commenced may, by a sufficient lapse of time, be the

foundation of a legal title. Any act of possession which gives the legal owner the right to sue, is generally adverse, and may, after the time limited by the statute, bar the plaintiff's right of recovery. In Fisher vs. Prosser, Cowp. 217, Lord Mansfield said: "A man may come in by a rightful possession, and yet hold over adversely without a title. If he does, such holding over, under circumstances, will be equivalent to an actual ouster. For instance, length of possession during a particular estate, as a term of one thousand years; or under a lease for lives, as long as the lives are in being, gives no title. But if tenant per autre vie hold over for twenty years after the death of cestuy que vie, such holding over will, in ejectment, be a complete bar to the remainder-man or reversioner, because it was adverse to his title." So in the case before us, the holding over of the husband, after the death of his wife, the tenant for life, is adverse to the title of the complainant. For at any time after the expiration of the year, in which Mrs. Talbird died, (if she died after the 1st of March,) the complainant might have brought trover for the conversion of the slaves, against the defendant; and his use of them would have been sufficient evidence to establish the conversion. Under our Act of Limitations, actions of trover or detinue must be brought by the plaintiff, if laboring under no disability, within four years next after the cause of action given or accrued, and not after. For the purposes of this question, this bill must be regarded in the same light as an action of trover or detinue; and be subjected to the same rules as to the operation of the statute of limitations.

The question, then, arises, when did the complainant's right of action accrue? At the end of the year in which Mrs. Talbird died, the defendant's right, as tenant per autre vie, ceased. His use of the slaves, after this time, was the use of the property of another, without his consent, either actual or implied.

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His *possession was, therefore, in this respect, adverse to the legal estate; and the statute would then commence to run, unless the defendant's admissions qualify the legal effect of this his possession, and repel the presumption that it was adverse. And this, I think, they do.

The admissions, proved by Mr. De Treville, distinctly admit the complainant's right to an undivided part of the negroes in dispute; propose to give the legacies of the defendant and daughter to the amount of $2,000 for his entire interest; and assign, as a reason why the negroes had never been given up, that they had never been demanded.

There is a wide distinction between promises to revive a debt barred by the statute of limitations, and admissions giving character to a possession. In the former, as decided in the case of Young v. Monpoey, (2 Bail. 278,) there must be an express promise to pay, or an admission of a subsisting debt which the party is either liable or willing to pay. In the latter, any admission of the party in possession, which goes to show that the possession was not intended, in its commencement or continuance, to defeat the other party's title, will generally prevent the possession from being considered adverse. Harrington v. Wilkins, 2 McC. 289; and Markley v. Amos, 2 Bail. 603.

The defendant, in his conversation with Mr. DeTreville, admitted the complainant's right as a co-tenant; and although he afterwards added, I will not give up the slaves, because I have had an exclusive possession for more than four years, yet it is clear, from his admission, that his possession, in both its commencement and continuance, was by him supposed to be in the right of himself and another. If so, it at once negatives the otherwise legal presumption, that it was adverse. His offer to give up his and his daughter's legacies, amounting to $2,000, for a release of the complainant's rights, was not a mere peace offering; it was such a sum as no one would be willing to pay to be rid of the trouble of a law suit. It shows that he regarded the complainant as having still the rights of property. The reason assigned by the defend-

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ant, why possession of the slaves had *not been delivered to the complainant, "that no demand had been made," shows that his possession was either by the actual consent of the remainder-man, or that he did not regard himself as holding over against his rights. For these reasons, I think the plea of the statute of limitations was properly overruled: and the decree of Chancellor De Saussure is, therefore, affirmed.

JOHNSON and EARLE, JJ., concurred.

Decree affirmed.

Rich. Eq. Cas. 369

PETER GOWAN v. ADAM TUNNO, JOHN WALKER et al.

(Charleston, March and April Term, 1832.)

[*Judgment* ⇐847.]

No matter at what price one may buy a judgment, as against the defendant he may claim the whole.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1549; Dec. Dig. ⇐847.]

[*Payment* ⇐47.]

J. W., being the holder of a judgment against R. M., and also his indorser in bank, received from R. M. a sum of money, and gave him a receipt generally, on account: the notes were protested, and, by agreement, the money was applied to them, and the receipt destroyed: *Held*, that junior judgment creditors of R. M. had no right to require the money to be applied to J. W.'s judgment, as a payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 127, 129; Dec. Dig. ⇐47.]

[*Partnership* ⟸219.]

Though partnership effects should be first applied to partnership debts, yet, after these are exhausted, a judgment against the partners, as such, binds the separate estate of each partner from its date.

[Ed. Note.—Cited in Hutzler Bros. v. Phillips, 26 S. C. 149, 150, 1 S. E. 502, 4 Am. St. Rep. 687; Blair v. Black, 31 S. C. 358, 9 S. E. 1033, 17 Am. St. Rep. 30.

For other cases, see Partnership, Cent. Dig. § 438; Dec. Dig. ⟸219.]

[*Judgment* ⟸898.]

The holder of a judgment, formally and technically entering on the record satisfaction in part, cannot have the entry vacated because it was gratuitous.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1714; Dec. Dig. ⟸898.]

Before De Saussure, Ch., at Charleston, January, 1832.

This case came up on exceptions to the report of the Master, Mr. Furman. The report is as follows:

"In obedience to the decretal order made in this case, I have been attended by the parties, and have taken an account of the several debts of Robert Murray mentioned in said order. The debts of record are, first, a judgment obtained by Adam Tunno v. Murray & McLeod, entered up in the City Court, on the 2d July, 1824, for $582.65, with interest from

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said date on $500. *Second, a judgment obtained by J. M. Lowrey v. Murray & McLeod, entered up in the Court of Common Pleas, on the 23d June, 1827, for $137.03. This is supposed to be paid. Third, a judgment obtained by J. B. Clough, assignee, v. Robert Murray, and entered in the Court of Common Pleas, on the 16th February, 1828, on a bond, the penalty of which is $14,981.40, now held by John Walker, assignee of Clough. Fourth, a judgment obtained by Adam Tunno v. Robert Murray, and entered up in the City Court, on the 27th July, 1830, for $294.50, and interest on $250, from August, 1830. Fifth, a judgment obtained by Peter Gowan v. Robert Murray, and entered up in the Court of Common Pleas, on 20th April, 1831, on several causes of action, for $———. The amount due on which is $———. Sixth, a judgment obtained by Robert Murray v. Robert Murray, Sr., and entered up 18th June, 1831, on a bond for $1,972.84, on which there is due $———. Seventh, a judgment obtained by John Bowden & Co. v. Robert Murray, on 28th June, 1831, and entered up in the Court of Common Pleas. Amount of Judgment, when entered, $2,083.20.

"I find that Robert Murray died intestate, in 1831, without assets to pay the judgments of record against him. I have taken an account of the estate, a particular statement of which appears on papers accompanying this report.

"An objection is made by Mr. Gowan, the complainant, to the first judgment of Mr. Tunno, on the ground that it is a copartnership debt of the firm of Murray & McLeod. I find that Robert Murray and George McLeod, some time in the year 1820, formed a copartnership, and carried on business as merchant tailors in this city, and continued to do so until May, 1823, at which time the copartnership was dissolved; that, at the dissolution of the copartnership, the whole of the funds were left in the hands of Robert Murray, who was to settle the affairs and pay the debts. At the time, it was the impression that the concern was solvent. Mr. Tunno held a note of the firm, and after the dissolution the same was renewed by Robert Murray, who signed the renewal 'Murray & Mc-

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Leod, by Robert *Murray,' and the judgment was obtained on a note so drawn. I find that George McLeod, the other partner of the firm of Murray & McLeod, removed from Charleston, and departed this life on the —— day of ——, 1831, utterly insolvent. I also find that Robert Murray, on the 26th April, 1826, agreed in writing to pay the judgment of Mr. Tunno, by monthly payments of $100 each. As the copartnership of Murray & McLeod had been dissolved, and the funds placed in the hands of Murray to pay the debts, as he renewed the notes, and these matters having occurred previous to the contracting of the debts which appeared against him individually, and as the other partner died before him, insolvent, I have allowed the said judgment and execution as liens on the estate of Murray, to be paid according to their priority.

"The amount due on the judgment held by Walker, as assignee, is disputed on several grounds. It appears that John Ferguson, who had been carrying on business as a merchant tailor in this city, in the year 1820, sold out his stock to Murray & McLeod, who then entered into copartnership and continued the business formerly carried on by Ferguson. For the stock sold them, Ferguson took the joint and several bond of Robert Murray and George McLeod, conditioned for the payment of $7,490.70, payable in instalments. Some time after, this bond was assigned to the Charleston Fire and Marine Insurance Company by Ferguson, who guaranteed the payment. The Company afterwards assigned it to James Butler Clough. At the time the bond was assigned to Clough, Robert Murray gave a certificate in writing, in which he admitted that there was then due on the bond the sum of $4,300. Mr. Clough brought an action on the bond, and entered a judgment thereon, as before stated. After the assignment of the bond to Clough, Ferguson, who had guaranteed its payment, entered into a negotiation to purchase it, and borrowed from Mr. Walker the sum of $750, to assist him in effecting the purchase. For the amount so loaned he gave a receipt, express-

ing that the said sum was advanced to him
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on account of Murray and McLeod's *bond. The negotiation failed, but Mr. Ferguson used the amount loaned by Walker, and so informed the latter. Subsequently, however, Ferguson did make an agreement for the purchase of the said bond, for the sum of $1,000; but, not having the funds himself, he applied to Walker to take the contract, and he, consenting, paid the money, and took an assignment of the bond. It does not appear that Murray took any part in procuring the assignment of the bond; indeed, Mr. Ferguson states that he had no concern in making the arrangement, and that the whole interest in the bond was assigned to Walker. It appears, however, after the assignment of the bond to Walker, he indorsed a receipt on the bond, in the following words: 'Received, 28th July, 1828, of Robert Murray, $4,367.80, leaving a balance due thereon of $1,888.70,' and on the judgment he indorsed the following receipt: 'John Walker, assignee of this judgment, comes here into Court, and acknowledges to have received the sum of $4,367.80, leaving a balance due of eighteen hundred and eighty-eight dollars, seventy cents.' There was no money paid at the time these indorsements were made on the bond and judgment; but the object of making them appears to have been to discharge Murray from liability on the bond, except so far as was necessary to refund Walker the amounts he had advanced, at the several times above mentioned, to purchase the bond. The particular circumstances which have attended the transaction are detailed in the evidence of Mr. Axson and Mr. Ferguson, and in the original papers. It appears that Mr. Walker received at one time, from Robert Murray, the sum of $989.50, which the complainant contends must be regarded as a payment on his judgment, and that though it was returned to Murray, or rather was applied to taking up some notes of his, indorsed by Walker; yet that it was not in their power to set up the judgment again in this manner, after it had been reduced by a payment. The complainant also contends that the only amount which Walker can claim upon the judgment is the sum of one thousand dollars, paid by him when he procured the as-
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signment; that the $750 *paid to Ferguson could not give him any right against Murray, and he must look to Ferguson for it. And, therefore, as his claim was limited to $1,000 and interest, and he received the sum of $989.50, there is but a small balance due on the judgment. It appears to me that Mr. Walker is entitled to claim both sums he had advanced to purchase the judgment. There is no doubt that Murray owed a sum on the bond equal to the amounts advanced by Walker. Indeed, in the testimony offered respecting the indorsements on the bond and judgment, there is proof of an admission to that effect. It, therefore, could not make any difference to him what arrangements were made between Walker and Ferguson, if he was not called on to pay more than was actually due. It does appear that the sum of $989.50, received by Walker, was intended to be a payment on the judgment, as this sum was received from a note or notes of Murray, indorsed by Walker, which were discounted in Bank. After the receipt of the money, however, some of Murray's notes, upon which Walker was indorser, became due, and at Murray's request, the former applied almost the whole of the sum he had so received to the payment of the said notes, and Murray gave up the receipt which Walker had given him, for the payment so made. On the other hand, Walker claims to set up the judgment so as to recover, not only the amounts advanced to purchase it, but also certain notes of Murray which he held, most of them friendly indorsements, which he was obliged to pay in July and August last, amounting to about $800. Although, from the testimony, it appears that when the judgment was assigned to Walker, Murray had no agency in the transaction, yet, from the circumstances which attended the making the indorsements on the bond and judgment, the evident intention of the parties to execute an effectual and entire discharge, by Walker to Murray, of monies due on the bond except the sum of $1,888.70, and as there may be some uncertainty as to what was the actual amount due on the bond when it was assigned, there having been also some transactions between Walker and Murray, I have disal-
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lowed claims beyond *the sum of $1,888.70 and interest. Should, therefore, the Court be of opinion that the sum of $969.50 is not to be regarded as a payment on the bond and judgment, the said judgment and execution will be a lien on the estate of Murray, to the amount just mentioned, according to its priority."

To this report the complainant filed the following exceptions:

1. In allowing the judgment of Tunno to be a lien on the estate of the intestate, in preference to the individual judgment of the complainant—Tunno's judgment being one against the copartnership of Murray and McLeod, and it being a settled rule of law in this State, that individual judgments take individual property, and copartnership judgments copartnership property.

2. Because no part of the testimony proved Tunno to be other than a copartnership judgment creditor, and none could be legally introduced for that purpose, Tunno being estopped from denying his own record.

3. Because it is submitted the Master erred in allowing the $750 advanced by John Walker to John Ferguson, and used by him, as an item which could possibly be covered by the judgment against Robert Murray, held by Clough, and assigned to Walker.

4. Because it is submitted the Master should have admitted the $989.50-100, acknowledged by Walker to be the amount due on the judgments. The agreement by Murray to revive the judgment and apply the $989.50-100, otherwise than to the judgment, was subsequent to the intervention of other judgments, and even of the complainant's judgment, and Murray could not then, without a clear fraud on his other judgment creditors, whose liens had accrued, revive a judgment already extinguished and satisfied.

5. Because it is submitted the report of the Master is, in other respects, against law and the facts appearing by evidence.

6. Because the judgment of Walker is also

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a copartnership *judgment, and ought to have been disallowed on the same ground.

The defendant, Walker, also excepted to so much of the report as disallowed the judgment of J. B. Clough held by him, as a security for anything more than the amount paid by him for it, and contended that he was entitled to the amount of his debt as rendered to the Master and established by proof; and that the receipts which he gave on the bond, and on the record, are no release.

DeSaussure, Ch. This case comes up on the report of the Master, and exceptions. These involve some questions of difficulty and nicety, which have been well considered and decided by the Master. The questions made before me have been fully and learnedly argued: and I should desire to go fully into the examination of the doctrines discussed. But as I concur in the views taken by the Master in his report, and adopt them, it seems to me less necessary.

It is, therefore, ordered and decreed, that the exceptions on both sides be overruled, and the report confirmed.

The complainant and the defendant, Walker, appealed.

Thompson, for complainant.

Petigru, contra.

The opinion of the Court was delivered by

O'NEALL, J. The complainant contends that Walker's judgment should not stand for more than $1,000, the sum at which he bought it. This is supposed to be correct, because $750 of the money advanced by him, was with his consent used by Ferguson, and not applied, as first intended, to buy the judgment. But there cannot be any force in this objection. No matter at what price Walker bought the judgment, he was, as against the debtor, entitled to the whole amount. He owed the money, and to him it must have been immaterial to whom he was to pay. The only question between him and the as-

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signee, *was, how much was due on the judgment: the assignment gave Walker the right to demand the whole, and whether he abated a part or none, was optional with him. But, in fact, Walker appears to have pursued a perfectly just and equitable course. He was willing to give $1,750 for the judgment. Ferguson was authorized to give that much for it. He subsequently bought it for $1,000, and the defendant paid that sum in addition to the $750, which he had previously advanced for it, so that he claimed on the judgment no more than the money and interest which he paid for it.

The complainant insists that $989.50, paid by the deceased to Walker, was a payment and satisfaction pro tanto of the judgment. I am very much inclined to think that if the money had been paid on the judgment, no subsequent agreement between the parties to give it a different application, could set up the lien of the judgment as against third persons for the sum so paid. But it appears that the only evidence on this subject, is the answer of the defendant. He swears, that he was the endorser of the deceased in several banks; that the deceased is now indebted to him, by notes which he endorsed and has been compelled to pay, in a considerable sum besides this judgment. That he gave a receipt for the money generally on account; that, after a short time, finding that three notes of Murray, endorsed by him, amounting to $925, had been protested, the said Murray requested him to apply the money which he had received, to their payment; that he did so, and Murray gave him up the receipt, which has been destroyed. According to this statement, he had the right to apply the money to any of the different debts of Murray for which he (Walker) was liable, or which belonged to him. The money was a mere deposit with him, and if he applied it as his debtor wished, it would be difficult to say how his creditors can change the application.

It is supposed that Tunno's judgment is a copartnership debt, and cannot be enforced against the individual estate of one of the partners. There is no doubt that the judgment was a debt against the firm of Murray

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& McLeod. But there is as little *doubt that, on the death of McLeod, the judgment survived against Murray, and it became, in law, the debt of Murray alone, and that it could alone be legally enforced against him or his representatives. But I should think that a judgment against partners created a lien, from its date, on the estates of both partners. If there were both partnership and separate estates, the rule in equity would be, that the partnership effects should be first applied to the partnership debts: but after these were exhausted, I know of no rule which would authorize subsequent judgments against either of the partners, to be preferred to senior judgments against them both.

By Murray's agreement with the defendant, he made the judgment his own debt:

this was before the complainant obtained a judgment, and he has, therefore, in no point of view, a right to complain.

The defendant, Walker, contends that he has a right now to be paid under his judgment, not only the balance of $1,888.70, with the interest thereon, but also the sum of $802 which he has paid as an endorser of Murray. This depends upon the question whether Walker can now vacate the entry of the receipt of $4,367.80 made by him on the judgment, for which, it is conceded, no money was paid by the deceased. It was purely gratuitous on the part of Walker, and done to reduce the judgment to the amount actually paid for it by him. Without entering into the question, whether, if this was to be regarded merely as a receipt, Walker would not have the right to vacate it as without consideration? It will be sufficient for the purposes of this case to say, that the entry made is a suggestion entered, formally and technically on the record, of satisfaction in part, to the amount of $4,367.80. It is made thereby a part of the record, and against it the defendant can not aver anything.

The Chancellor's decree is affirmed.

JOHNSON, J., concurred.

HARPER, J. I concur, reserving my opinion on the ground of appeal taken by the defendant Walker.

Decree affirmed.

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*JOHN HENRY MEY, Ex'or, v. JANE MEY et al.

RENE GODARD v. JOHN HENRY MEY, Ex'or, et al.

(Charleston, March and April Term, 1832.)

[*Dower* ⟸24.]

The widow of a devisee is entitled to be endowed only of what remains of the land after the debts of the devisor are paid.

[Ed. Note.—Cited in Shiell v. Sloan, 22 S. C. 157; Shell v. Duncan, 31 S. C. 563, 10 S. E. 330, 5 L. R. A. 821.

For other cases, see Dower, Cent. Dig. § 66; Dec. Dig. ⟸24.]

[*Dower* ⟸107.]

In Equity, a widow is entitled to an account of rents and profits, or the interest when it is reduced to money, of her dower.

[Ed. Note.—Cited in Phinney v. Johnson, 15 S. C. 163.

For other cases, see Dower, Cent. Dig. § 184; Dec. Dig. ⟸107.]

Before DeSaussure, Ch., at Charleston, January, 1832.

The defendant, Jane Mey, widow of Charles S. Mey, appeals from so much of the Chancellor's decree as limits her dower, of the real estate devised by Florian C. Mey to John Henry Mey, and the husband of this defendant, to an assessment on a moiety of the clear residue, after payment of the debts of the devisor. And she moves that the said decree may be reformed in that particular, so as to direct her dower to be admeasured or assessed, of an entire moiety of the real estates whereof her husband and the said John Henry Mey were seized, as tenants in common, under the said devise; and that interest may be ordered to be paid to her on the several sums assessed, in lieu of her dower, in both these cases, from the period of her husband's death. And in support of this motion, she relies upon the following grounds:

1. That the widow's right of dower extends, in law, to the entire real estate whereof the husband was seized during the coverture, and that she is not liable for contribution for the removal of general charges on the estate, in aid either of the heirs of the husband, or of creditors who stand in the place of the heirs, and who have not a permanent lien.

2. That whatever may be the rule at Law, in Equity the widow is entitled, by the settled practice of the Court, to an account for rents and profits, where her dower is admeasured, or to interest, where a sum of money is assessed in lieu of dower, and that this practice ought most especially to be adhered to, where, as in this case, the widow

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has been made a *party defendant to a suit for settling the estate, and has been prohibited, during the progress of a tedious litigation among other parties, from proceeding to recover her dower at law.

Bailey, for appellant.

The opinion of the Court was delivered by

JOHNSON, J. We concur with the Chancellor, that the widow of Charles S. Mey was only entitled to be endowed of the one-third part of the balance of the proceeds of the sales of the real estate, after the payment of the debts due by the estate of F. C. Mey. It is true that the wife is entitled to be endowed of all the real estate whereof the husband was possessed during the coverture. But the seizin of Charles S. Mey in the lands devised to him by his father was only sub modo, and she is only entitled to be endowed after that manner. By law, lands of one deceased are assets to pay debts, and the devisee or heir must take, and is seized, subject to that lien or incumbrance. Suppose, for instance, the debts had swallowed up the whole proceeds of the sales. In that case, Charles S. Mey would have taken nothing whereof the wife could be endowed; and yet, in law, he was seized of the lands of the testator immediately on his death.

We are of opinion, however, that the widow of Charles S. Mey is entitled to an account of the rents and profits, or the interest, when it is reduced to money, of her dower. There is, I believe, no case in which

it has been refused in Equity, and, as I understand it, the reason why she has not been allowed it at law is, that the mode of proceeding there is not adapted to such an account, and, but for our own adjudications, I should think there was no great difficulty in framing a precedent, in analogy to our action of trespass to try titles, in which rents and profits might be recovered in the shape of damages. She has had the benefit of this rule, as we understand it, in apportioning her dower in the proceeds of the lands devised by F. C. Mey to her husband, the balance being made up of principal and interest.

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*In this respect, therefore, the decree of the Circuit Court must be reformed; but in all other respects it is affirmed.

O'NEALL and HARPER, JJ., concurred.

Decree modified.

Rich. Eq. Cas. 380

DEVISEES OF JOHN ASHE v. EXECUTORS OF JOHN ASHE.

(Charleston, March and April Term, 1832.)

[*Wills* ⇐616.]

Testator devised a lot in Charleston to his son J. S. for life, with remainder to his children, etc., and bequeathed to him $10,000, "to enable him to build a house on the lot:"—*Held*, that the money was bequeathed to J. S. for life only, with remainder to his children, but that he was not bound to invest it in buildings on the lot; and the executors were ordered to invest the money in bank stock, etc., for the use of J. S. for life, with remainder to his children, etc.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1430; Dec. Dig. ⇐616.]

[*Executors and Administrators* ⇐16.]

One appointed executor and trustee by the same will, may qualify as executor and refuse to accept as trustee.

[Ed. Note.—Cited in Anderson v. Earle, 9 S. C. 464.

For other cases, see Executors and Administrators, Cent. Dig. § 37; Dec. Dig. ⇐16.]

[*Trusts* ⇐156.]

If a trustee appointed by the will refuse to accept, the executors of the will must execute the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 201; Dec. Dig. ⇐156.]

Before Johnston, Ch., at Charleston, January, 1832.

The testator, John Ashe, by one clause of his will, devised to his son, John A. S. Ashe, for life, a lot in Charleston, with remainder to his children, and in default of children, over; and, by another clause, bequeathed to him "ten thousand dollars to enable him to build a house on the lot." By separate clauses, he devised to his daughter, Harriet Ashe, for life, another lot in Charleston, with remainder to her children; and bequeathed to her "fifteen thousand dollars to enable her to build a house" on the lot. He bequeathed property to John A. S. Ashe, his executors and administrators, in trust for testator's daughter, etc.: and he appointed John A. S. Ashe and others, executors of the will.

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*Johnston, Ch. The answer to the seventh question is, that the legacies of fifteen thousand dollars to Miss Harriet, and ten thousand dollars to Mr. John Algernon S. Ashe, are not legacies to them personally, merely, but are given to them to enable them to build (that is, for the purpose of building houses and offices, of the value of those sums, on their lots, which buildings are intended for the benefit of the persons to whom the lots are limited, as well as for the benefit of the immediate legatees). If the benefits were intended to be confined to the immediate legatees, although purposes are pointed out which the testator might suppose they would be most benefited by applying their legacies to, in such case the legatees might take the legacies and apply them otherwise, if they pleased; but in the present cases benefits are intended, as much for the ulterior as for the immediate legatees. Therefore, if the legatees take the money, they must employ it for the purposes for which it was given. If they take it, they must build; they cannot divert it to purposes for which it was not given, so as to deprive the ulterior legatees of their testator's bounty.

Mr. John A. S. Ashe, being not only executor but legatee, is bound, if he takes his own legacy, under the will, to perform his trust. A trustee will, however, be substituted, whenever any one will apply and give sufficient security.

The executor, John A. S. Ashe, appealed.

The opinion of the Court was delivered by

JOHNSON, J. In considering the first ground of this motion, it will be necessary to premise that the testator devised to John A. S. Ashe and Harriet Ashe, each, a lot of land in Charleston, which, on their deaths, are limited over to their children, respectively, and in the event of their dying without children, over to others, and to John A. S. Ashe he bequeaths $10,000, and to Harriet $15,000, to enable them to build houses on their respective lots so devised.

1. These legatees are disinclined to invest these legacies in buildings on the lots, be-

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cause they believe they may be other*wise more profitably invested for themselves, particularly in the case of Harriet Ashe, on whose lot there is already a comfortable house, rendered still more so by extensive repairs made by herself; and the question is, whether they are bound to invest the legacies in buildings on their lots.

I concur entirely with the Chancellor, for the very satisfactory reasons he has given, that the testator intended that the remain-

der-men, or ulterior legatees, should derive a benefit from the pecuniary legacies. He unquestionably contemplated that the houses to be built would go over with the lots to those entitled in remainder. But it is equally clear, that he intended, also, that the immediate legatees should derive a benefit from them, in the use and occupation of the houses, or the rents and profits. But the thing given is money, and although we are bound to give effect to the intention of the testator, I cannot perceive what violence is done to his intention, by permitting the legatee to use the thing given, in the manner most agreeable and profitable to himself, if ulterior objects and interests are not affected by it, and, more especially, if there is a reasonable probability that these objects and interests will be promoted.

The immediate legatees are not bound to accept the legacies, and if they should refuse to do so, the executors must keep the fund for those in remainder. Those in remainder are not entitled to the accruing interest, because that benefit was intended by the testator for the immediate legatees, and if they refuse to accept, the interest must sink into the residuum of the estate. There is, therefore, no injury done to those in remainder by permitting the immediate legatees to enjoy the income; and that course is more consonant to the intention of the testator.

The great probability is, too, that the interest of those in remainder will be promoted by it. Suppose the buildings erected, as contemplated by the testator. The chances are perhaps equal, whether their value will appreciate or depreciate. If there is any difference, the probability is in favor of depreciation. The old proverb, that "fools build houses, and wise men live in them," is verified every day by the fact, that build-

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*ings, when they change hands, very rarely pay the cost of their erection. Besides that, the remainder-man must bear the inevitable decay from time, and is constantly exposed to entire loss from fire and other casualties, and if he was in being, and could speak, I have no hesitation in saying that if he consulted his own interest, he would prefer to have the pecuniary legacy secured to him after the termination of the life estate, rather than have it invested in buildings. This can be conveniently done by investing it in stock, or lending it out on good security, and, as I think, most profitably for those in remainder, and thus substantially give effect to the intention of the testator, most beneficially to all concerned.

2. John A. S. Ashe was appointed and qualified as one of the executors of the will, and the question made in another ground arises out of the following clause of the will, viz., "As to the share remaining to my said daughter, Eliza," (Mrs. Livingston,) "I give and bequeath that to my said son, John, and to his executors and administrators, upon the trust hereinafter immediately expressed—that is to say, as to any property, to the use of which my said daughter shall be entitled, under any of the preceding dispositions of this my will," the testator directs that the annual income shall be paid over for the joint benefit of his said daughter and her children, during her life, and at her death, the property and money capital to be divided amongst her children; and the question is, whether, by qualifying as executor, John A. S. Ashe has accepted, and is bound to execute the trust.

In a strictly legal and technical sense, this is a legacy to John A. S. Ashe, coupled with a trust, which he is not bound to accept, nor is his having qualified as executor conclusive of his election to accept. If a legacy be left to an executor, and he qualify, I apprehend there is no doubt he may, notwithstanding, say, I will discharge my duty as executor, but will not accept the legacy, but leave it for the benefit of the residuary legatee. It is obvious, too, that the testator himself regarded the execution of this trust as

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no part of the duty of his execu*tors—he has confided it to John A. S. Ashe alone, and not jointly to his executors. But I have not been able to see how this question has arisen, nor of what importance it is, for if J. A. S. Ashe will not accept the special trust, as executor, jointly with the others, he is bound to execute it, precisely in the same manner that he would have been, if a stranger had been nominated and refused to accept—so that the result is pretty much the same, and I presume that is what the Chancellor meant, in saying he was bound to execute the trust.

It is, therefore, ordered and decreed, that the decree of the Circuit Court be modified, so far as it is inconsistent with this decree; and it is further ordered and decreed, that the defendants, the executors of the said John Ashe, do invest the said legacies of $10,000 to the said John A. S. Ashe, and $15,000 to Harriet Ashe, in bank stock, or such other public securities as the Master shall approve, and that the said John A. S. Ashe and Harriet be entitled to receive the dividends on the said stock, in which their said legacies are to be so invested, during their natural lives, and that the capital of the said stock stand to the credit of those entitled in remainder, according to the principles of this decree.

O'NEALL, J., concurred.

Decree modified.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA, MAY TERM, 1832.

JUDGES PRESENT.

HON. DAVID JOHNSON,
" JOHN B. O'NEALL,
WILLIAM HARPER.

Rich. Eq. Cas. *385

*EXECUTRIX OF P. J. McINTOSH v. ADM'R OF P. J. WRIGHT.

(Columbia. May Term, 1832.)

[*Subrogation* ⇐31.]

Where a judgment is recovered against principal and surety, and the surety pays the debt, he is entitled to the security of the judgment as against his principal.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 83; Dec. Dig. ⇐31.]

[*Executors and Administrators* ⇐261.]

An interlocutory judgment is not such a judgment as is contemplated by the Act of 1789, prescribing the order in which the debts of a testator or intestate shall be paid.

[Ed. Note.—Cited in De Saussure v. Zeigler, 6 S. C. 13; Ex parte Farrars, 13 S. C. 259; Bankhead v. Good, 56 S. C. 394, 34 S. E. 689.

For other cases, see Executors and Administrators, Cent. Dig. § 957; Dec. Dig. ⇐261.]

Before De Saussure, Ch., at Sumter.

De Saussure, Ch. It is a general rule, that in equity a surety is entitled to the benefit of all the creditor has against the principal: and when a bond is given by principal and security, and a mortgage is given, the security, if he pays the bond, has a right to stand in the place of the mortgagee. Copis v. Middleton, Tur. & R. 224-9, 231. Sureties

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are entitled to the *benefit of every security which the creditor has against the principal. Mayhew v. Cricket, 2 Swanst. 185; see also 1 Atk. 135; 1 Eq. Cas. Abr. 93; 2 Cox, 86. Praed v. Gardiner. Our courts have adopted and acted upon this principle of subrogation or substitution, and protected the security wherever it could be done with propriety. The next question is, whether the surety is entitled to the benefit of the security arising from the judgment obtained by the creditor Cox, against Wright as well as McIntosh, whatever may be the extent or validity of that judgment: and of this I have no doubt. In Hill v. Kelly, 1 Ridgeway's Irish T. Rep. 265, it was decided, that where A. & B. joined in executing a bond and warrant of attorney to C., who entered judgment thereon and issued execution against A., who was merely a security, and he filed a bill to have the judgment assigned to him on payment of the debt, he was entitled to a decree. In Parsons v. Briddock, 2 Vern. 608, it was decided, that the surety, who had paid the debt under suit, was entitled to the benefit of the judgment against the principal, and even against his bail. These, and indeed many other decided cases, have settled the doctrine in favor of the surety.

In this case, however, it is contended for the defendant, the administrator of Wright, the principal debtor, that the judgment, of which the representative of the surety claims the benefit, was not a final judgment, but interlocutory; and that is not such a judgment as will let in a surety as a judgment creditor. Our statute of the 13th March, 1789, directs that the debt of a testator or intestate, should be paid in the order it prescribes. (5 Stat. 111.) After funeral expenses, etc., it goes on to enumerate debts due to the public: next, judgments, mortgages and executions, the oldest first: next, rents, etc. In the case we are considering, there is a judgment entered up, at the suit of John Cox v. P. J. Wright and Peter McIntosh, on a note of hand for $250 with interest. There was an order for judgment on 10th August, 1824. The amount of damages is assessed by the clerk at $250, with interest from 21st January, 1823. Judgment entered up on the 10th May, 1826. It is said, by

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the *counsel for defendant, that this judgment was irregular, for, though the order for judgment was made on the 10th August, 1824, it was not entered up till May, 1826, when Wright, as it is alleged, was dead. This is a very awkward state of things. Here is a judgment of the court of law, acquiesced in for a number of years; no steps have ever been taken in the court of law to set it aside; no allegation of fraud. It is not for this Court to open it on the ground of irregularity. I am bound to treat it as it appears, a judgment of the Court. It is entered up as a final judgment, after the assessment of damages by the Clerk of the Court. But, it is said, notwithstanding all this, it must be considered merely as an interlocutory judgment. I cannot, however, change its character: it must be taken for what it purports to be. It seems to me, therefore, that the surety is entitled to the benefit of it as a judgment according to the decided cases. It is, therefore, ordered and decreed, that the defendant, the administrator of Wright, do pay the complainant the amount of the debt, out of the funds of the estate, if the same be sufficient, according to the order prescribed by the statute of 1789, considering this as a judgment debt; and the costs of suit. It must be referred to the Commissioner to examine the order in which the judgment stands, according to the statute.

The defendant appealed.

The opinion of the Court was delivered by

HARPER, J. The only question made, and which it is necessary to consider in this case, is, whether an interlocutory judgment is a judgment within the meaning of the Act of Assembly of 1789, prescribing the order in which executors shall pay debts. We concur in the view of the law taken by the Chancellor as to the right of a surety, who has paid off a debt, to have the benefit of any security which the creditor had against his principal. But there was no final judgment of Cox against the defendant's intestate, at the time of the death of the latter. By the executor's Act, the debts are to be paid in the order of priority as they existed at the time of the testator's

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or intestate's *death. Unless the interlocutory judgment, therefore, is to rank as a judgment within the meaning of the Act, Cox had not the security of a judgment against Wright's estate, and complainant cannot be subrogated to that security. In giving construction to this Act, we must have reference to the law as it stood before. Before the Act, executors and administrators were bound to pay off judgments, the oldest first, in preference to bonds or simple contract debts. A judgment obtained against the executor himself, gained a preference over specialty and simple contract debts, and was ranked as a judgment. In this respect the statute has made an alteration: in other respects it seems to have enacted the common law. Before the Statute 29, Ch. 2, it is commonly said, that, by a fiction of law, all judgments were supposed to be judgments of the first day of the term at which they were obtained. This appears from the recital of the statute itself—"Whereas, it hath been found mischievous that judgments in the King's Courts at Westminster, do many times relate to the first day of the term, whereof they are entered, or to the day of return of the original or filing the bail, and bind the defendant's lands from that time, although, in truth, they were acknowledged, or suffered or signed in the vacation-time after the said term," etc. In saying that a judgment has relation to the first day of the term of which they are entered, final judgment must, of course, be intended. This cannot relate to interlocutory judgments. It was never supposed, I believe, that lands were bound from the term as of which an interlocutory judgment was entered. The statute has relation only to lands, and after the passing of it, I suppose executors and administrators were still bound to regard judgments as of the first day of the term whereof they were entered, until the Statute 4 and 5 W. and M. c. 20. By that statute, which has not been adopted in this State, and which by the English Court has been construed to extend to executors and administrators as well as to lands, (see Hickey v. Hayter, 6 T. R. 384,) judgments were required to be signed and docketed as directed by the statute of frauds; and if this were not done, they ranked only

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as simple contract *debts. Before the Act of 1746, (7 Stat. 193,) which we have taken from the Stat. 8 and 9 W. 3, c. 11, it is plain that an executor could not have regarded an interlocutory judgment as a judgment entitled to priority over specialties and simple contracts. By the death of the testator or intestate after interlocutory and before final judgment, the suit was at an end, and the creditor had nothing but his cause of action. That Act providing that when a defendant dies after interlocutory and before final judgment, the plaintiff may bring a scire facias against his executor or administrator, and being silent as to the rank which the judgment shall have in the course of administration, it must have been postponed to any final judgment which had been obtained against the testator or intestate himself, if such had been obtained as of a term previous to the judgment on the scire facias. Then the Act of 1789, providing for the payment of judgments, mortgages and executions, the oldest first, must relate only to such as were before regarded as judgments against the testator or intestate, and makes no alteration as to the mode of determining the seniority. No such question can have arisen in England

since the Stat. 3 and 4, W. and M., requiring judgments to be docketed; nor do I suppose that any such could have arisen before. Judgments, whether against the testator or executor, had priority according to date; and, if the views which I have taken be correct, according to the date of the final judgment, this being the first day of the term of which the judgment was entered. If judgment were confessed by the testator and entered up after his death, this, I suppose, would relate to the previous term. Some light might be thrown on the subject by Metcalfe's case, 11 Co. 38. The question was, whether a writ of error lay on the judgment quod computet in an action of account. It was determined on the words of the writ of error, that the judgment spoken of must mean the final judgment. "When a thing (whereof there are divers degrees and qualities) is indefinitely mentioned in a writ, count, or other record, the principal thing and the most worthy shall be intended," and this was the final judgment. It is added, that it

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must mean not *only the principal judgment, but the entire judgment, when the whole matter is determined. That is, the judgment by which the defendant is charged with the account which is the effect of his suit, and the other award is but accessory to it, as in trespass and in writ of inquiry of damages, etc., "which are but awards of the Court, and are but interlocutory and not definitive." Such is the rule with respect to decrees of the Court of Equity. Decrees in Equity rank as judgments; but a decree quod computet is not, for this purpose, regarded as a decree. The decree of the Chancellor must, therefore, be reversed.

JOHNSON and O'NEALL, JJ., concurred.

Decree reversed.

Rich. Eq. Cas. 390

THOMAS WILKS, Ex'or of Jos. Robinson, v. ANN DAVIS et al.

(Columbia. May Term, 1832.)

[*Executors and Administrators* ⇐125.]

J. R., one of two administrators, who joined in the same administration bond, was cited alone before the Ordinary, to account; a decree was pronounced against him, for the amount of which judgment was recovered against him in an action at law on the bond: *Held*, that he might file a bill against his co-administrator and the distributees, for contribution from the co-administrator, to the extent of the assets in his hands, and for which he, J. R., had been compelled to account.

[Ed. Note.—Cited in McBee v. Crocker, McMul. Eq. 489.

For other cases, see Executors and Administrators, Cent. Dig. § 518; Dec. Dig. ⇐125.]

[*Executors and Administrators* ⇐125.]

Where administrators join in the administration bond, each is responsible for the acts of the others; and where one is called upon to account, it is no defence that the assets are in the hands of another.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 511; Dec. Dig. ⇐125.]

[*Executors and Administrators* ⇐469.]

The Ordinary has no authority to adjust matters of account between joint administrators; semble.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2000–2009, 2012, 2013; Dec. Dig. ⇐469.]

The case of Henderson v. Mitchell (Bail. Eq. 113 [21 Am. Dec. 526]) approved.

Before Johnston, C., at Union, June, 1831.

Johnston, C. Joseph Robinson filed his bill against Hiram Davis and Ann, his wife, John Warren and Sarah, his wife, and Elizabeth Robinson, on the 10th of September, 1828. No subpœna ad respondendum is to be

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found in the record; but the *bill was ordered pro confesso, on the 19th June, 1829. On the 20th June, 1829, an order was endorsed on the bill "that matters of account be referred to the Commissioner, to report thereon at the next sitting of the Court." On the 17th June, 1830, after the death of Joseph Robinson, the present plaintiff, as his executor, filed his bill of revivor against the same defendants. There is no subpœna ad respondendum, nor any evidence of the service thereof, on Hiram Davis or Elizabeth Robinson, nor has the bill been ordered pro confesso against them. Ann Davis filed her answer on the 25th of June, 1830, and Warren and wife filed their answer on the 10th of May, 1831. The Commissioner made up and filed his report on the matters of account on the 13th of June, 1831. Six exceptions, on the part of the plaintiff, and five, on the part of Warren and wife, were taken to the report. They were argued before the Commissioner, who made a report thereon, which was filed on the 25th of June, 1831. On the same day this case came before me, first on its merits, and then on the reports and exceptions. On going into the merits, the defendants, Ann Davis and Warren and wife, the only defendants in Court, by their counsel admitted, "that no written citation of Joseph Robinson is to be found in the Ordinary's office for Chesterfield District, among the proceedings in which that officer decreed against him." This was the only evidence introduced before me. Upon examination of the reports and exceptions, I am satisfied with the report, as modified by the Commissioner in his report on the exceptions, and should confirm the report, thus modified, so far as Warren and wife are concerned, but not so far as Davis and wife, or Elizabeth Robinson, are concerned, were it not that the case will turn on another point. This I state, that if the case goes up, it may go up with my opinion on the report—and thus the whole case will be before the Court of Ap-

peals at once. I could not have confirmed the report as against Davis, and of course his wife, nor against Elizabeth Robinson, upon the plaintiff's own principles. For, as he contends that, for want of evidence of citation, except what is contained in the Ordi-

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nary's decree, the *Ordinary's decree against Joseph Robinson is a nullity, and that no presumption of citation arises from the decree itself, which is a proceeding subsequent in order, he must concede that I would be committing a worse blunder in his favor, than he imputes to the Ordinary against him, if I should proceed to decree against defendants, who do not appear to have been subpœnaed, and who, from anything appearing in the record, are not before the Court. The bill, as to them, must have been dismissed of course.

But before we can come to the matters of account at all, the merits must be disposed of. This is not a bill for contribution as between the administrators of William Robinson. If it was, unless the Ordinary's decree be set aside, or regarded as a nullity, the plaintiff would not be entitled to contribution—for, so long as that decree stands, it shows that Joseph Robinson received the whole estate of William Robinson, and is therefore answerable for the whole. The plaintiff attacks the decree, on the ground that the defendants, in taking it, acted unconscientiously, because, at the very time they were charging Joseph Robinson with the whole estate, they knew that the widow, now Mrs. Davis, had received not only enough to pay her own distributive share, which she retained, but enough to pay a portion, at least, of the shares of her daughters. I should undoubtedly have supported this view of the plaintiff, but for the unreported case of Henderson v. Mitchell, (Bail. Eq., 113, [21 Am. Dec. 526],) in which the Appeal Court held, that the taking a judgment, with a consciousness that it was for more than was due, formed no ground for an injunction of it, if the person against whom it was pronounced, had the control of evidence before the trial, to show how much was really due. The plaintiff makes no allegation of want of evidence, nor does he call for a discovery on that ground. His complaint is, that he was not given an opportunity by the Ordinary to exhibit his evidence. The decision in Henderson v. Mitchell binds me; but as that de-

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cision is not *satisfactory, to a part, at least, of the profession, in which number I am free to confess myself one, I should feel happy if the Supreme Court would take occasion, in reversing my present decision, to examine and review that case.

The next ground taken by the plaintiff is, that the decree of the Ordinary against Joseph Robinson is a nullity, inasmuch as he was not cited. The admission made before me was, not that he was not cited, but that no citation is to be found in the Ordinary's office, among the proceedings. Independent of the Ordinary's recital in his decree, that Joseph Robinson was cited, it may well be presumed, notwithstanding the admission of the defendants, that he was cited. Is a plaintiff to lose the benefit of his decree, simply because the citation, even if the law required a written one, was not preserved? The ground taken here is the same as that which the plaintiff's testator took at law. The decision on it there must govern me here. On the trial at law on the bond, the Ordinary's decree was brought in, as evidence of the damages. The question was made, "Is it a valid and binding decree on Robinson?" If it was, it was conclusive evidence of the damages; if it was not, it was no evidence whatever. The Law Court on the Circuit, although it appears to me they gave a very absurd reason for it, held that the decree was conclusive on him, and therefore received it in evidence. The Court of Appeals sustained this decision, although, as appears by the bill, they gave a more plausible reason for it. The Court of Appeals has then decided, that the objection taken did not invalidate the decree; that it was binding and conclusive on Joseph Robinson. They held that no citation need appear, otherwise than by the Ordinary's recital. In the present case, I must hold so too, being bound by that opinion. And if the decree of the Ordinary be valid and binding on Joseph Robinson, I must hold it conclusive on the matters of account. The Court of Ordinary is a competent tribunal to investigate them: and having done so, and determined that Joseph Robinson received the whole estate, and charged him with it, this Court is bar-

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red from the examining the *accounts. If the objections taken to the decree here had been valid, they would have availed Robinson at Law, as a defence to his bond.

It is ordered and decreed that the bill be dismissed, but without costs.

The complainant appealed on the grounds:

1. Because the bill should have been sustained, and the relief prayed for granted.

2. Because the decree should have been against Ann Davis, for what she has in her hands, as appears by the report.

3. Because the children's shares should have been charged with their maintenance and education.

4. Because defendants should have been decreed to pay all costs, both in Law and Equity.

Thomson, for appellant.

The opinion of the Court was delivered by

JOHNSON, J. The necessity of making Hiram Davis and Elizabeth Robinson parties to this bill, is too apparent to require ex-

planation. Without it, the object of the bill could not be attained, and when that appears, this Court has, in very many instances, permitted the plaintiff to make additional parties, after trial on Circuit, of which Rodgers v. Jones, 1 McC. Eq., 226, is an instance. They are named in the bill, and if process was not served upon them, it was probably an inadvertence—possibly they may have been served, and the evidence of it lost—and these considerations appear to me to furnish a sufficient reason for extending the like indulgence to this plaintiff, especially as, in the judgment of the Court, the case must go back for a new trial upon the merits. The bill is ordered, by the Circuit Court decree, to be dismissed, on the ground, as I understand it, that the complainant's testator was concluded by the decree of the Court of Ordinary, and to the correct understanding of this ground it will be necessary to take a concise view of the circumstances. William

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Robinson died intestate *in 1805, and administration of his estate was granted to Joseph Robinson, complainant's testator, and the defendant, Ann Davis, then his widow. They made and returned to the Ordinary's office, an inventory and appraisement of the personal estate, and afterwards sold it, under an order from the Ordinary, to whose office an account of this sale was also returned. No other returns were made to the Ordinary. By a decree of the Ordinary, which bears date on the 3d day of October, 1825, it is recited that Joseph Robinson (alone) had been cited before the Court of Ordinary, to account for his administration, and that he had so accounted; and it is ascertained that he had in his hands, on the 9th April, 1807, the sum of $302 58¼ cents, assets of the estate, after deducting expenses, that being the amount of sales and cash on hand, taken from the return of sales; and by the decree he is ordered to pay that sum, with interest from that day, one-third to the defendant, Ann Davis, his co-administratrix, one-third to the defendants, John Warren and wife, and the remaining one-third to Elizabeth Robinson. To recover this amount, an action was brought at Law, in name of the Ordinary, against Joseph Robinson, on the administration bond, and he would have defended himself, on the ground that he had never been cited before the Ordinary, or otherwise had notice to account, and had not accounted; but it was held that he was concluded by the decree of the Ordinary containing a recital of his having been cited and having accounted.(*a*) And the allegation in the complainant's bill is, that notwithstanding that decree, by far the greater portion of the estate—all, indeed, except a very small amount—went into the hands of the defendant, Ann Davis, his co-administratrix; and it is prayed that she may be compelled to account with the complainant for it; but it is objected that the complainant is concluded by the decree of the Ordinary against him.

I concede, in extenso, that the judgment of the Court of Ordinary, in a matter in

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which he has jurisdiction, is conclusive *between the parties to it. But the foundation of the liability of joint administrators (indeed, of every administrator,) is the bond given to the Ordinary for their faithful administration of the estate committed to their charge. The obligation imposed by the bond is, that they, (the joint administrators,) when, as in this case, they join in the same bond, shall account before the Ordinary, when required, and shall pay over the assets to those entitled by law—it is then a joint liability. The power of administration is joint—each is equally entitled to the possession of the assets. Suppose an action brought against joint administrators, will it be any excuse for one that he has never intermeddled with the estate, and that the other has taken upon himself the whole management of it; or, if one of several is sued on the bond, will that defence avail him; or, if one only is called to an account in Chancery, will it avail him that the funds are in the hands of his co-administrator? Surely not, for he is bound by his bond for his administration, and if he is compelled to pay, may he not require remuneration from the defaulter?

What is the case here? Joseph Robinson, one of two administrators, has been called before the Ordinary, to account for his administration of the estate of Wm. Robinson. Could it have availed him, as a defence, if he had shown that the assets were in the hands of Ann Davis, his co-administratrix? Whether they were, or not, he was bound by the terms of the bond. But that is not all: there is no condition in the bond that the administrators shall account with each other, and I know of no authority that the Ordinary has to determine matters of account between them. It is evident, moreover, that the matters of account between these administrators was not before the Ordinary. There is no statement of their accounts, nor does the decree itself profess to adjust them. They are yet unadjusted, and it is but reasonable that complainant shall require contribution from the defendant, Ann Davis, to the extent of the assets in her hands, and that is substantially the leading object of the bill.

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*This would suffice for the case itself. I cannot forbear, however, to notice the case of Henderson v. Mitchell, noticed in the Circuit Court decree, lest the assent of the Court to the strictures on it might be inferred. I was not present at the trial of that cause; but,

(*a*) See this case, 1 Bail., 25.

as I understand it, the point decided is, that one having a good defence at law, and neglecting to make it, will not be relieved in Equity; and I do not know that that has ever been questioned, nor can I see its necessary bearing on this case.

It is, therefore, ordered and decreed, that the decree of the Circuit Court, dismissing complainant's bill, be, and the same is hereby set aside and reversed, and that the cause be referred back to the Circuit Court, for trial on the merits; and that complainant have leave, if necessary, to amend his bill, and sue out subpœnas, to make Hiram Davis and Elizabeth Robinson parties.

O'NEALL, J., and MARTIN, J., sitting for HARPER, J., concurred.

Decree reversed.

Rich. Eq. Cas. 397

DORCAS SMITH et al. v. HENRY EADY et al.

(Columbia. May Term, 1832.)

[*Wills* ⊂⊃734.]

A legacy to a wife bears interest, as other legacies do, from one year from the testator's death: she will not be allowed interest, as children sometimes are, for maintenance.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1856; Dec. Dig. ⊂⊃734.]

Before DeSaussure, Ch., at Marion, February, 1832.

The testator, Daniel Stone, died January 9, 1822, having left a will in writing, which being only attested by two witnesses, was insufficient to pass his real estate. The bill was filed by the complainants against the execu-

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tors and widow of the testator, now *Mrs. McNeil, for account and partition. The testator devised and bequeathed as follows: To his wife two hundred acres of land, describing the same, and choice of bed, bedstead and furniture, choice of a horse and riding chair, one-third of his kitchen furniture, one thousand dollars at her discretion, and at the expiration of four years, one thousand dollars more, if she survives to that time. He also advises his executors to build her a comfortable dwelling house and outbuildings. He also advises his executors to furnish her with sufficient necessary provisions for the term of four years, if her child lives from (after) his decease. He gives her two cows and calves. The testator also lent to his daughter a negro girl named Gin, (Jenny,) and if she lives to the age of eighteen years, or marries, the slave and her issue to be hers absolutely; if not, then the slave to be sold, and the money appropriated to the rest of his estate. The testator further advised his executors to sell part of his personal estate on a short credit, to pay his debts, and his negroes to be sold on a credit of four years, and that his lands and tenements be sold. He also advises, that after his debts are paid, the balance of the money be put to interest. He also advises, that his daughter, then only four months old, should be put to school at a fit age, and supported decently. He provides in the same way for any posthumous child or children, and then declares that if his daughter should arrive at eighteen years of age, or marry, he gives and bequeaths to her, or them, all his estate, after giving Leonard White three hundred dollars in schooling, if he lived. If his daughter or posthumous child or children should die before marrying or arriving at the age of nineteen years, he advises, that seven years interest of the money be put to the use of the schooling of the poor children of this inhabitance, the residue of the money to be equally divided between his wife, if she is surviving, and his father's and mother's heirs at law. From the Commissioner's report it appeared, that the daughter of the testator died a few months after his death: that his wife had no posthumous child; that she had been since twice mar-

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ried; that Leonard *White was living, and about fifteen or sixteen years of age; and the Commissioner, in making up his report on the accounts of the executors, allowed the testator's wife interest on her first legacy of one thousand dollars from April 15, 1822.

To this report the plaintiffs excepted, on the ground, that interest should have been allowed only from January 9, 1823, one year from testator's death.

The presiding Chancellor overruled the exception, and the complainants appealed.

Moses, for appellants.

Holt, Ervin, Graham, contra.

The opinion of the Court was delivered by

HARPER, Ch. The rule of law is, that interest is to be allowed on a legacy from the time it is payable, and if no time of payment is specified, it is at the end of a year after the testator's death. An exception has been made in some cases, where it appeared that the legacy was intended for the maintenance of children, and in the case of Crickett v. Dolby, 3 Ves. 16, Lord Alvanley supposes that a wife would certainly come under the same exception. He adds, however, "I do not find it in the books. It can hardly ever happen that a wife has not some other provision; and that may make a difference in the case of a child." The point was not before him, and in Stent v. Robinson, 12 Ves. 461, where such an application was made, the Master of the Rolls dismissed the petition, observing that there was nothing to support it but that dictum of Lord Alvanley; and no authority to support that, notwithstanding the numerous instances of legacies to wives. On the authority of that case, and on the general rule of law, the motion must be granted.

JOHNSON and O'NEALL, JJ., concurred.

Motion granted.

APPENDIX

*J. J. BULOW, Jun., et al. v. C. BUCKNER et al.

[*Wills* ⇐742.]

Testator authorized his executors to sell his house and lot, but not for an amount less than a sum fixed by him:—*Held*, that this direction did not bind devisees and the Court; that the devisees themselves, if sui juris, might sell, and, if infants, the Court, for them, might order a sale, for less than the sum fixed by the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1902; Dec. Dig. ⇐742.]

[*Infants* ⇐33, 35.]

The jurisdiction of Chancery to sell and convey an infant's estate, is now too firmly established to be shaken: it ought, however, to be exercised with caution, and the Court, before ordering the sale, must be satisfied of its necessity or expediency to the infant's interest.

[Ed. Note.—Cited in Bulow v. Witte, 3 S. C. 321.

For other cases, see Infants, Cent. Dig. §§ 66, 75; Dec. Dig. ⇐33, 35.]

[*Equity* ⇐408; *Infants*, ⇐39.]

In references to the Master or Commissioner on this subject, as well as on all others in which infants are concerned, and which are, in fact, ex parte, the officer should report to the Court the testimony on which his opinion is founded, that the Chancellor may form an opinion for himself.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 901; Dec. Dig. ⇐408; Infants, Cent. Dig. § 88; Dec. Dig. ⇐39.]

This case came before the Court, Johnston, Ch., presiding, on the report of Commissioner Gray, as follows:

"This case has been referred to me under the following order, made on the 12th inst.: 'ordered, that this case be referred to the Commissioner to report on the expediency of the sale proposed by the parties interested.'

"It is an application to the Court for its aid and sanction to enable the executors of the will of C. W. Bulow, formerly of this city, deceased, to sell a house and lot belonging to the estate, situate in Meeting-street, in Charleston, for a less sum than that to which they are limited by said will. The clause of the will is as follows: 'I authorize and direct my executors, etc., to sell and dispose of (as soon after my death as the same can be conveniently done) all the rest and residue of my estate, both real and personal, whatsoever and wheresoever in the State of South Carolina, on the following terms: the land for one-third cash, the balance payable in one, two and three years, with bond and mortgage of the same to secure the pur-

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chase money, etc.; but *it is my will, and I do hereby declare, that my said executors and the survivor of them, or such of them as shall qualify on this my will, shall not sell, nor have the power of selling, my house and lot in Meeting-street, in the city of Charleston, where I now reside, for a less sum than $25,000; but they are hereby empowered to sell the same for that sum or more, on the same terms as the rest of my landed estate is herein directed to be sold.' The testator afterwards proceeds to devise and bequeath his estate, real and personal, including this house and lot, to his son John J. for life, then to the children of his said son, and in default of them to his wife, Mrs. Abigail F. Bulow, and the children of testator's daughter, Mrs. E. Buckner, the wife of Wm. G. Buckner, residing in N. York. I find that William G. Buckner was, by an order of the Court of Chancery in N. York, made 5th October, 1830, duly appointed guardian of the persons and estates of his five minor children, viz: C. W. Buckner, Elizabeth Buckner, W. F. Buckner, G. Buckner, and E. Buckner, who are the children of said Mrs. E. Buckner referred to in said will. I find that Mrs. Bulow, J. J. Bulow, Jr., and W. G. Buckner, as guardian of his said children, executed a power of attorney on 6th of last October, in New-York, to Wm. Lance, of Charleston, authorizing and empowering him to make the present application to this Court. I further find that all the parties interested in this property, who are of age, and the guardian of those under age, concur in the expediency of the sale, and are desirous that the Court would sanction a sale by the executors for a less sum than the will directs.

"I further report, that I have consulted several of the most respectable and experienced persons in Charleston—gentlemen who have had and still have the best opportunities of knowing the value of said property—all of whom concur, that it will be impossible to effect a sale of this house and lot for the sum demanded by the will. No one of them supposes that as much as $15,000 could be procured for it, and several put its value considerably below that amount. It is presumed that the high estimate placed on this property by the testator, grew out of the

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*comparatively greater value of property when the will was made, and the large expense incurred in building the house, which was erected when materials brought the highest prices. I, therefore, respectfully recommend, that the executors be authorized

and empowered by the Court, to sell, at a less price than that limited by the will—a price to be regulated by their sound discretion; that the terms of sale be such as the will directs, and that the proceeds of sale be applied and held by them subject to the uses and limitations of said will. The title to be made by the proper officer of the Court."

The presiding Chancellor rejected the report, and ordered the bill dismissed.

An appeal was taken on the grounds—

1. That all the parties interested in the sale of the property being before the Court, and applying on behalf of themselves, the Court has power to order a sale, and that their officer should execute a title; the prohibition in the testator's will, being to the executors only.

2. That all the parties interested in the estate being residents out of this State, and it being for the benefit of all that the sale should be made, the Court would do what the testator himself would probably have directed, had he foreseen the change of circumstances.

Lance, for appellants.

The opinion of the Court was delivered (April, 1831) by

HARPER, J. We concur in the view taken by the complainants' counsel, that the restraint which the testator thought proper to impose on his executors, with respect to the sale of the house and lot in question, could have no effect in restraining the devisees, if they were of full age and sui juris. If all of the devisees, in possession and remainder, were of age, and should join in a conveyance, the title would, of course, be good. It is only the minority of some of them which prevents this from being done, which all seem to desire. The jurisdiction of

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Chan*cery to sell and convey an infant's estate, however questionable it may have been when first exercised, is now too firmly established to be shaken. It has been familiarly exercised ever since a Court of Chancery has existed in this State, and very many titles now depend upon it. It is, in many instances, an exceedingly beneficial jurisdiction: especially in this country, where land is frequently the least valuable and productive sort of property. Still, however, it ought to be exercised with the utmost caution, and the Court ought to be most fully satisfied of its necessity or expediency to an infant's interests, before it will order a sale of his land. If not carefully guarded, the jurisdiction is liable to the most obvious abuses. The Court will not speculate for an infant. It must be satisfied that a certain advantage will be gained, or a serious injury suffered, before its interference can be warranted. I may observe, that in references to the Master or Commissioner on this subject, as well as on all others in which infants are concerned, and which are in fact ex parte, the officer should report to the Court the testimony on which his opinion is founded, in order to enable the Chancellor to form an opinion for himself. In the present case, there was no inquiry as to the necessity or expediency of the sale for the infants' interests, but it is desired that the cause may be remanded for the purpose of making such inquiry. I suppose it is competent for this Court to make such an order. If the interests of the infants do require such sale, the Court would be unwilling to put the parties to the expense and delay of another suit. The cause is, therefore, remanded accordingly.

JOHNSON and O'NEALL, JJ., concurred.

Decree reversed.

Rich. Eq. Cas. *405

*ISAAC CARR and Wife v. JOHN F. GREEN, Executor of James Green, Deceased, et al.

[*Equity* ⇐441.]

On a bill of revivor, to carry into effect a final decree of the Court of Equity, which has been affirmed in the Court of Appeals, the defendant cannot be permitted to bring into review the merits of the case, which have been once considered and decided.

[Ed. Note.—Cited in Price v. Nesbit, 1 Hill, Eq. 458; Bennett v. Bell, 10 Rich. Eq. 465; Ex parte Knox, 17 S. C. 209.

For other cases, see Equity, Cent. Dig. § 1063; Dec. Dig. ⇐441.]

[*Equity* ⇐445.]

Where a case has been heard and decided upon its merits, by the Court of Appeals, a rehearing, or bill of review, will not be granted, upon any other ground than newly discovered evidence since the trial.

[Ed. Note.—Cited in Bennett v. Bell, 10 Rich. Eq. 465; Ex parte Knox, 17 S. C. 209.

For other cases, see Equity, Cent. Dig. § 1078; Dec. Dig. ⇐445.]

[This case is also cited in Ex parte Knox, 17 S. C. 212, without specific application.]

This was a petition, presented to the Court of Appeals, in January, 1828, for a re-hearing.

The petition is as follows:

To the Honorable, the Judges of the Court of Appeals:

The petition of John F. Green, executor of James Green, deceased, and Benjamin Green, respectfully sheweth, That a bill was filed by the present complainants against James Green, deceased, the object of which was to obtain possession of a plantation in Georgetown District, (claimed by them under the will of William Wilson,) and to have an account of the mesne profits. The defendant demurred, because there was plain and adequate remedy at law, and because validity of the title to a freehold was peculiarly proper for the determination of a Court of Law.

The Circuit Court overruled the demurrer, and without hearing argument on the merits, decreed for the complainants, ordering the defendant to deliver up the plantation, and to account for the rents and profits. This decree was confirmed by the former Appeal Court. The defendant, James Green, departed this life without complying with the terms of the decree. In December, 1824, the Court of Appeals in Equity was abolished, and its power transferred to the new Court of Appeals, established at that period by Act of the Legislature. The original suit was afterwards revived against the executor and heir at law of James Green, deceased. But previous to the hearing of the bill of revivor, the new

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Court of Appeals had *determined, in a case depending on the construction of the same clause of William Wilson's will, under which complainants claim, that the complainants were not entitled to recover. A decree has been recently pronounced, by which the former decree, and all the orders against James Green, deceased, stand revived against his executor and heir at law.

Your petitioners submit that the decree originally pronounced in this case is erroneous, in the following particulars, viz.:

First. Because the complainants had plain and adequate remedy at law.

Secondly. Because the question submitted was peculiarly cognizable by a Court of Law, and should have been submitted to the determination of that tribunal.

Thirdly. Because, if the Court of Equity had jurisdiction, they erred in the construction of William Wilson's will, under which, as your petitioners would have contended, Thomas Wilson (from whom defendant's ancestor purchased) took an estate in fee simple.

Whereupon, your petitioners pray that your Honors, representing the former Court of Appeals, will be pleased to vouchsafe a re-hearing of this cause, your petitioners submitting to pay such costs as the Court shall award, in case their complaint shall be groundless. And your petitioners will ever pray, etc.

Bentham & Dunkin, Defendants' Solicitors.

We certify that we have perused the foregoing petition, and are of opinion that a rehearing ought to be granted, as thereby prayed for.

J. L. Petigru,
B. F. Dunkin.

M. King, Esq.:

Sir:—Be pleased to take notice that the petition in the within stated cause will be presented to their Honors, the Judges of the Court of Appeals, at their next meeting in Charleston, or as soon thereafter as counsel

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can be heard, *and that a motion will then and there be made, that the prayer of the said petition be granted, which motion will be grounded upon the said petition, and upon the pleadings, proofs, and other proceedings, heretofore had in the said cause, both in its original and revived characters.

Bentham & Dunkin, Defendants' Solicitors.

The opinion of the Court was delivered by

NOTT, J. This case presents two questions for the consideration of this Court:

1. Whether, on a bill of revivor, to carry into effect a final decree of the Court of Equity, which has been affirmed in the Court of Appeals, the defendant can be permitted to bring into review the merits of the case which have been once considered and determined?

2. Whether the Court will grant a re-hearing, or bill of review, where a case has been heard and decided, upon its merits, by the Court of Appeals, upon any other ground than newly discovered evidence, since the trial. I speak of a re-hearing and bill of review, without regard to the technical distinction between them, as, in point of principle, there can be no difference in this case.

The first point has not been much insisted on by the counsel, I presume from an impression that it furnished but little hope of success. And I concur with them in opinion, that any argument which could have been used, in all probability, would have been unavailing. On that subject, therefore, I shall be satisfied with observing that the Court concur in opinion with the Chancellor, for the reasons given in the decree.

The second, if it were now a new question, might perhaps have been one of more difficulty. But when we look back upon the decisions of the Court of Appeals, and see the number of cases in which the question has been considered and decided, we do not feel authorized to sustain this motion. The Court of Appeals was established in the year 1808, and it appears that this question arose shortly after the establishment of the Court. The first case, however, which I find reported, in

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which the *question is directly decided, is the case of James Burn v. Poaug, 3 Des. Aus. 596, which was decided in the year 1813. In that case, it is said, the Court has had occasion to consider these applications for rehearing, and it has formed an opinion that it is not at liberty, under its present organization, after a full and final decree, to open cases for re-hearing. It would appear, from these observations, that such applications had been frequent, and had been well considered, and that the Court availed itself of that occasion to announce its final determination.

In the year 1818, the case of Perkins and wife v. Lang and others [1 McCord, Eq. 30, note] occurred. That was an application for a bill of review. The Judges in that case again remark, that the Act of 1808 declares, that the decrees of the Court of Appeals shall be final and conclusive, and it would be manifestly contrary to its intentions, to allow

bills of review for error on the face of them. But as that application was founded on a suggestion of newly discovered matter since the decree, of which the party could not have had the benefit in the first instance, making, as the Judges observe, a new case, the application was granted on that ground.

The next case, which is entitled ex parte John R. Murrell, [1 McCord, Eq. 31, note,] was a petition by Mr. Green, his solicitor, for a re-hearing. All that appears on the minutes of the Court, is an order upon the docket, by the presiding Chancellor, (DeSaussure,) "The petition neither granted or refused, but Mr. Green left to pursue his own course, by bill of review in the Circuit Court." A bill was filed in the Circuit Court of Georgetown, which was dismissed by Chancellor Thompson, "because no new matter had been discovered since the rendition of the decree in the former case." From that decree there was an appeal, and the decree simply affirmed by the Court of Appeals.

The last case, which was one of the last acts of that Court, in December, 1824, was Blair et al. v. R. G. Farr et al., in which the entry on the docket is, "Refused, because it was not to ask a review of the case on newly discovered evidence, but to alter the decree on the evidence which had been before the Court and decided on."

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*It appears, therefore, that the question has been well considered in the former Court of Appeals, and that the decisions have been uniform, from its first establishment, in the year 1808, to its final extinguishment, in the year 1824. After such a series of decisions, we must consider the practice and the law as finally and conclusively settled. It appears to me, also, that this practice is conformable with the practice of all the Courts in England and the United States, the organization of which bears any analogy to ours.

The case of Browder v. McArthur, 7 Wheat., 58, [5 L. Ed. 397,] had been remitted to the Court below, to carry into effect a decree of the Supreme Court, and upon an appeal the counsel moved for a rehearing upon the merits. The Court denied the motion, being of opinion that it was too late to grant a rehearing in a cause, after it had been remitted to the Court below to carry into effect the decree of that Court. In Virginia, it has been held that the Superior Court of Chancery cannot grant a bill of review of any matter which has been heard and decided in the Court of Appeals. 1 Hen. and M. 13, McCall v. Graham. And in the case of Ludlow v. McCartney, 4 Vin. Abr., 414, it is said, "matters already settled, or which might have been put in issue in the original cause, shall never be drawn into examination upon a bill of review."

And it appears, that in England, the House of Lords will not allow a bill of review, or re-hearing, after a cause has been heard and decided by them. Bernal v. Marquis of Donegal, 3 Dow's Reports, 157; Bamfield v. Popham.

If, therefore, we are to be governed by the decisions of our own Courts, or by the authority of analogous cases from abroad, we are bound to refuse this motion. If we resort to principle, we shall be led to the same conclusion. A decision of the highest tribunal of the country must necessarily constitute the law of the case decided, whatever subsequent decisions may take place. It is a rule founded on public policy, and intended to prevent the endless litigation which would otherwise necessarily ensue.

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*If we listen to the application in this case, we shall open a door for a similar application in every case which has been decided since the establishment of that Court. It is, indeed, extremely inconsistent, that the disposition of property under the same will, should depend upon the Court in which the case might happen to be tried. But it was the result of the then unfortunate organization of our Courts, and the evil was no greater than the conflicting decisions, in many other cases, depending on the same principles, many of which are known to exist, and which was one of the causes that led to the present organization of the judiciary. But it is an evil that had better be borne than to introduce a greater, and we must console ourselves with the reflection that it no longer exists.

I am of opinion that the motion must be refused, and that the decree of the Chancellor must be affirmed.

COLCOCK and JOHNSON, JJ., concurred.

Motion refused.

Rich. Eq. Cas. 410

JOHN HIPP and JOHN H. VANZANT v. DRURY SAWYER et al.

[*Fraudulent Conveyances* ⇐30.]

Conveyance of land and judgment confessed set aside as fraudulent as to creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 73–75; Dec. Dig. ⇐30.]

[*Fraudulent Conveyances* ⇐132, 137.]

A vendor's continuing in possession of land after a sale does not of itself constitute fraud, as in the case of a chattel; yet, if the grantor remains in possession, as before, as apparent owner, paying no rent, it is evidence that the sale was colorable, and that some trust for the grantor was intended.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 407, 412, 435; Dec. Dig. ⇐132, 137.]

[*Fraudulent Conveyances* ⇐14, 163.]

A conveyance intended to defeat creditors, may be fraudulent as to them, even though a full consideration be paid; and the inserting of

a larger consideration than that paid, is some evidence that the transaction was colorable.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 17, 510; Dec. Dig. ⟸14, 163.]

[*Fraudulent Conveyances* ⟸66.]

Where a judgment confessed is impeached by a creditor for fraud, it is a circumstance entitled to considerable weight, where the transaction is of a doubtful character, that it was confessed pending the creditor's suit.

[Ed. Note.—Cited in Beattie v. Pool, 13 S. C. 384.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 169; Dec. Dig. ⟸66.]

[*Fraudulent Conveyances* ⟸88.]

A judgment may be fraudulent as to other creditors, though the debt be bona fide due.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 232; Dec. Dig. ⟸ 88.]

[*Fraudulent Conveyances* ⟸21.]

[Cited in Virginia-Carolina Chemical Co. v. Hunter, 94 S. C. 69, 77 S. E. 751, to the point that where a husband, who is considerably indebted, voluntarily conveys personal property in trust for his wife, and at the same time conveys real estate to the same trustee for the latter's own use, of which he retains possession, the circumstances raise a strong suspicion against the good faith of the latter conveyance towards the grantor's creditors.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 27; Dec. Dig. ⟸ 21.]

Before Harper, Ch., at Lexington, February, 1830.

HARPER, Ch. The bill charges that, in 1818, the defendants, Drury Sawyer and Mat-

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thias Quattlebaum, executed a *promissory note to the complainant, John Hipp, for three hundred and fifty dollars, on which note the said complainant afterwards recovered a judgment against the makers, at April Term, 1821. That pending the suit on the note, the defendant, Drury Sawyer, confessed a judgment to the defendant, Micajah Martin, for the sum of $8,377; which confession is charged to have been without consideration and fraudulent, and intended to defeat complainant's judgment, and the bill prays that it may be set aside, and the said Micajah Martin compelled to account for the money he has received on it.

The bill also charges that the note mentioned was given for a negro slave, sold ostensibly to Sawyer; but that Martin and Sawyer were partners in the business of buying and selling slaves, and that the purchase was, in fact, made on the joint account, and that Martin is liable as partner (Sawyer being insolvent) for the amount of the purchase money.

The bill also charges, that pending the suit on the note, the defendant, Matthias Quattlebaum, executed two deeds to the defendant, Andrew Sheely; by one of which he conveyed to Sheely most of his personal property, in trust for his (Quattlebaum's) wife, and by the other a tract of land to Sheely's own use. These deeds are charged to have been fraudulent.

The complainant, John H. Vanzant, is also a judgment creditor of Drury Sawyer, and claims to set aside the judgment of Martin. His judgment was recovered in 1823.

I shall first consider Sheely's part of the case. There was little dispute, that the conveyance of the property in trust for Quattlebaum's wife, must be considered fraudulent as to creditors. It purports to be voluntary, and he was very considerably indebted at the time; and, among others, owed the debt to complainant. The chief dispute was concerning the conveyance of the land to Sheely's own use. This purports to have been in consideration of $2,000, but was charged to be voluntary. The circumstances chiefly relied on to show the fraudulent character of this conveyance, were, that it was executed at the same time with the deed for the personal

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property, which is *obviously fraudulent, and must be considered part of the same transaction, and that Quattlebaum has remained in possession of the land ever since. These circumstances certainly raise a strong presumption against the deed. That at the very time of executing a conveyance for putting his personal property out of the reach of creditors, he should sell his land to the trustee of that fraudulent deed, is of itself suspicious; but the suspicion is very much heightened by the fact that he continued in possession as owner after the sale. The vendor's continuing in possession of land after a sale, does not of itself constitute fraud, as in the case of a chattel. As observed by Roberts, (Fraud: Con. 549,) "where land is conveyed, the want of possession casts a less degree of suspicion on the transaction, than where goods are the subject of the conveyance: for, with respect to lands, the property is evidenced by the possession of the title deeds, and manual occupation is no criterion of ownership." Yet certainly, that the grantor should remain in possession, as before, as apparent owner, paying no rent, is evidence that the sale was colorable, and that some trust for the grantor was intended. An attempt was made at the hearing to prove that a consideration was paid. This was principally by the evidence of Michael Barr, who stated that he transferred to Henry Sheely, a brother of the defendant, Andrew Sheely, a note of hand, executed by Quattlebaum as principal, with defendant and John Sheely as sureties, and he did not doubt but Andrew Sheely paid it off—he did not know but Henry Sheely told him so. The same witness stated his impression that defendant, Sheely, had paid off a debt of Quattlebaum to one Eigleburger—perhaps Eigleburger told him so. This is very

imperfect proof; but it was urged that Henry Sheely and Eigleburger, who could have proved the payments explicitly, are dead. Yet, it may be asked, if defendant took up the note, why is he unable to produce it, or why did he not take a receipt from Eigleburger? These, to be sure, may have been lost, or he may have neglected to take them; but there is too unusual a concurrence of unfortunate circumstances. Nor, if defendant did pay off

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these *debts of Quattlebaum, does it follow that it was on account of the land. It was not contended at the hearing, however, that defendant had paid to the amount of the consideration stated in the deed ($2,000). Indeed, the answer of Sheely states that he paid but $700 or $800. Now, if this had been proved, I should think the difference between the actual payment and the ostensible consideration, a strong circumstance against the deed. It does not follow, that because a consideration was paid, a conveyance cannot be fraudulent as to creditors. In Twine's case, there was a consideration. Even if the full value were paid, and it appeared that the transaction was concerted between the grantor and grantee, to enable the former to defeat creditors, by changing his land into money, which he could more easily put beyond the creditors' reach, I presume the conveyance would be considered fraudulent. Lord Mansfield says, in the case of Cadogan v. Kennet, Cowp. 434—"But if the transaction be not bona fide, the circumstance of its being done for valuable consideration will not alone take it out of the statute. I have known several cases where persons have given a fair and full price for goods, and where the possession was actually changed, yet being done for the purpose of defeating creditors the transaction has been held fraudulent, and therefore void." He instances the purchase of a house and goods with a view to defeat a sequestration out of Chancery, and of goods to defeat an execution, and adds: "The question, therefore, in every case, is, whether the act done is a bona fide transaction, or whether it is a trick and contrivance to cheat creditors. If there be a conveyance to a trustee, for the benefit of the debtor, it is fraudulent." The inserting of a false consideration in the deed, shews the transaction to be in some degree colorable. It indicates that they thought the true consideration inadequate and insufficient to support the deed. It may be that defendant Sheely paid some debts on account of Quattlebaum; that he intended him, nevertheless, to hold the land, not subject to the claims of creditors, and that he thought this

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a benevolent and unexceptionable *transaction; but the law pronounces it fraudulent. It was a secret trust for the debtor.

We are next to consider the case of the defendant Martin. So far as he is sought to be charged as the partner of Drury Sawyer, in the purchase of the slave for which the note to the complainant Hipp was given, I think there is no ground for the bill. According to the evidence, complainant made his contract with Sawyer alone; Martin expressly declined to be concerned in the purchase; complainant refused to have any thing to do with him, and chose his own security by taking the note. It seems to me perfectly immaterial whether any arrangement was made between Sawyer and Martin, that the slave should be on their joint account. Complainant could have no remedy at law, and I perceive no ground for coming into Equity. I think there is evidence enough, that, to some extent, Martin and Sawyer were connected as partners, in buying and selling slaves—indeed, Martin admits, in his answer, that it was intended, in the first instance, that he should be concerned in the purchase in question—but that can make no difference, when complainant expressly understood and agreed that he was not to look to Martin for his money, but to Sawyer and his surety Quattlebaum.

The more important part of Martin's case, however, relates to the judgment confessed to him by Drury Sawyer, which is charged to have been fraudulent, and on which Martin, in his answer, acknowledges to have received upwards of $1,500. It appears that in June, 1817, the defendants Martin and Drury Sawyer formed a partnership in trade, which was dissolved before September of the same year: again renewed in November, 1818, and finally dissolved the following winter, by Martin's selling out his interest in the concern to George Sawyer, the brother of Drury, who executed to Martin a bond in the penal sum of two thousand dollars, conditioned to indemnify him against the debts of the late firm. In 1821, as Martin alleges in his answer, a settlement was made between himself and Drury Sawyer, by one Harrington, an ac-

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countant, on which occasion *Sawyer fell in debt to him $8,377, and gave his note of the date of 3d of February of that year, and on the 5th of February confessed a judgment for the amount. On the settlement, as Martin's answer states, "it was agreed that this bond of two thousand dollars should be delivered up to George Sawyer, upon the amounts (after deducting the payments made by Drury and George Sawyer of the debts of the concern) being included in the judgment: that the balance of the said bond (this defendant thinks about fifteen hundred dollars) was included in the judgment confessed by Drury Sawyer to this defendant: the balance of the judgment was for money paid in Charleston for goods of the concern, on notes which defendant held against him, and for money for which the defendant was liable as security and has paid, and for money for which he is liable, to the amount of between eight and nine hundred dollars, which this defendant has not as yet paid."

The complainants impeach the judgment from various circumstances. First, they rely on the testimony of the witnesses, Nicholas Vanzant and Caughman, to Martin's admission, at the time of his selling out to George Sawyer, that Drury Sawyer owed him nothing, and the improbability of so large a debt being contracted up to the 3d of February, 1821.

Then the improbability of so large a debt being due on the settlement of so inconsiderable a concern. According to defendant's own testimony, the entire aggregate of goods purchased during the continuance of the partnership amounted to $8,400. Martin was by far the most efficient and intelligent person of the concern, and it was unlikely that he should permit Sawyer to get so much in his debt. If goods were paid for in Charleston during the continuance of the firm, the presumption is that they were paid for with the partnership funds.

The confession of judgment to Martin was made during the pendency of the complainant, Hipp's, suit against Sawyer, and just before the judgment was recovered; and though a debtor may, without fraud, prefer one creditor to another, yet the circumstance is entitled to considerable weight, when the

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trans*action is otherwise of so doubtful a character as the present. According to Twine's case, the making of a conveyance in satisfaction of a debt during the pendency of the writ, is one of the badges of fraud, and the confession of a judgment comes within the same reason.

According to the testimony of George Sawyer, when the property of Drury Sawyer was exposed to sale under the execution of Martin, the witness purchased to the amount of about $200, for which he gave his note to Martin. This note was afterwards given up, without being paid, and Drury Sawyer remained in possession of the property he had bid off.

Complainants also rely on the testimony of Amos Banks, that having a demand against Drury Sawyer, he had threatened, if he were not paid, to file a bill in Equity against Martin & Sawyer, and impeach this judgment, and that he was afterwards paid, but did not know by whom. Complainants leave it to be inferred, that the payment was made by Martin, induced by his consciousness that the judgment was liable to be impeached.

According to Martin's own answer, the debts of the firm in Charleston, for which he was liable as partner, were included in the judgment, and also the amount of the bond given to indemnify him against those debts. This, at the hearing, was supposed to be in consequence of mistake or inadvertence. But besides the improbability of such mistake, it shows it to have been a loose transaction, and adds to the probability of its being huddled up to defeat complainant's demand.

Defendant, Martin, states that the bond of indemnity was given up to George Sawyer, on its amount being included in the judgment. George Sawyer, who was sworn on his behalf, stated that Martin told him he gave up the bond on Drury Sawyer's representation that there was enough due to the firm on the books to pay off the debts; Martin having possession of the books and going on to collect debts.

A great deal of testimony was produced on the part of the defendant, Martin, to show

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a consideration for the judgment; *of which I do not think it necessary to enter into a minute examination. In general, it was of a vague and inconclusive character, and such as would have been proper on a reference to account. A reference had been ordered in the case, but it seems that the account could not be made out before the Commissioner, and the reference was abandoned. It may be said, in general, that there was no evidence that anything was actually due from Drury Sawyer to Martin, at the time of the dissolution of the firm; but the evidence of Vanzant and Caughman to the contrary. The only liability on account of the firm was the debt to O'Neal of $1880. Of this, $1250 had been paid before the settlement of 1821. It does not appear from the receipts annexed to the record of O'Neal's judgment, by whom these payments were made or with what funds. The balance of this debt appears to have been paid by Martin; but, according to George Sawyer's testimony, Martin gave up the bond of indemnity because he supposed that, having the books, he could collect enough of the debts of the firm to pay it off. It is true, he added that he supposed Martin had collected very little—not to the amount of $100. But this could not be known without an account and the production of the books, which are or were in Martin's possession. In fact, the testimony tended merely to make out a one-sided account. It was in evidence, that Martin and Drury Sawyer were much connected in their transactions after the dissolution of the partnership, and I am satisfied they were connected in the business of buying and selling slaves. I therefore think it unnecessary to consider the testimony as to the other particulars in which defendant, Martin, endeavored to show that he was under liability for Sawyer. No satisfactory conclusion can be drawn with respect to them. I am of opinion that the presumptions against the judgment are strong enough to impose on the defendant the burden of showing that it was bona fide and founded on consideration, and that he has failed to do so. Roberts, in his treatise on fraudulent conveyances, (p. 490) says, "though the debt be bona fide due, the judgment quoad other creditors, may be mala fide con-

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fessed, i. e. may be *confessed with intent to

delay, hinder or defraud others of their just and lawful actions, and such intent is to be collected from the circumstances of each case." In the present case, I am not satisfied that any debt was bona fide due: but if there was, or if defendant was under liabilities against which he was not sufficiently secured, I am satisfied the judgment was mala fide confessed, for an extravagant amount, with intent to cover all the property of Sawyer, and to hinder and defraud other creditors.

It is therefore ordered and decreed, that the deed of trust of certain personal property, executed by the defendant, Matthias Quattlebaum, to the defendant, Andrew Sheeley, on the 10th of March, 1821, to the use of Catharine Quattlebaum, and also the conveyance of a tract of land to the use of the said Andrew Sheeley, executed on the same day by the said Matthias Quattlebaum, be set aside and given up to be cancelled, as fraudulent and void, and that the said land and personal property, in the possession of the said Andrew Sheeley or Matthias Quattlebaum, or so much thereof as may be necessary, be sold by the Commissioner of this Court, for the satisfaction of the judgment of the complainant, John Hipp: And it is further ordered and decreed, that the judgment confessed by the defendant, Drury Sawyer, to the defendant, Micajah Martin, on the fifth of February, 1821, be set aside as fraudulent, and satisfaction thereof acknowledged by the said Micajah Martin, and that the said Micajah Martin account before the Commissioner for all monies or property which he has received on account of the said judgment, and pay what shall be found due on the coming in of such account, first towards the satisfaction of the complainant, John Hipp, and next towards the satisfaction of the judgment of the complainant, John H. Vanzant. Defendants to pay the costs.

On appeal, this decree was affirmed by the Court of Appeals.

Rich. Eq. Cas. *419

*BENJAMIN BAILEY v. WILLIAM SEABROOK.

[*Wills* ⇐594.]

Testator devised lands to his sons "to be equally divided between them and the heirs of their bodies: if either of my said sons should depart this life, leaving no lawful issue of his body, then it is my will that his or their share of my lands, so dying, shall be for the surviving brothers or brother, and their or his heirs:"—*Held*, that B., one of the sons, who had children living, might convey his share of the lands, and thereby bar, not only his own issue, but also the limitation over, (supposing the same to be valid,) to the surviving brothers.

[Ed. Note.—Cited in Deas v. Horry, 2 Hill, Eq. 246.

For other cases, see Wills, Cent. Dig. § 1310; Dec. Dig. ⇐594.]

[*Wills* ⇐622.]

[Cited in Buist v. Dawes, 4 Strob. Eq. 49, to the point that a remainder cannot be limited after a fee conditional.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1440–1444; Dec. Dig. ⇐622.]

Before Harper, Ch., at Charleston, February, 1829.

HARPER, Ch. Ralph Bailey, deceased, by his will executed in 1798, devised as follows: "Item: I give and bequeath unto my beloved sons, Benjamin Bailey, John Splatt Bailey, Henry Bailey, Ralph Bailey, Edward Bailey, Charles Bailey, William Eberson Bailey, and the child my wife is now pregnant with, (if male,) all my lands that I now possess, to be equally divided between them, and the heirs of their bodies; Item: if either of my said sons should depart this life, leaving no lawful issue of his body, then and in that case, it is my will and desire, in particular, that his or their share of my lands, so dying, shall be for the surviving brothers or brother, and their or his heirs."

The bill charges that complainant, who is the eldest of the sons of Ralph Bailey mentioned in the will, has made a contract with the defendant, for the sale of the land which he acquired under his father's will, and has tendered a conveyance in pursuance of his contract, which defendant declines to accept, on the alleged ground of complainant's inability to make a good title in fee simple. Complainant has several children living. The answer admits the facts stated, and declares defendant's readiness to perform his contract, provided the Court shall determine, that under the terms of his father's will, complainant can convey a good title in fee simple.

It is not doubted, that the devise to the testator's sons and the heirs of their bodies, to be equally divided, makes them tenants in common, and would, in England, give them an estate tail, under the statute de donis;

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nor that with us, where the statute *has not been adopted, the words give a fee simple conditional at the common law. The existence of this estate has been repeatedly recognized by our Courts. If these words stood alone, there could be no doubt that the complainant, who has issue living, might alienate and bar the issue and the reversion or possibility of reverter, and consequently make a good title to the defendant. The doubt arises from the subsequent limitation to the surviving brothers, in the event of either's dying without leaving issue. The question is, whether this is a good limitation by way of executory devise, and restrains the devisee from alienating until the contingency is determined. It was argued that it is so, because the words leaving issue do not import an indefinite failure of issue, but relate to issue living at the death of the first taker,

and also because the limitation to the surviving brothers shows it was intended to take effect during lives in being, and therefore it is within the limit of the rule against perpetuities.

There is no doubt, but if personal property be given by will, or real property be given in fee, it may be limited over by way of executory devise, on any event within the prescribed limit as to time; and such an event may be the first taker's dying without issue then living. To this effect are the well-known cases of Pells v. Brown, Cro. Jac. 590; Gulliver v. Wickett, 1 Wils. 105, and Doe v. Wetton, 2 Bos. & Pull. 324. There is no doubt but that, if personal property be limited over on the event of not leaving issue, the word leaving is sufficient to restrict the failure of issue to the time of the death. This is said to be the natural import of the words, and it seems to me obvious enough that it is so. A limitation to survivors, is also sufficient, either in the case of personal estate or land given in fee, to show that by a devise on the event of dying without issue, is not meant an indefinite failure of issue, but that the limitation is to take effect within lives in being. Hanbury v. Cockerel, 1 Roll. Ab. 835; cited, Butler's Fearne, 396; and Hughes v. Sayer, 1 P. Wms. 534. The case of Porter v. Bradley, 3 T. R. 143, is an

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authority, that if land be given in *fee and limited over on the event of not leaving issue, this means issue living at the death, and is a good executory devise. This case, or rather dictum of the Judge who decided it, has been the subject of a good deal of criticism; but it seems to me, to be supported by strong argument and authority.

It appears to me, however, that in England, after an estate tail given, there can be no executory devise, depending on the event of the first taker's dying without leaving issue or children then living; no matter by what words the intention may be expressed. The reason seems obvious enough; though it does not appear to be very clearly expressed in the cases. Such a limitation does not fall within any definition of an executory devise, but is clearly and to all intents and purposes a contingent remainder. An executory devise, according to Fearne, is such a limitation of a future estate or interest in lands or chattels, as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. In the case of lands, the limitation, as is elsewhere fully explained, must be, either to take place in abridgment of the preceding estate, (as when the fee is given and limited over on the event of the first taker's dying without issue then living) or must be limited to arise in future, (as where the estate is suffered to descend to the heir at law till the contingency is determined) not being expectant on the determination of a preceding estate of freehold. Mr. Fearne observes, with respect to an executory devise, "it is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void; for wherever a future interest is so limited by devise, as to fall within the rules above laid down for the limitation of contingent remainders, such an interest is not an executory devise, but a contingent remainder." He refers to the case of Purefoy v. Rogers, 2 Saund. 280, in which Lord Chief Justice Hale lays down the rule thus: "Where a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not other-

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*wise." Sergeant Williams, in his note to the case, note 9, p. 288, refers to the cases in which this rule has been recognized, and particularly to Doe v. Morgan, 3 T. R. 763, in which Lord Kenyon said, that if ever there existed a rule respecting executory devises, which had uniformly prevailed, without any exception to the contrary, it was that which was laid down by Lord Hale, in the case of Purefoy v. Rogers. Now I suppose it cannot be doubted that an estate tail is an estate of freehold, and capable of supporting a remainder; that the death of the first tenant in tail, without issue then living, is a regular determination of such estate; that the interest which is limited over on that event, is expectant on such determination, or that such a limitation would be good in a conveyance at common law.

I think I may venture to assert, that in the infinite number of English cases, not one can be found in which such a limitation, after an estate tail, has been supported as an executory devise, however strongly the intention may have been expressed. In the case of Edgar v. Driver, Cowp. 379, the testator devised lands to his daughter and the heirs of her body lawfully begotten; and if she should die without leaving children or child, living at her decease, the estate should be void as to the inheritance of heirs, and should go to the testator's heir male and his heirs male. The daughter suffered a recovery, devised the estate, and died without children, and the question was, whether this recovery had barred the limitation to the testator's heir male. It was held to have done so, on the ground of its being a remainder expectant on the estate tail; for it is of the essence of an executory devise that it is incapable of being barred till the contingency is determined. It was said, in argument in the case, that there can be no executory devise after an estate tail; perhaps this position might be questioned; but I think it pretty clear that there can be none on the event of the first tenant's dying without issue. Fearne, after citing this case and that of Fountain v. Gooch, which are quoted by

Lord Mansfield, and observing that conditional or executory limitations, depending on estates tail, may always be barred by a re-

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covery suffered *before the contingency is determined, adds: "But however the expression, in cases of this sort, may wear the complexion of conditions, or conditional limitations, they seem, in fact, not to differ from remainders; as they are taken up from an event which is, in itself, a regular determination of the estate tail, viz. the death of the tenant in tail without leaving issue then living, so that the express declaration, that the estate tail shall cease, determine or become void in such event, being no more than what is involved in the very nature of the estate itself, is in strictness perhaps a mere nullity. And the ulterior limitation not operating in any degree to abridge or interfere with the estate tail, or accelerate its determination, may well be considered as a remainder; not vested, indeed, because confined only to the event of the estate tail determining by the decease of the tenant in tail leaving no issue then living, but contingent on the expiration of the estate tail by that event. And this will, in some measure, account for an observation by the Court in the said case of Fountain v. Gooch, that the words 'and for want of such issue, the son to have but an estate during his natural life,' was no more than the law implied, for that if tenant in tail have no issue, it resolves into an estate for life."

This view of the subject, I think, will reconcile the case of Porter and Bradley, with Forth and Chapman, and the other cases with which it has been supposed to be at variance, and serves to explain the dictum of Lord Kenyon which has been the subject of censure. In Forth and Chapman, the testator gave real and personal estate to his nephews generally, and if either should die without leaving issue of their respective bodies, to a third person. The Lord Chancellor thought it might be reasonable enough to take the same word in different senses, as to the two different estates; and that as to the freehold estates, the construction should be, if the nephews died without issue generally, and as to the leasehold, the same words might be construed to mean a dying without leaving issue at their death. Now we are to observe, that in the devise to the nephews, there was no limitation to heirs or

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issue, and if it had stood alone, *would have given them only an estate for life. But it was plain that a benefit was intended to the issue, as the estate was limited over for want of issue. They could not take as purchasers; and therefore, of necessity, to effectuate the testator's intention, the nephews were construed to take an estate tail which was descendible to issue. But construing it an estate tail, it was necessary to construe the words leaving issue, to import an indefinite failure of issue. For the reasons I have mentioned before, the limitation over was a remainder expectant on the determination of the estate tail. But being such remainder, it seems to me that the words must necessarily import an indefinite failure of issue. I am not aware of any English case, or principle of law, which would authorize the notion of two remainders, or a remainder and reversion expectant on the same estate tail, accordingly as the estate shall terminate by one or another event; though two remainders may be limited as substitutes or alternatives for each other, on the same event. Lord Coke observes (Co. Litt. 20) that the Judges, after the statute de donis, in execution of the will of the donor, "adjudged that the donee should not have a fee simple; but divided the estate, and created a particular estate in the donee and a reversion in the donor; so as where the donee had a fee simple before, by this Act he had but an estate tail, and where the donor had but a possibility before, which after issue might be barred at the pleasure of the donee, now, by construction upon this Act, the donor had the fee simple expectant upon the estate tail, which we call the reversion." The whole fee is divided into the estate tail and the reversion, and the creation of a remainder is a grant of the reversion. If a grant were to A. and the heirs of his body, and on failure of his issue to B., this would be a vested remainder in B.: the fee would be in him. But if it were further provided, that if A. should die without children living at the time of his death, then the remainder should be to C. and his heirs, it is plain this limitation could not take effect as a contingent remainder or an executory devise. Not as a contingent remainder; because it could only have effect by divesting

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the fee sim*ple already vested in B.: nor as an executory devise; because it was limited and expectant on the regular determination of a preceding estate of freehold. So it would be if the reversion remained in the donor. I take it, therefore, to be a matter of absolute necessity, if the words are to have any effect at all, that when an estate tail is given, and limited over on the event of the first taker's dying without issue or children, this shall be construed a remainder expectant, generally, on the determination of the estate tail, and the words "leaving issue" or "leaving children living at the time of his death," or any similar words, to import an indefinite failure of issue.

In the case of Porter & Bradley, the devise was to the testator's son and his heirs and assigns forever; which plainly gave a fee simple. The limitation over was on the event of the son's dying without leaving ssue behind him. It was in reference to the words "leaving issue" in this case, that Lord Kenyon uttered the dictum which has been

the subject of censure, that "it would be very strange if these words had a different meaning when applied to real and personal property," and which Lord Eldon, in Crooke v. DeVandes, 9 Ves. 203, supposed to be inconsistent with Forth and Chapman. But if we confine the dictum of Lord Kenyon to the case of lands given in fee, the inconsistency vanishes. Lands no doubt may be given in fee, and limited over, by executory devise, on the first tenant's dying without issue then living. If, as is said in many cases, and as seems clear, the natural import of the words "leaving issue," is issue living at the time of the death, there is no conceivable reason why their meaning should not be the same when applied to a devise of land in fee simple or of personal estate. But as we have seen, there is ample reason, when they are used after the devise of an estate tail; because they have no effect at all, unless they were intended to import an indefinite failure of issue. If, therefore, we understand Lord Macclesfield, when he says, in Forth & Chapman, the words have a different meaning when applied to real and personal estate, to refer to real estate given

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in tail, (which was his case,) *and Lord Kenyon in Porter and Bradley to speak of land given in fee simple, (which was the case before him,) the opinions of both seem to be founded on just reason, and to be perfectly consistent. If Lord Kenyon had held the words to imply an indefinite failure of issue, he must have held that the testator's son took only an estate tail; for it is perfectly settled, that if land be given to A. and his heirs, and limited over on failure of the heirs of his body, A's. estate will be restricted to an estate tail. This would have been to destroy the plain, legal effect of the words giving a fee, in order to give an effect to the words of limitation over (leaving issue), which is stated to be contrary to their natural and obvious import; thus defeating the expressed intention of the testator, when there is nothing in the law to forbid his intention's having effect. The cases since decided, which have been supposed to be in opposition to Porter and Bradley, do not appear to me to be so. In Temy v. Agar, 12 East. 252, and Dansey v. Griffiths, 4 Maule and Sel. 62, it was a matter of necessary construction, from the whole of the will, that the first taker had only an estate tail, and therefore it was necessary that the limitation over on the event of not leaving issue, should be construed a remainder, and the words to import an indefinite failure of issue.

I conclude, therefore, that in England, under the statute de donis, this will would give the testator's sons an estate tail, with remainder in the case of each, to such of his brothers as should survive him. As such remainder, the limitation would be good, and would have effect, unless barred by fine and recovery. For the reasons mentioned, being limited after a fee conditional at common law, it must take effect as a remainder, if at all: the death of the first tenant, without issue living, is no less a regular determination of a fee conditional, than of an estate tail, and the limitation over is expectant on that determination. I have heretofore taken for granted, from the authorities, that a remainder limited after a fee conditional, was void. This has recently been in some degree questioned in a learned publication, by Mr. Preston, on Estates. He admits, however,

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*p. 320, that "by the preponderance of authority, no remainders are admissible after a gift of a conditional fee."

The principal authority relied on by Preston is that quoted by him from Bracton, Lib. 11, c. 6. "Item poterit pluribus fieri donatio per modum simul et successive, ut si quis plures habeat filios, et sic fecerit primogenito donationem et dicat, Do. A. primogenito meo filio tantam terram, &c. habendum et tenendum sibi et hæredibus suis, de corpore suo procreatis, et si tales hæredes non habuerit, vel si habuerit et defecerint, tunc terram illam do B. filio meo post genito, et volo quod terra ad ipsum B. revertatur habendum et tenendum, sibi et hæredibus suis quos de corpore suo procreatos habuerit, et si nullos tales habuerit, vel si habuerit et defecerint, tunc volo et concedo pro me et hæredibus meis, quod prædicta terra revertatur ad C. tertium filium meum, habendum et tenendum sibi et hæredibus suis, quos de corpore suo procreatos habuerit, et sic de pluribus. Et si prædicti A. B. C. sine talibus hæredibus de corpore suo procreatis decesserint, tunc volo quod prædicta terra revertatur ad me et ad alios hæredes meos; quod quidem fieret sine expressione per tacitam conditionem, nisi donatur aliud inde ordinaret." The other authorities cited in favor of such remainders, are Fleta, Lib. 3, c. 9, § 9, which Mr. Preston refers to without quoting; a doubt expressed by Lord Chief Justice Vaughan in Gardener v. Sheldon, Vaughan, 269, with respect to what is said by Lord Coke, 1 Inst. 18, that no remainder could be limited after a base or determinable fee; and some observations of Mr. Watkins on copy-holds, to show that, by the custom of some manors, copy-hold lands might be granted to a man and the heirs of his body with remainder over. The last authority I have not had an opportunity of referring to, but so far as I can perceive, it does not seem to bear very strongly on the question.

With respect to the passage quoted from Bracton, it struck me that it might possibly admit an interpretation of this sort—that the qualified gift "donatio per modum" might be limited to several and the heirs of their bod-

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ies, successively, each taking *the same

qualified estate, without having relation to the ultimate possibility of reverter. As to the last limitation to the donor's right heirs, he says, "quod quidem fieret sine expressione, per tacitam conditionem;" this would be the effect of the law, without any such limitation expressed in the grant. Lord Mansfield observes, in the case of Burgess v. Wheate, 1 Bl. Rep. 177, that if in the grant of a feud, it were limited to escheat to the Lord, after a failure of heirs generally, this limitation would be good; though it would be no more than what the law would operate. Yet, certainly a limitation to any one else, by way of remainder, after a general failure of heirs, would be bad. Though the expression, "nisi donatur aliud inde ordinaret," might seem to imply that a different disposition might be made by the grantor, yet perhaps no certain conclusion can be drawn from such an expression. What is said by Bracton, in the introduction to the same chapter, seems to favor this view of his meaning, "Donationum alia divisio, s. quod alia simplex et pura, alia conditionalis, alia sub modo, uni facta vel pluribus successive." It may be observed that the "donatio sub modo" is what we now speak of as a fee conditional, where not only a condition is imposed, but the course of descent restricted. The "conditionalis" to which he alludes, is the case of a grant to a man and his heirs, if he shall have heirs of his body; where, upon the performance of the condition, it becomes a fee simple absolute, and will descend to heirs generally. To the same effect is the passage referred to in Fleta: "Item, pluribus fieri poterit donatio per modum filiis et successive: ut, Do A. filio meo primogenito tantam terram tenendam sibi et hæredibus suis, de corpore suo progenitis; quisi tales sibi non genuerit, vel si habuerit et defecerint, tunc volo quod terra illa ad B. filium meum post natum revertatur, tenendam sibi et propriis hæredibus suis, ut supra: qui si nullos tales habuerit vel si habuerit et defecerint, tunc volo et concedo pro me et hæredibus meis quod prædicta terra revertatur ad C. tertium filium meum, habendam et tenendam sibi et hæredibus suis, de corpore suo progenitis, et sic de pluribus filiis, parentibus vel *extraneis. Et si prædicti A. B. C. sine hæredibus de corporibus suis progenitis discesserint, tunc volo quod prædicta terra revertatur ad me et ad alios hæredes meos." Fleta, Lib. 3, c. 9, § 9. It is true, that if several estates tail were now limited in succession, each, after the first, would be called a remainder; yet I can conceive, that before the statute, it may have been considered a peculiar case—a sort of substitution—not involving the power to limit the ultimate possibility, or fee absolute. I confess, however, that this seems contrary to the import of the authorities referred to.

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This would, perhaps, be too uncertain speculation to found a conclusion upon; but I must consider myself bound by the later authorities, which are uniform, that no such remainder can be limited. So it is repeatedly laid down by Lord Coke, (1 Inst. 18) that no remainder could be limited after a base or qualified fee. "There was no reversion or remainder expectant upon any estate tail at the common law, nor the issue in tail had any remedy." 1 Inst. 327. And see reading on the statute de donis, 2 Inst. 335; 3 Rep. 4; 7 Rep. 35. It is true, that Lord Chief Justice Vaughan expresses a doubt as to what is said by Lord Coke, 1 Inst. 18, that no remainder can be limited after a qualified fee; but that doubt does not seem to have been regarded in subsequent decisions. Lord Hardwicke says, "no remainder could be created of any estate not within the stat. de donis; for before, it was a possibility of reverter, out of which a remainder could not be; upon this notion, that being but a possibility, it could not be grantable over; and if before the statute de donis, a man had granted lands to another and the heirs of his body, and said, in default of such issue to B. and his heirs, that grant had been void." Earl of Stafford v. Buckley, 2 Ves. Sen. 180; Id. 335. So it is said by Lord Loughborough, in Turner v. Turner, Amb. 782, "by the common law, there is no possibility of limiting over such an estate." These are not dicta, but decisions, respecting annuities, which are hereditaments, not included in the statute de donis, but remaining subject to the rules which governed fee simples conditional at the *common law. To these, may be added the authority of the author of Bacon's abridgment in the introductory remarks to the chapter on estates. Mr. Preston supposes Chief Baron Gilbert to have been the writer of these remarks.

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But if we admit that remainders may be created after a fee simple conditional at common law, another question arises, whether they may be barred by alienation after issue had. No doubt remainders after estates tail may be barred by fine and recovery, but the proceeding by fine and recovery has grown up since the statute. There is no direct authority to this point, but it seems matter of obvious and necessary inference. The donor's right of reverter might be barred by alienation; the creation of a remainder is but a grant of the reversion; if alienation will bar the donor himself, it seems to follow that it will bar his grantee. Indeed, it is perfectly settled, that any executory or conditional limitation after an estate tail, may be barred by fine and recovery. See what is said by Fearne, 424, (Butler's edition,) and the cases cited by him. It is for this reason that it has been said as in argument in the case of Edgar and Driver, that there can be no executory devise after an estate tail; as it is characteristic of an executory devise that it cannot be barred. A

limitation may be made by will, which will so far partake of the nature of an executory devise, that it may take place in abridgment of the preceding estate—it will not be a remainder expectant on its determination: as if land were devised to A. and the heirs of his body, but provided, that if A. should fail to pay B. £100, the land should go to B. and his heirs. This is one of the cases cited by Fearne, in which the limitation over was held to be barred by fine and recovery, though the condition was not complied with; and such a limitation differs from an executory devise, not only in this respect, but another—that it is not restricted to any limit of time. Land may be devised to A. and the heirs male of his body, on condition that he and his descendants, tenants of the estate, shall take and bear the name of the donor, with a limitation over in the event of breach of the condition. Such a limitation would be

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good, and might *take effect at any distance of time, but alienation by fine and recovery would bar it. From the analogy of the estates, I should infer that alienation after issue would bar any such executory or conditional limitation annexed to a fee simple conditional. It is said to be of the essence of an estate tail, that it may be barred by fine and recovery; it seems to have been no less of the essence of a fee simple conditional, that the tenant might alien after issue had.

In the present case, therefore, I conclude that the limitation to the surviving sons of the testator, after giving them a fee simple conditional, must be construed a remainder limited on that estate; that such a remainder is void by law; that if it be not void, it may be barred by a conveyance; that if it may be construed an executory limitation or devise, from the analogy of law, it may still be barred, and consequently that it is in the power of complainant who has issue living, to make a good title to the land in question.

It is, therefore, ordered and decreed, that upon the complainant's executing to the defendant a sufficient title to the land mentioned in the bill, the defendant accept such title, and pay the price stipulated to be paid for the same.

NOTE.—This case has been often referred to. See Adams v. Chaplin, 1 Hill Eq. 268; Edwards v. Barksdale, 2 Hill, Eq. 187; Deas v. Horry, ib. 247; Buist v. Dawes, 4 Strob. Eq. 49.

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*JAMES GILLAM v. THOMAS BRIGGS. THOMAS BRIGGS v. JAMES GILLAM.

[*Vendor and Purchaser* ⟸114.]

One taking possession under a contract to purchase, and, after coming to the knowledge of a defect in the vendor's title, continuing in possession an unreasonable time, without objecting to the title, or offering to abandon the possession, or the contract, or insisting on immediate performance, will be bound to accept the vendor's title: and a fortiori will be bound to accept, if he goes on to treat the property as his own, by wasting or altering the situation of it, or offering it for sale.

[Ed. Note.—Cited in Whitworth v. Stuckey, 1 Rich. Eq. 407.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 202, 204; Dec. Dig. ⟸114.]

[*Vendor and Purchaser* ⟸31.]

A contract of sale will not be relieved against on the ground of an outstanding title, while the vendor continues in possession, unless on the score of fraud: mistake in relation to an outstanding title, where there has been no eviction of the purchaser, is no ground for a rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 37; Dec. Dig. ⟸31.]

Before Harper, Ch., at Newberry, July, 1834.

HARPER, Ch. The latter of the two cases stated (and which is the principal case now to be considered) presents, in a great degree, the same questions which were made in the case of Gillam vs. Briggs, heard by me as Chancellor and decided in 1830, and the testimony, as to the most material points, is precisely the same. I shall not think it necessary, therefore, to consider at great length the points determined in that case, nor shall I make any statement of the facts so far as they are stated in that decree, to which I refer. Since the decree, the defendant Gillam has brought his action at law on the contract, and recovered a verdict for $. It appears from the record at law, that the general issue and the statute of limitations were pleaded to the action. No defence was attempted on the ground that Gillam had failed to make a good title according to the contract, and the first question made in the present case is, whether having failed to make his defence at law, Briggs can now come into this Court for a rescission on the contract. I am of opinion he is not estopped by the judgment at law. No doubt this is a proper jurisdiction in which to obtain the rescission of a contract. And though I believe the true rule to be, that what parties have once had an opportunity of litigating

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in the course *of a judicial proceeding, they shall not be permitted to draw into question again; whatever might have properly been put in issue, shall be concluded to have been in issue and determined; yet I think Briggs is not precluded in this instance. Though he might, perhaps, have defeated the action at law, complete justice could not have been done in that Court. If Gillam failed to make or tender such a title as by his contract he was bound to make, this would have defeated the action, but it would not have put an end to litigation. The court of law could not award a restoration of the possession of the

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

land, or the reimbursement of that part of the purchase money which had been paid. There must have been still a suit in Equity for these purposes. Or if we suppose that the land and the purchase money would have been recovered by separate actions, yet the saving of circuity and multiplicity of litigation, is a good ground of jurisdiction. This Court can direct the proper accounts, and being properly in possession of the case, will do complete justice between the parties. The present bill by Briggs is for a rescission of the contract on the grounds on which he before resisted specific performance. Besides contending for the goodness of the title, Gillam now relies on the ground that Briggs has bound himself to accept such title as he is able to make.

In the former decree, I decided that the title offered by Gillam was of so doubtful a character, that on a bill for specific performance by him, Briggs could not be compelled to accept it; unless he had in some way bound himself to accept such title as Gillam was able to make. That was the point adjudicated in the case, and I should not feel at liberty to enter into it again, even if I doubted the correctness of my opinions, which I do not.

In that case also I considered (but without determining) the question, whether Briggs had bound himself to accept such title as Gillam was able to make. I expressed the opinion, that if Briggs was aware of the defect of title when he went into possession, he was so bound, and I refer to the decree for the reasons and authorities on which the opinion was founded.

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*I intimated the opinion that there was not sufficient evidence of his having had such knowledge. But upon reconsidering the testimony as to that point, I am more doubtful of the conclusion. The letters of Briggs, shewing that he was employed by Satterwhite to make enquiries about "Porcher, Gaillard and Moore," as I before observed, give reason to suspect that he knew the purpose for which those enquiries were made, and that it was to cure Satterwhite's defect of title to the land. But in addition to this, Briggs states in his bill, that Gillam had rented part of the land to one Brooks, and by the contract it was stipulated that he (Briggs) should not have possession of that part till the 1st of January, 1825, "at which time he believed the five years' possession of his tenant would expire, and thereby his intention to perfect his title by the statute of limitations would be consummated." Now, from the plain terms of this statement, it is to be inferred, that at the time of the contract Briggs knew the purpose for which the land in the possession of Brooks was retained, and such is the more probable conclusion from the facts. It is likely that he would require an explanation of the reason why possession of part of the land was retained. If he knew this, he must have known that there was an outstanding title, against which Gillam's title was to be matured.

I should hold it to be immaterial whether he knew of the claim of Burden, or only of the older grants to Porcher and Harris. In either case Gillam's title was defective, and Briggs' making the contract and going into possession under these circumstances, can only be construed into an assent on his part to take the risque of the title. If he knew only of the grant to Porcher, he must have known that there was a chance of Porcher's having conveyed to some one else. Besides these circumstances, there is the testimony of Barber Hancock, that of James G. Burton, and that of William Gillam, tending to confirm the impression, that Briggs did know of the defect of title at the time he purchased.

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I feel so much impressed by this *testimony, that I could not decide in favor of Briggs on this point, without sending it to be determined by a jury.

But on another ground I find myself compelled to determine against him. In my former decree I expressed the opinion that "if the party taking possession has no knowledge of the defect at the time, but comes to the knowledge afterwards, I apprehend that if he continues in possession for an unreasonable time, without objecting to the title or offering to abandon the possession or the contract, or insisting on immediate performance, he will be bound to accept. Still more strongly, if he goes on to treat the property as his own, by wasting or altering the situation of it or offering it for sale. I infer this from the cases of Fleetwood v. Green, and Margravine of Anspach v. Noel, before cited. In those cases, the abstract was delivered after the possession taken; but the parties continuing in possession long afterwards, without objection, were held to have waived any defect." Now, in this case, Briggs, according to his own statement, came to the full knowledge of the defect of title in 1826. The present bill, which is the first proceeding instituted by him to get rid of the contract, was filed in 1832—after a lapse of six years.

To this it may be replied, that after coming to the knowledge of the defect, he did demand of Gillam a rescission of the contract, and the latter must take the consequences of refusing his first demand. Besides, during a considerable portion of the time Gillam was prosecuting his former suit to obtain performance of the contract, which Briggs resisted, and insisted on his claim to a rescission. I doubt if the mere offer to rescind will do, unless it be followed up by proper legal steps to enforce the claim to rescission within a reasonable time. Shall a party, after having once offered to rescind, be permitted to lie by for an indefinite length of time, using the property as his own, and

speculating on the chances of its rising or falling in value? Then, as to the pendency of the former suit, I expressed my doubts in the decree whether a rescission could be decreed in favor of Briggs on Gillam's bill, or whether he was not bound to proceed on his part by filing a cross-bill.

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*But independently of this, I think there was such laches on the part of Briggs as, according to the authority of the decided cases, will preclude him from relief. He came to the knowledge of the defect of title in 1826; it is not particularly stated at what time of the year. He charges, by his bill, that soon after coming to the knowledge of the defect of title, he offered to restore the possession and demanded a rescission of the contract. Gillam denies that any such offer was made until the filing of his former bill, nor have we any evidence of such offer until the coming in of his answer to that bill. Gillam's former bill was filed on the 23d of August, 1828. The answer was filed on the 16th of June, 1829, which must have been between two and three years after Briggs was apprised of the defect of title. Now, in the case of the Margravine of Anspach v. Noel, before referred to, (1 Madd. Rep. 310,) specific performance was decreed, without a reference of title, upon possession for two years after discovery of the defect of title; there having been a correspondence in the mean time, in which no objection was taken to the title. In the case of Fleetwood v. Green, between three and four years had elapsed. In that case, stress was laid on the circumstance of the defendant's having treated the property as his own. Are there not circumstances in this case stronger than occurred in those? Briggs treated the property as his own. He cleared for cultivation a very considerable portion of it, and the weight of the testimony is, that he injured it considerably by his methods of cultivation and materially impaired its value. Then the small payments that were made and credited in 1828, amounted to an express affirmance of the contract. Briggs states in his answer to Gillam's bill, that these credits were for money advanced in 1826, before he knew of the defect of title; but this is not evidence in his own case. Besides, although the money were advanced in 1826, yet if he agreed to its being credited in 1828, it is the same thing as if the money were then paid. All that we know, however, is that the credit was given in 1828. Then, after his offer to rescind the contract, he in 1828 advertised the land for sale, clearly

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treating it *as his own. The decree of 1830 apprised him of the necessity of proceeding on his part, and put him upon the assertion of his right. The action at law brought by Gillam, was a further call on him to proceed if he intended to do so. He still delayed, till Gillam had recovered judgment at law and was about enforcing execution, and had filed his present bill. Then he files his bill for a rescission. It would be a premium to laches, to afford him relief after these circumstances.

I have treated the case hitherto as if Gillam were now seeking a specific performance, and I think he would be entitled to it. But the case is certainly stronger against Briggs coming for a rescission on his part. I do not find that a contract of sale has ever been relieved against, on the ground of an outstanding title, while the vendee continues in possession, unless on the score of fraud. Contracts have often been rescinded on account of mistake; but not of mistake in relation to an outstanding title, when there has been no eviction of the purchaser. Such is the case of Abbott v. Allen, 2 Johns. Ch. 519, in which Chancellor Kent refused to relieve against the payment of the purchase money, though an outstanding title was very satisfactorily shown. That was the case of a conveyance executed; but the reasoning will apply to one like the present.

The Chancellor says, "Can this Court proceed to try the validity of the outstanding claim in the absence of the party in whom it is supposed to reside, or must he be brought into Court against his will, to assert or renounce a title which he never asserted, and perhaps never thought of? I apprehend there is no such practice or doctrine in this Court; and that a previous eviction or trial at law is, as a general rule, indispensable."

The purchaser's resort in such cases, must be upon his covenants of seisin or warranty, should he be afterwards evicted. See the cases there cited, and Bumpus v. Platner, 1 Johns. Ch. 213. With this agrees Westbrook v. McMillan, 1 Hill, 317, [26 Am. Dec. 187.] That was a law case, but it was the adoption of an equity doctrine. In the case of Abbott and Allen, as I have said, an outstanding title was proved. But, in this case,

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I cannot say *that Gillam's title may not be perfectly good. No title has been legally proved in the heirs of Burden. If it had been proved in Burden himself, he may have conveyed to some one else: and the silence of his will with respect to this land, may afford room to conjecture that he had done so. Or, if it is in the heirs of Porcher, these may have been adults, against whom Gillam's title has been matured by the statute. I do not say that his title is good: perhaps the probabilities are against it; but for aught that I can see, it is very improbable that any one will ever be able to establish a title against him at law. Certainly, no case of fraud has been made out against Gillam.

I have, so far, considered the case as if Briggs were still in possession of the land, and it is to be decided on the same principles as if he were.

The bill, on the part of Gillam, was filed,

first, to render the land specifically liable to the satisfaction of his verdict at law, and to obtain a sale of it; and next, to stay Briggs from committing waste pending the litigation. The land has been sold, and the proceeds, which are not quite sufficient to satisfy the verdict, are in the hands of the Commissioner. A decretal order was made on that bill, "that the said tract of land be held specifically liable for the payment and satisfaction of the complainant's said judgment at law, without prejudice to the defendant's claim to set aside the contract for the land, and subject to the final order and decree on the merits." I have decided that Briggs is not entitled to a rescission of the contract, and I must regard this as a decree giving Gillam the proceeds of the land. The only question remaining, in relation to that case, respects the costs, and these I think Gillam must pay—I think so, because it appears to me that the suit was unnecessary. Though the legal title had not been conveyed to Briggs, yet if Gillam had caused the land to be levied on and sold under his execution, the purchaser would have had a good title. Both Briggs and himself would have been estopped to deny the purchaser's title. It is said, there were older judgments against Briggs, which would have claimed the pro-

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ceeds. But the Court of law exer*cises an equitable jurisdiction, in ordering the proceeds of executions to be paid over, and this land could never have been held liable to the satisfaction of any other judgment. Then, I am of opinion, Gillam was not entitled to stay waste. He claims to enforce the contract as a valid one, and his claim has been sustained. Briggs must then be considered, in equity, as the absolute owner of the land, entitled to use it or to waste it, as he pleased. As well might any other creditor file a bill to prevent his debtor from wasting his lands, pending the action at law for the recovery of his debt.

It is ordered and decreed that the proceeds of the land in the hands of the Commissioner be paid over to James Gillam, the complainant in the first case stated, and that the said Gillam pay the costs of that suit, and that the bill of the complainant, Briggs, be dismissed with costs.

NOTE.—Vide Whitworth v. Stuckey, 1 Rich. Eq. 404, and Thompson v. Dulles [5 Rich. Eq. 370] Ms. Charleston, January, 1853, in which these cases are referred to. R.

Rich. Eq. Cas. 439

RACHEL LINDSAY, by Next Friend, v. WILLIAM LINDSAY and Others.

[*Husband and Wife* ⟸205.]

A wife may, by her next friend, sustain a bill against her husband and the administrators, for a settlement out of her distributive share of her father's estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 754; Dec. Dig. ⟸205.]

The question, whether the income shall be paid to her separate use, reserved until the coming in of the report: and the Commissioner ordered to report the terms of a settlement, &c.

Before Harper, Ch., at Spartanburg, June, 1836.

HARPER, Ch. The bill states that Henry Ernest, the father of the complainant, died in 1834, possessed of considerable real and personal estate, and that the defendants, Isaac Lindsay and Dennis Lindsay, admin-

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istered on his estate. It further states, *that the defendant, William Lindsay, the husband of the complainant, has been many years intemperate in drinking, is insolvent, and treats her with great cruelty, so that she is afraid to live with him. That she has frequently applied to the administrators to prevent their father, the said William Lindsay, from wasting the estate, and to retain her share till it may be settled in trust for her by a decree of the Court, with which request they have refused to comply. The bill prays that complainant's share of her father's estate may be paid over to a trustee, in trust for her separate use, during her life, and to go, at her death, to her children.

The answer of William Lindsay generally denies the facts charged, with respect to his great intemperance, his cruelty to his wife, his insolvency or incapacity to manage his estate.

He states, that on the recommendation of the Ordinary, it was agreed among all the parties interested, that his mother-in-law, the widow of Henry Ernest, a very aged woman, should live with him during her life, and that the whole estate should be kept together in his hands, and managed by him for her support and that of his own family; which has been done. He states that the estate has been improved in value by his management. He resists the settlement of his wife's share of the estate upon her.

The answer of the administrators, Dennis and Isaac Lindsay, confirms that of their father, with respect to the agreement that the estate should remain in their father's hands for the support of his mother-in-law and his own family; they deny the excessive intemperance charged, or his incapacity to manage the property; but state, that besides supporting the mother-in-law and family, the estate has been improved by his management.

It appears that the estate has been sold since the bill filed, by order of the Ordinary.

This is not a bill for alimony, though some of the charges of the bill, and much of the testimony, would seem applicable to such a case. The complainant is not living apart

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from her *husband, nor does she pray to be

protected in so living apart, nor was her claim to relief urged on that ground at the hearing.

It is put on the footing of her right, on equitable principles, to a provision out of her share of her father's estate, yet in the hands of the administrators.

A good deal of testimony was given, which I do not think it necessary to examine minutely, as the case will be mainly decided upon legal principles. I will merely give my conclusions from the evidence, and my notes may be referred to, if necessary.

It is sufficiently established, that the defendant, William Lindsay, is, and has been, for a long time, in the habit of very intemperate drinking.

But the effect of this has not been so to impair his mind as totally to disqualify him for the management of business. I think the evidence is, that besides supporting his family, the property in his hands was well managed and improved by him.

He is not shown to be insolvent; though I suppose, that, independently of the property in question, his circumstances would be extremely narrow.

His conduct to his wife, when under the effect of intoxication, is proved to have been harsh and unkind; using towards her very abusive language, and sometimes personal violence. But, upon the whole of the evidence, I cannot say that this was without fault on her part. Her temper seems to have been high, and she sometimes provoked his violence by her reproaches; as, in the instance mentioned by the witness, Owens. I, by no means intend to say, that there was equal blame on both sides; but only that, with more forbearance and command of temper, on her part, his conduct would probably have been better. In the language of one of her own witnesses, there seems to have been "no kindness on either side." When not intoxicated, he seems to have been an honest, industrious and well-disposed man.

I come now to consider the complainant's claim for a provision out of her portion of

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her father's estate in the hands of *the administrators. There is no question concerning the rule, as laid down, 1 Fonb. 95, n. h., "that Courts of Equity, considering the husband bound, in conscience, to make a settlement upon his wife, at least adequate to her fortune, will not part with her fortune unless he do make a proper settlement."

The objections to the interference of the Court are, that it is only upon the application of the husband for the wife's fortune that the Court refuses its aid, and that a bill, at the suit of the wife, cannot be sustained: that the Court does not direct funds to be paid to a trustee for the wife, but only decrees a settlement upon his proposal: that the only means of relief, is to withhold the fund, and direct the interest to accumulate, for the purpose of compelling him to make proposals, and to secure the property to the wife by survivorship, if she shall outlive her husband; that if the husband can obtain the property of the wife without the aid of the Court, the Court will not interfere; and that, in this case, the administrators are willing to pay to the husband, unless restrained by the Court.

These views seem to be in conformity to some of the older cases, but they seem to have been modified by the later decisions. In Bosvil v. Brander, 1 Pr. Wms. 458, where the Commissioners in Bankruptcy had assigned over to the assignees a mortgage which had been given to the bankrupt's wife before marriage, and she brought her bill against the assignees to have the benefit of the mortgage, the Chancellor refused relief. He said, "it might have been a matter of different consideration, if the assignees had been plaintiffs in equity, and desired the aid of the Court to strip an unfortunate widow of all she had in the world: towards the doing of which, equity would hardly have lent any assistance; because the assignees, claiming under the bankrupt husband, could be in no better plight than the husband would have been; and if the husband had, in equity, sued for the money, or else prayed that the mortgage might be foreclosed, equity (probably) would not have compelled the mortgagor to pay the money to the husband, without his making some provision for his wife—or, at

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least, the wife, by an ap*plication to the Court against the husband and the mortgagor, might have prevented the payment of the money to the husband, unless some provision were made for her." "But, in the present case, the widow was plaintiff against the assignees, so that she, and not the creditors, sought the aid of equity." So, the doctrine seems to be impliedly laid down in other cases, as in Milner v. Colmer, 2 Pr. Wms. 641, "that where the husband has a legal title to the wife's personal estate, which he can come at by law, without the aid of equity, this Court will not, in such case, interpose; but where the application is in equity, for his wife's portion in the hands of the Court, or, perhaps of a receiver, there, if he will have equity, he must do equity." In Bond v. Simmons, 2 Atk. 20, in the bill of the husband for the wife's legacy, the Court referred it to the Master to receive proposals. The husband refused to make any, and the Court directed the fund to be vested and accumulate. After the husband's death, however, the Court directed the arrears of interest, as well as the principal, to be paid over to the wife.

Mr. Cox, in his note to Bosvil and Brander, comes to the conclusion, that "it does not seem material whether the wife, or the husband, or his general representatives or assignees come for the aid of the Court." Among other cases, he refers to Ex parte Coysegame, 1 Atk. 192, where a bankrupt had de-

livered to the assignees a bond for an annuity, given to a trustee for his wife, the Court, on her petition, ordered the bond to be delivered up, and the future payments of the annuity to be made to her separate use.

The subject of sustaining such a bill by the wife, however, is fully considered and decided in Elibank v. Montolieu, 5 Ves. 737. There the bill was by the wife against the husband, and the administrator of an estate, of which she was entitled to a distributive share. The Court decreed the wife to be entitled to a provision out of her distributive share, and it was referred to the Master to take the accounts and see a proper settlement made. In that case, it made no difference that the administrator claimed to retain the fund for a debt due to him by the

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hus*band. As, against any right of the husband, it was not questioned but that he might retain: but he could have no greater right than the husband. It was argued that the Court had never decreed against a trustee who had paid without suit, and payment to the husband's debt, was equivalent to payment to himself. The Reporter observes, in a note, p. 739, that the distinction upon which the case of Bosvil and Brander was decided, that the assignees were not the plaintiffs, has certainly not been attended to in the more recent authorities. To the same effect as Elibank and Montolieu, was the case of Carr v. Taylor, 10 Ves. 574, which was a bill by the wife against an administratrix and the assignees of a bankrupt husband. These cases seem in point to the present.

In Kenny v. Udall, 5 Johns. Ch. 465, Chancellor Kent sustained a bill by the wife against the husband and the husband's assignee of certain stock, which had been transferred in trust to pay the dividends for the use of the wife till she attained the age of twenty-one years, then to transfer to her the principal. The trustee having refused to accept, the Assistant Register of the Court was appointed Trustee. The Chancellor declared the assignment void, as against the wife's equity, and directed the trustee to pay the dividends to the wife till she attained the age of twenty-one; the provision to be made for her to be then determined on reference. He lays down the rule that "the wife's equity attaches upon her personal property, when it is subject to the jurisdiction of the Court, and is the object of the suit, into whatsoever hands it may have come, or in whatever manner it may have been transferred. The same rule applies, whether the application be by the husband, or his representatives or assignees, to obtain possession of the property, or whether it be by the wife or her trustee, or by any person partaking of that character, praying for a provision out of that property." In our own State, in the anonymous case, 4 Eq. Rep. 94, where the bill was by the wife for alimony, to which the Court did not think her entitled, yet, as the husband and wife were, in fact, living apart, and it was

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necessary that she should *be maintained, the Court directed one-half the income of property which had been settled to the joint use of the husband and wife, to be paid to her.

When it was held that the Court could interfere only when the suit was by the husband, or one claiming in his right, and that the only relief which could be afforded was, to withhold its aid till a provision should be made, there was manifest reason why a settlement should only be decreed on his proposal. But, when a bill is sustained at the suit of the wife, and the person and property are both within the jurisdiction, it would be singular indeed, if the interference of the Court might be rendered ineffectual by the obstinacy of the husband in refusing to make proposals. Great hardship and injustice might be done to the wife by directing the fund to be paid into Court and accumulate; especially in cases where it is proper that the interest should be paid to her separate use. On the reference to ascertain the proper provision, the husband may always attend and propose or suggest what may seem to him proper. In Mr. Cox's note to Bosvil and Brander, before referred to, the case of Watson and Mascal is quoted. That was a bill, by the assignees of a bankrupt, against the husband, the wife, and the administrator of an estate, of which the wife was entitled to a distributive share. The decree is said to have been, (after directing an account) that the administrator should invest the share to which the wife was entitled, in the name of trustees to be allowed by the Master: that the interest should be paid to the wife for life, to her separate use, and after her death, to the assignees for the use of creditors.

The foregoing reasoning shows, that a mistaken inference has been drawn from expressions used in some of the cases, as in the Attorney General v. Whorwood, 1 Ves. Sen. 539: that if the husband can lay hold of the wife's estate, without the aid of a Court of Equity, the Court will not compel him to provide for her as they will where he cannot without such aid. The true rule I take to be this—if the husband may be compelled, provided the trustee or person in

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whose hands the fund is, should *stand out for the interest of the wife, and refuse to pay unless provision be made for her, to come into Equity or any other Court of concurrent jurisdiction, there the Court will, at any time before the fund is actually paid over, on application, compel the husband to make the provision. So I understand Lord Hardwicke to say, in Jewson v. Moulson, 2 Atk. 420, that "if the husband can come at the chattels of the wife, without the aid of this Court, or of a Court of concurrent jurisdiction, I do not know any instance where the

Court has interfered; as if the wife's debtor will pay her debt to the husband; so where there is a bond debt to the wife dum sola, and the husband recovers it at law, I do not know that this Court has ever granted an injunction." He adds, "though if a bill was brought in favor of a wife, for an injunction to stay execution upon the judgment at law, I do not know whether this Court would not grant it; but as that point is not now before me, I will not determine it." On the general current of authorities, I apprehend the Court would not grant such an injunction. The Chancellor states, that the Court has frequently granted injunctions to stay proceedings in the ecclesiastical Courts, the Courts having concurrent jurisdiction. Such were the cases of Gardiner v. Walker, 1 Str. 503, and Meales v. Meales, 5 Ves. 517 n. So, if an action were maintained in a Court of Law for a wife's legacy or distributive share, by parity of reasoning, I suppose an injunction would be granted: for this would be an exercise of concurrent jurisdiction; otherwise, in the case of a bond given to the wife dum sola. In the case of Deeks v. Strutt, 5 T. R. 690, determining that an action will not lie for the wife's legacy, it is put on the ground, that a Court of Equity will make provision for the wife and family. If, in this case, the administrators had actually administered the estate, and paid over to their father his wife's share, before the bill filed, I am not aware that she could have had any remedy.

As is said by Lord Eldon, in Murray v. Elibank, 10 Ves. 90, referring to McCaulay v. Philips, 4 Ves. 15, "Previously to a bill, a trustee who has the wife's property, real or per-

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sonal, may pay *the rents and profits, and may hand over the personal estate to the husband. Lord Alvanley, in McCaulay v. Philips, has laid down, that after a bill filed, the trustee cannot exercise his discretion upon that: that the bill makes the Court the trustee, and takes away his right of dealing with the property as he had previously."

A question must be considered in the course of the case, whether the income of the property directed to be settled, shall be paid to the separate use of the wife as prayed for by the bill. In McCaulay v. Philips, before referred to, it is laid down that, in general, the husband is entitled to the income of his wife's fortune, unless he has received some fortune with her, or has misbehaved himself; as in Like v. Beresford, 3 Ves. 506, by running away with a ward of the Court. Exceptions are also made, where the husband is living apart from his wife, as in Ball v. Montgomery, 2 Ves. Jr. 197; or is bankrupt, Wiman v. Mason, 1, Pr. Wms. 459, n.; or has made a general assignment for the benefit of creditors, Prior v. Hill, 4 Br. C. C. 139. In Sleeck v. Thorington, 2 Ves. Sen. 562, however, it is said, to be the constant rule of the Court, where the husband maintains the wife, to direct the interest to be paid to him. In the case of the bankrupt or insolvent person, the reason of the exception is obvious; unless the income were paid to the separate use of the wife, it would go to the husband's creditors, and she would be left unprovided for. So in the case of a wife's living apart from her husband, who has no other maintenance. In the case of a person running away with the ward of the Court, it was intended as a punishment for his contempt of the Court. Now, in this case, the defendant, William Lindsay, has in some sense misbehaved himself, but not so as to constitute a contempt of the Court. I do not know upon what authority I could undertake to punish him for his ill treatment of his wife, short of a case for alimony being made. There is no complaint made of him with respect to the maintenance of his wife, nor do I perceive grounds for any. Living together as one family, it would hardly be practicable to ap-

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portion their respective shares of *family expenses, and it cannot be thought that she is to receive the income of her provision to her separate use, and still demand maintenance of her husband. The main object of such a provision, is to secure to the wife a maintenance in the event of her surviving her husband. I incline to think the income must be paid to the husband; but on this point, I shall conclude nothing till the coming in of the report.

It is adjudged and declared, that the complainant, Margaret Lindsay, is entitled to a provision out of her distributive share of the estate of her deceased father, Henry Ernest, in the hands of his administrators, the defendants, Isaac Lindsay and Dennis Lindsay; and it is ordered, that it be referred to the Commissioner to take an account of the estate of the said Henry Ernest, in the hands of his said administrators; and it is further ordered, that it be referred to the Commissioner to report what portion of the complainant's distributive share of the said estate ought to be settled on her, and the terms of such settlement, and also to report a fit and proper person to be appointed the trustee of such settlement; and it is ordered and decreed, that upon the confirmation of the said report, the said defendants, Isaac Lindsay and Dennis Lindsay, pay over such proportion of the said estate as may be reported and directed, to the trustee so appointed, to be by him invested and the income thereof disposed of according to the terms of the said settlement. Costs to be paid out of complainant's distributive share of the estate.

*FRED NAISOR and Others v. PHILIP NAISOR BROCKAWAY and Others.

[*Death* ⇐2.]

Where an absent party is unheard of for seven years, the presumption is, that he died at the commencement of that period; vide Chapman v. Cooper, (5 Rich. 452) contra, semble.

[Ed. Note.—Cited in Godfrey v. Schmidt, Cheves, Eq. 59; Canady v. George, 6 Rich. Eq. 108; Corley v. Holloway, 22 S. C. 381, 386.

For other cases, see Death, Cent. Dig. §§ 1–3; Dec. Dig. ⇐2.]

[*Death* ⇐2.]

[Where a testator directs his residuary estate to be divided among his grandchildren, and, if either of such grandchildren should die unmarried under the age of 21 years, his share should go to the survivors, and one of such grandchildren left the country before the age of 21, and was absent and unheard of for more than 7 years, it would be presumed that he died at the commencement of that period, and therefore under the age of 21 years, and hence the residuary legatees were entitled to his share out of the estate.]

[Ed. Note.—For other cases, see Death, Cent. Dig. § 1178; Dec. Dig. ⇐2.]

Before Harper, Ch., at Charleston, May, 1830.

HARPER, Ch. By the will of Philip Naisor, deceased, all his residuary estate was directed to be divided among his grandchildren, children of his son, Frederic Naisor, and his daughter, Mary M. Brockaway, when the youngest should attain the age of eighteen years. But, if either of the said grandchildren should die unmarried, under the age of twenty-one years, the share of him or her so dying, was given to the survivors. Philip Naisor Brockaway was one of these grandchildren, the son of Mary M. Brockaway. According to the testimony, he was born in May or June of 1799 or 1800, and left Charleston in the summer of 1813 or 1814. He was heard of, as residing in New York, some six months after his leaving Charleston, since which time, nothing has been heard of him. The present bill was filed by the grandchildren, for distribution of the estate; which was made with respect to the whole of the estate except the share which it was supposed might be claimed by the said Philip Naisor Brockaway or his representatives, which was paid into Court to abide its future order. The other grandchildren of the testator applying to have that share divided amongst them, according to the limitation over of the will, public advertisement was directed to be made, for the purpose of giving notice to the said Brockaway or his legal representatives. This has been done, and the application is now renewed to distribute the fund among the other grandchildren. Their right to it, depends on the question, whether Philip Naisor Brockaway shall be presumed to have died before he attained the age of twenty-one, as the limitation over to them was on that event. If he attained twenty-one, the legacy vested absolutely in him, and

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would go *to his legal representatives. There was some discrepancy in the testimony as to the dates of his birth and death, which I do not think necessary to decide upon, as I am clear on the principle of law. If he left Charleston in 1814, and was, at that time, fourteen years of age, (and I incline to think the testimony preponderates in favor of this state of facts) he would have attained the age of twenty-one a little before the seven years since his being last heard of, had elapsed; which time was necessary to raise the presumption of his death. There is no doubt, that the presumption of his death has long since arisen, and the question is, whether it is to be taken to relate to the time of his being last heard of, or to the end of the seven years, the lapse of which, was necessary to raise the presumption. But a single authority was produced, having any direct relation to the question; the case of Webster v. Birchmore, 13 Ves. 363. That case depended on the question, whether John Herfill should be presumed to have died in the lifetime of Susannah Herfill. John Herfill had not been heard of for twenty-three years—but, of that period, not more than between five and six years had elapsed at the death of Susannah Herfill. It was argued that, though five or six years is not enough to raise the presumption of death, yet, when a sufficient time has elapsed, the relation must go to the first moment of the uncertainty of his existence. Lord Eldon determined, that he must be taken to have died in the lifetime of Susannah. It is true, that he lays stress on the circumstances that, at his departure, he expected to return in six months, and that he was then in a bad state of health. But I think there are strong grounds for supposing, that the general principle is, as contended for in the argument of the case. When a person leaves his home and family, and goes abroad, the natural and general presumption is, that his family and friends will be, from time to time, advised of his situation and movements. If this be omitted for any unusual length of time, this naturally raises a suspicion, that it is owing to some casualty—it may be death, or to some minor casualty, as sickness, imprisonment or shipwreck. When the peri-

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od of seven years has elapsed, how*ever, the law presumes that it was occasioned by death and not by any minor casualty. Not death at the end of the period; but, that the ignorance of his existence during the whole period was the consequence of his death. This seems, naturally, to have relation to the earliest period when his existence became uncertain. I do not say, that circumstances may not exist to occasion a modification of the rule; but I am satisfied, the general rule

must be as I have supposed. I do not perceive such circumstances in this case. I am, therefore, of opinion, that Philip Naisor Brockaway must be taken to have died under the age of twenty-one years, and that the limitation over of his share of his grandfather's residuary estate must have effect—or, rather that he died under the age of eighteen years, and that the fund goes, by the direct bequest, to such of the testator's grandchildren as were living when the youngest attained the age of eighteen years. I do not know that this will make any difference in the rights of the claimants. It is ordered and decreed, that the fund be distributed accordingly.

MEM.—After this decree and after the distribution, Phillip Naisor Brockaway as I have been informed, made his appearance in Charleston, in good health. W. H.

Rich. Eq. Cas. *452

*A. HOWARD, Escheator, and THE CITY COUNCIL, v. J. W. SCHMIDT.

[*Escheat* ⇐3.]

The term escheat applies, in this State, as well to personal as to real property.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. § 3; Dec. Dig. ⇐3.]

[*Executors and Administrators* ⇐104.]

An administrator setting up a claim to the fund in his hands, *held* liable for interest pending the litigation—the claim having been decided against him.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 425; Dec. Dig. ⇐104.]

[*Executors and Administrators* ⇐495.]

It is only where interest is actually received, and vested so as to accumulate, that an administrator is entitled to ten per cent. commissions thereon.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2104; Dec. Dig. ⇐495.]

[*Executors and Administrators* ⇐104.]

Though it is within the power of the Court, in conformity to the English Chancery, to charge executors and other trustees less than the legal rate of interest; yet to authorize the Court to change the established practice of charging the legal rate of interest, a thorough investigation would be necessary, founded on the fullest evidence of the present value of money.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 423–432; Dec. Dig. ⇐104.]

[*Executors and Administrators* ⇐495.]

Administrator allowed commissions on paying over the amount reported to be due by him.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2089–2106, 2108; Dec. Dig. ⇐495.]

Before Harper, Ch., at Charleston, January, 1829.

HARPER, Ch. The bill is filed against the defendant as administrator of the estate of Joseph Clark, deceased, for an account of the personal estate of his intestate, which is claimed by the complainants as escheated property, the said Clark having died intestate and without relations, under a grant from the State by the Act of the Legislature passed in 1799. The defendant admits that Clark died intestate and without relations, and that he, defendant, has possession of his personal estate. But defendant states, that he has claims against the estate of his intestate, growing out of a partnership which existed between them, in the business of running packets between Charleston and Sullivan's Island. The defendant states, that he was a dormant partner, entitled to one-fourth of the profits of the business; that the intestate in his lifetime accounted with him, as he then supposed, fully and fairly, for his share of the profits of the business; but he now alleges that Clark defrauded him by retaining much more than his due proportion of profits. Defendant also claims the whole of the estate as survivor.

The first question made, is as to the existence and terms of the copartnership. The statements of the answer and the proofs in the cause are peculiarly vague and unsatisfactory. It is certainly extraordinary that a

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partnership should have existence *for twelve years, settlements continually taking place between the parties, and the defendant be unable to offer any distinct proof in writing or otherwise, of any transactions between them. Yet unless I discredit the witnesses, (which I have no right to do,) I must believe that some partnership connexion did exist. Two witnesses (Logan and McGee) state expressly that Clark acknowledged the partnership to them. The former fixes the date of the acknowledgment in 1810—the latter, so far as I can perceive, fixes no date. I lay little stress on the circumstance, that Logan represents Clark to have said, that defendant was interested in the business to the extent of one-half, while defendant only claims to be entitled to one-fourth of the profits. The witness' expression is, "he said it was Dr. Schmidt who was half concerned with him in the packet boat business, and that Dr. Schmidt owned half of the boat." The memory of the witness may not have been precise as to expressions. Clark may have said that Dr. Schmidt owned half of the boat, and the witness inferred, as of course, that his interest in the whole business was one-half. The testimony of these witnesses is corroborated by other circumstances. The defendant is proved to have advanced the whole or a considerable part of the money for the purchase of the packet (Eagle) with which the business was commenced. The control of the defendant over the sale and disposition of the negro Bingo, (a boat hand,) indicates an interest beyond the agency of a mere friend and adviser, and the note, of which the exist-

ence and contents are proved by the witness Cuckow, certainly shews that there had been some common interest in the boats and other property specified in it. I think a partnership is shewn to have existed. If nothing else appeared, it would be inferred that the parties were equally interested. But the defendant must be restricted, by his admission and the claim set up in his answer, to one-fourth of the profits. A claim is advanced in the argument, though it does not seem to be distinctly set up in the answer, to one-half of the property which constituted the stock

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or capital of the concern. *This property, I suppose, is specified in the copy note proved by Cuckow. That is as follows:

"$2,100.—Charleston, So. Ca., May 1st, 1822. Due Dr. J. W. Schmidt, two thousand one hundred dollars, or half of the packets Eagle and Mary—also half of the negroes Prince, Tartar, Henry and Sango—also half of the Hughes.

"Signed Joseph Clark."

This paper seems to indicate that the defendant, previously to the execution of it, had an interest of one-half in the property specified. Clark, the intestate, was the ostensible and legal owner of the whole. But it also appears to me, this was an arrangement made with a view to his becoming the absolute and entire owner, or, in other words, as an arrangement for the purchase by Clark of Dr. Schmidt's interest in the property. It is an acknowledgment that there is due to Dr. Schmidt, either the sum of $2,100, or (notwithstanding the apparent ownership of Clark) one-half of the articles enumerated. It is an engagement either to pay Dr. Schmidt $2,100, or to transfer to him one-half of the property. I am forced to draw conclusions from scanty premises, but I cannot conceive any other explanation of this transaction. Now, there is no account given of the original of this note. If the $2,100 mentioned in it were shewn to have been paid, I should conclude that there was an end of Dr. Schmidt's rights in the property. But the fact that the original note is not produced, seems to raise a presumption that it has been paid, or the note in some manner satisfied and taken up. On this point, however, I shall conclude nothing, but reserve it for the coming in of the report.

The answer states that the intestate, Clark, from time to time, accounted with the defendant for his share of the profits of the business. This accounting may have amounted to a settlement or the stating of an account. If so, in order to have avoided it, fraud should have been proved. Though this was alleged, no evidence was offered to prove it. This matter I also reserve for the coming in of the report, as well as the question, how far

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*back the account ought to be carried, supposing the defendant to be entitled to an account as against the estate of his intestate. It is hardly necessary to observe, that there could be no right by survivorship to the partnership property.

It is ordered and decreed, that the defendant account before the proper officer of this Court, for the personal estate of his intestate, and that on such account, he be at liberty to establish against the estate of his intestate, subject to all legal exceptions, any demand growing out of the partnership transactions of the defendant and his intestate, and his claims to any portion of the property which was held as partnership property, and that he pay to the complainants the balance that may be found due on such account.

In January, 1831, the cause was heard before his Honor, Chancellor Johnston, on exceptions to the report. His Honor decreed as follows:

Johnston, Ch. The bill, in this case, claimed from the defendant the estate of his intestate, as escheated property. Such proceedings were had, that it was, by decree of the Court, referred to the Master to report on the accounts, allowing the defendant, who was a copartner of Clarke, to establish any demands he might have against the estate. The defendant professes to have had suspicions excited in his mind, by finding, after the decease of his intestate, that he possessed an estate to an unexpected amount; that, notwithstanding they had repeated settlements up to the intestate's death, on the copartnership concern, the intestate had accumulated that estate by fraudulently abstracting from the profits of the copartnership—and laid claim to his copartner's estate, in his hands, as compensation. The Master heard testimony and reported—but the report was recommitted upon a suggestion, that the Master was a member of the City Council, and, therefore, one of the complainants in this case; and the accounts were referred to the Commissioner on the same terms as they had been to the Master. The Commissioner has reported, and the de-

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fendant has put in two exceptions *to the report—and it is this report and these exceptions that come before me.

The first exception is, to the allowance of interest on the funds in the defendant's hands, while he was bona fide litigating his demands against the estate.

The demand of the defendant appears to have had no other foundation, than his own suspicions. The testimony shows, that he ought not to have referred the acquisitions of Clark to fraud, but that he should have attributed them to the industrious pursuit of a profitable business, which although in part unlawful, he did not conceal. If surmise and suspicion should excuse from the pay-

ment of interest, it would be easy to escape it. But why did not the defendant pay the money into Court, a measure which would at once have rendered secure the interests of whoever should have been proved entitled to it—and demonstrated that the defendant was not profitably employing it. If paid in, the Court would have seen to its profitable investment, pending the litigation. As a general rule, I consider every trustee liable to interest pending the suit, who does not pay into Court, or tender payment to the person who eventually shows that he rightfully demanded it. This exception is overruled.

The second exception is decided, I apprehend, by the case of Wright v. Wright, and is overruled.

It is ordered and decreed, that the Commissioner's report be confirmed, and that the defendant do pay to the complainants the sum reported against him, being nine thousand seven hundred and sixty-three dollars, sixty-and-three-fourth cents, with interest thereon from the first of January, 1824.

The defendant appealed on the grounds

1. That the decree of Chancellor Harper was founded in error, in decreeing that complainants were entitled to an account from the defendant, administrator of Joseph Clark, of the personal estate of said Clark,—personal estate not being the subject of an escheat, and the complainants were

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not authorized, *under the Act of 1787, to sue for any part of the personal estate in the hands of the administrator.

2. That he ought not to be charged with interest on the balance in his hands, because, while his claim against the estate was in a course of litigation, he was guilty of no laches in not paying over the fund: but was entitled to the same privilege where he was the claimant, as he would have had, if a third person had been the claimant.

3. That, as the defendant is charged with interest on the fund in his hands, as though he had now collected and were ready to pay over the principal and interest of a bond arising from a sale of the estate, he ought to be allowed the usual commission of 10 per cent. on the amount of interest to be paid over under the report.

4. That the rate of interest charged should have been fixed at 5 per cent.

5. That, as the decree of Chancellor Johnston was founded on a mistake of the state of the accounts, as reported by the Master and Commissioner, alleged by complainant's solicitors, and acquiesced in by the defendant's solicitors, that the fact was correctly stated, the decree ought to be reformed, by allowing to the defendant the commissions on the final payment of the amount and interest reported as due by him.

Grimke, for defendant.

Axson, for complainants.

The opinion of the Court was delivered (April 16, 1831) by

HARPER, Ch. The principal point made in this case is, that which is involved in the first ground of appeal.

Whatever may have been before the legitimate meaning of the term escheat, the Acts of the Legislature on the subject, explain in a manner too clear to be doubted, that it is intended to be applied as well to the case of a person's dying intestate, possessed of personal property, and leaving none who are known as next of kin, as to that of one's dying possessed of real property and leaving no heirs.

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*The reasoning of Chancellor Johnston is entirely satisfactory on the point of interest, which forms the second ground of appeal.

As to the claim of a commission of 10 per cent. on the amount of interest which has accrued in the administrator's hands, this Court has already decided, that it is only where interest is actually received, and vested so as to accumulate, that an executor or administrator is entitled to such a commission. The purpose of giving the commission is to encourage executors to accumulate.

The rate of interest charged by the Court has heretofore been uniformly the legal rate of seven per cent. I suppose that it is in the power of the Court, in conformity to the practice of the English Chancery, to charge less than the legal rate of interest, if justice to executors and trustees should seem to require it. To authorize us, however, to change the established practice, a thorough investigation would be necessary, founded on the fullest evidence of the present value of money. This has not been afforded in the present case, and we cannot depart from the practice.

The counsel on both sides agree with respect to the fifth ground of appeal, that it was by mere inadvertence, that the commissions claimed were not allowed.

It is therefore ordered, that the decree be reformed, so as to allow the defendant commissions on the final payment of the amount due by him.

JOHNSON and O'NEALL, JJ., concurred.

Decree reformed.

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*JOHN M. BARNES, Ex'or of W. M. Barnes, v. JOHN MILNE, Adm'r of Wm. Richmond.

[*Judgment* ⇐435.]

Verdict at law relieved against on the ground of surprise.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 821; Dec. Dig. ⇐435.]

Before Harper, Ch., at Beaufort, January, 1830.

HARPER, Ch. Complainant's testator brought an action at law against the defendant, for the balance of an account, alleged to be due by his intestate. At the trial, defendant established various demands by way of set off, and gave, in evidence, a receipt by the agent of complainant's testator to defendant's intestate, acknowledging the receipt of five hundred dollars in money, and an order by Thomas Chaplin on Brown & Tunis for three hundred dollars. The jury found a verdict for the defendant for $834.30¾. This receipt, however, as proved in the present cause, was for the testator's own money, which had been delivered to the intestate, Richmond, by Mr. Thomas Chaplin, to be carried to the testator, Wm. M. Barnes. The bill seeks to be relieved against the verdict, on the ground of the surprise. The bill also states that the testator had paid to the intestate, Richmond, $300; the receipt, or evidence of which payment, was rejected as informal or inadmissible, and claims relief on this ground.

So far as respects this latter ground, nothing is shown to warrant the interference of this Court. The former, however, stands, I think, on a different footing. It is a well-established part of the jurisdiction of this Court, to relieve against verdicts or judgments at law, by its own decree, or by compelling the parties to submit to a new trial at law, even where the defence is of such a nature as might have been made at law; where the party has been prevented from making his defence, by fraud or accident, without any laches of his own. I think these circumstances must concur, that it was out of the party's power to avail himself of the defence, and that this was occasioned by no fault or neglect of his own. See Winthrop, Todd and Winthrop v. Survivors of Lane, Son and Fraser, 3 Desaus. 323, and note.

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325. *Unless the plaintiff at law was specially notified, that this receipt was intended to be produced on the trial, he had no reason to expect that it would be produced, and could not have been prepared with testimony to explain it. As it was not given by himself personally, but by his agent, it is probable he did not know of its existence. In his account against Richmond, filed with the declaration, no charge is made for the $500, and the order for $300, received on his account from Chaplin. From the nature of the transaction, he could not have divined that such testimony would be offered, unless directly informed, and it could be no laches that he was unprepared to meet it. The defendant, in his answer, "denies that the complainant was taken by surprise, by any charge exhibited by him in said cases, as all his charges were made out and pleaded by way of discount, so that the complainant could see how to answer them." This statement seems to have been made by mistake, as upon examining the record at law, no plea or notice of discount appears to have been filed. It is probable, that according to the usual liberal, or rather loose, practice of the Bar, evidence to establish a set-off was admitted, without a formal plea or notice. Or, if a notice of discount were given, it may not have been such as to apprise the plaintiff of the character of this receipt. It was urged, in argument, that the sort of surprise which will entitle a party, against whom a judgment at law has been obtained, to relief, must be such as to amount to fraud in the opposite party. This would be to confound the distinction between fraud and accident. The authority relied on, (1 Fonb. 125) has relation to a different matter. The author speaks of parties being induced to enter into agreements by surprise. If a party will sign an agreement, without knowing what it contains, unless he be drawn in to do so by some fraudulent contrivance of the opposite party, he has no title to relief on the ground of surprise. It is his folly and neglect. Some countenance might seem to be given to such an opinion by a dictum of Lord Hardwicke, in Williams v. Lee, 3 Atk. 223—that the cases for relief are where the plaintiff knows a fact to be otherwise than

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the jury *find, and the defendant is ignorant; as, where the defendant, after the trial, finds a receipt for the debt in his own possession. Certainly, however, there have been many cases in which the Court has relieved, though no fraud could be imputed to the plaintiff. Robinson v. Bell, 2 Vern. 447, and see Richards v. Symes, 2 Atk. 319. No case, I believe, lays down that the plaintiff must have been guilty of fraud to entitle the defendant to relief. See Hennell v. Kelland, 1 Eq. Ca. Ab. 377; Blackhall v. Combs, 2 Pr. Wms. 70; Gainsborough v. Gifford, 2 Pr. Wms. 425. Perhaps, it would be a safe rule to say, that the transaction must be such as would have amounted to fraud, if the plaintiff had acted knowingly. In such a case, it is unconscientious for him to avail himself of the verdict, after he comes to a true knowledge of the case. In the present case, if Richmond himself had been sued, and made the same use of the receipt, it would have been a covinous device—suggestio falsi. He would have known for what purpose the receipt was given. The administrator, finding it among his papers, did not know. If he had known, he, too, would have been guilty of fraud.

It was further urged, that after the verdict, the complainant's intestate might have obtained his remedy at law. He might have given notice of a motion for new trial, and the Appeal Court would have granted it on the evidence now produced. Accident or mistake is certainly a ground of jurisdiction in this Court. In cases of this sort, the Court

of Chancery formerly exercised exclusive jurisdiction in relieving against verdicts or granting new trials at law. The Courts of Law have assumed greater latitude in granting new trials, and it is probable that one would have been granted on a shewing of the evidence now produced. The rules of law on the subject seem not to be very perfectly settled. Perhaps the jurisdictions may be concurrent. Without expressing any opinion on this point, however, I think there is reason to conclude that the complainant's testator was not aware of the existence of the evidence now produced, till it was too late to give the notice of a motion for new trial. The receipts given by Richmond to Mr. Chap-

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lin, I suppose, were, *of course, in Mr. Chaplin's possession. (This should have been more distinctly alleged and proved.) He may not have known that such receipts were ever given, and could not know that they were still in existence. Though parties are not entitled to relief, who have lost their remedy by laches, yet the Court does not require the extremest possible diligence. A similar objection might have been made in several of the cases referred to. In the case of a party finding a receipt in his own possession, after verdict against him, it would seem that there must have been some defect of diligence. In the case of Bateman v. Willoe, 1 Sch. and Lef. 201, the Court refused to relieve, where the party, "by some mistake," had failed to give notice of a motion for new trial, in due time. But there, nothing appeared to shew why the party had failed to make his defence on the first trial.

I am sensible that the exercise of the equity jurisdiction in cases of this sort, is liable to great abuse. It is perhaps not possible to define with the exactness which would be desirable, the rules by which the Court proceeds. Yet the Court cannot refuse its interference in cases coming clearly within the reason of precedents of acknowledged authority.

I should at once direct a new trial at law, if the parties had intimated any wish for it. I will put it in the power of either of the parties, however, to try the matter anew at law, if they desire it: if not, it would perhaps occasion unnecessary delay and expense.

It is, therefore, ordered and decreed, if either party shall give notice to that effect, on or before the first of July next, that the said parties proceed to a new trial of the action of assumpsit brought by William M. Barnes against the defendant mentioned in the proceedings in this case, at the next sitting of the Court of Common Pleas for Beaufort District: no objection to be taken to the want of proper parties to the record at law. If no such notice be given, it is ordered that it be referred to the Commissioner of this Court, to report on the accounts of the parties, on which the judgment in the said action at law was rendered.

Rich. Eq. Cas. *463

*JOHN TODD and Others v. S. B. LEWERS, Ex'or.

[*Wills* ⟸565.]

What passes under a bequest of "all my stock in trade at Laurens Court House; the notes and book accounts there owing to me," considered; and reference to the Commissioner ordered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1233; Dec. Dig. ⟸565.]

Before Harper, Ch., at Laurens, July, 1830.

HARPER, Ch. Samuel Todd, deceased, by his will, bequeaths as follows: "I give to my nephew, Samuel R. Todd, (son of my brother Andrew,) all my stock in trade at Laurens Court House; the notes and book accounts there owing to me, and a negro man named Bob." There is no residuary disposition by the will, and the complainants claim the residue, as the next of kin and distributees.

At the time of his death, besides the goods belonging to his trading establishment at Laurens Court House, the testator left his books on which accounts were due, and a number of single bills, in the form of promissory notes, but under seal, taken in the course of his mercantile dealings. It was agreed, at the hearing that all the notes taken by the testator himself, were under seal. This was his habit of business. The defendant, Samuel B. Lewers, the executor, admitted that there might have been some notes not under seal transferred to his testator, which he had collected, but he did not know or recollect that such was the fact. The testator also left in the desk of his commercial establishment, a promissory note (not sealed) of James Brannon, of a considerable amount, not founded on any of his mercantile dealings. He had also recovered many judgments on account of debts due to his commercial establishment. The questions are, whether these single bills pass under the bequest set forth; whether the judgments pass, and whether James Brannon's note passes.

I shall first enquire as to the meaning of the words, "stock in trade," and next, as to the effect of the words, "notes and book accounts." It is observed by Roberts, in his treatise on Wills, 1 Vol. p. 369, "with respect

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to the words 'stock in trade,' *what shall be comprehended in these terms, must always, in a great measure, depend upon evidence of intention, intrinsically or extrinsically collected: but, where there is nothing peculiar in the case to determine the import of the phrase, the popular and usual understanding of the words must govern their interpreta-

tion." It seems to me, that what constitutes stock in trade, must, in general, be a question for extrinsic evidence, and is a proper subject of reference. I shall direct a reference in this case, and, in the mean time, throw out such ideas as may be a guide to the Commissioner in his investigations.

It was urged, that the popular meaning of the words "stock in trade," is the stock of goods on hand at any particular time. I am aware, that among traders, the goods on hand are designated as "stock;" but I cannot think, that in the general understanding, the terms "stock in trade" embrace no more than this. Nor do I think it can make any difference, if the practice of merchants in paying the tax imposed on "stock in trade" be to estimate only the goods on hand. Men are easily led, in any particular instance, to define words according to the bias of their interests. In general, I think the words must be taken to mean the whole capital employed in the trade—everything that is appropriated or necessary to the carrying on of the trade. If the party using the words were a member of a commercial firm, I suppose they would, in general, signify his interest in the firm. If the terms of the partnership were to employ a certain stated capital and to divide profits annually, the capital would constitute the stock in trade, and I suppose, that any profits that had accrued at the testator's death, would not pass under the words. If the terms were to reinvest the profits in the trade, I suppose that everything—the original capital and the profits, would remain stock in trade, till any part were actually withdrawn. There may be more difficulty in the case of an individual. An individual might set apart a certain specific capital for the purposes of trade withdrawing the annual profits to be employed or vested otherwise. In this case I should say only the original capital constituted the stock in trade. But,

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if his practice *were, to make no distinction between profits and capital, but to reinvest all the proceeds in the trade, then I should say that every thing, goods, shop furniture, cash on hand, debts, whether by note, book account, bond or judgment, were part of the stock in trade. But, still it would be in his power to withdraw any part of the funds or property from the trade; and by whatever means, he should signify his intention of doing so, that which was so withdrawn, would no longer constitute part of the stock in trade. If, as was suggested in argument, the merchant should purchase land with money, or with a note or bond, arising from his trade, this would be clearly a withdrawing it from his stock. The same intention might be signified in infinitely various ways; as, perhaps, if for a debt due, the merchant should take a bond payable at a distant day, out of the usual course of trade, with interest payable annually, this might be a sufficient signification of his intention to invest part of his capital in that way, and to withdraw it from the trade.

I have been surprised to find so little authority on the subject of what constitutes stock in trade. So far as I can find any, however, it seems to support the view I have taken. In the case of Stuart v. Bute, 3 Ves. 212, the testator devised all his wagon ways, rails, staiths and all implements, utensils and things used or employed, together with, or in, or for the working, management or employment of his collieries, and which may be deemed of the nature of personal estate. There were several references to the Master, to enquire what the articles bequeathed were, and what was necessary for carrying on the colliery. He reported, among other things a balance of money, £5512 19s. 6½d., which the Coal Mining Company had in the Tyne Bank; £656 17s. 4d. money in the hands of the Cashier; balances due from several persons, £5642 10s. 10d., and coals at the pit to the value of £2899 17s. 8d. The questions were with respect to these monies and coals. Lord Rosslyn decided that they passed under the bequest. He grounds his opinion chiefly upon the fact, that the same collieries had been disposed of in terms nearly similar by the

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will of Mr. Wortley, the father-in-*law of Lord Bute, and that it had been held in a former suit, (2 Eden, 87; 5 Bro. Par. Ca. 534) that similar balances of money passed. Lord Bute acquired them under a sale made by authority of that will, and Lord Rosslyn thought he intended to dispose of them as he acquired them. On a petition for rehearing before Lord Eldon, 11 Ves. 657, it was argued, against Lord Rosslyn's decision, that by the terms of Mr. Wortley's will (as indeed appears in the case) "all his stock in the coal trade" was bequeathed; and it was conceded, that if these words had been used, everything must have passed. Lord Eldon says the point did not arise in the former case—and if it had, it would have been of no authority, as the words of the two wills were different. He speaks doubtfully, but confirms Lord Rosslyn's decree. So, where the "stock" of a farm was bequeathed, it was held that corn growing at the testator's death passed. Cox v. Godsalve, 6 East, 604, n; West v. Moore, 8 East, 339. This must have been on the principle, that the term included everything on the farm that was proper and necessary for carrying it on. The uncertain and fluctuating nature of the bequest, if it were confined to goods on hand, is another argument against so restricting it. It might amount to much or almost nothing, as the testator happened to die just before or after laying in the usual supply of goods.

I have already said, that if the testator's practice was to make no distinction between

profits and capital, but reinvest the proceeds of the trade, everything would be included that was not shown to have been withdrawn from the trade, including debts of every sort. It is most probable, that this was the nature of the trade, but it does not clearly appear, and must be enquired of on the reference. I suppose the books will show. If this was the case, then it will follow, that if the words "stock in trade" had stood alone, the notes and judgments in question must have passed. But, as the "notes and book accounts" bequeathed, were part of the stock in trade, I must take these as qualifying and explaining the former words. I have no doubt as to the sealed notes. The words "stock in trade"

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and "notes" *must be taken together. The notes intended are those which constituted a part of the stock in trade. What the stock in trade was, is a matter to be enquired of by extrinsic evidence. It is agreed, that there were no notes constituting a part of the stock in trade, but those sealed ones; or, if there were, it was only accidentally, and not in the ordinary course of business. Such instruments are known by that name, though it is not the most obvious and appropriate one; and I certainly cannot think the enumeration of "notes" sufficient to exclude these instruments. So, any ready money on hand, under the circumstances, would be part of the stock in trade.

I am inclined to think differently with respect to the judgments; though my opinion is not so decided, but that I shall reserve it for the coming in of the report. The testator, after using the words "stock in trade," probably added the words "notes and accounts," from some feeling of doubt whether these would pass without being specified. He knew, of course, that the goods would pass. The question is, whether having specified two kinds of debts, a third, not specified, will pass. In the case of Stenhouse v. Mitchell, 11 Ves. 352, the bequest was of all debt, "whether by bond, mortgage or open account." The testator had judgments which he had recovered on bonds; and the question was, whether these passed. It was argued that all debts were bequeathed; that the word "whether" made the case different from what it would have been, if the testator had said "all debts by bond, mortgage or open account." Lord Eldon, though believing that the testator intended every kind of debt to pass, thought he was not authorized to give that effect to these words of the will. He afterwards decided in favor of the legatee, on a subsequent clause giving all debts due at a particular day. Now, I do not perceive that the bequest in the present case would have been different, if the testator had said, "my stock in trade and all debts due by note or open account."

From what I have said, it will also follow that I think Brannon's note will not pass. The words "notes and book accounts," refer to and qualify the previous words,

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"stock in *trade." They all have reference to the testator's commercial establishment at Laurens Court House. Brannon's note, though found in a desk there at his death, had no other connection with that establishment, and was not given on account of any dealings there.

Another question was made. Several of the debtors of the commercial establishment had counter demands, forming matter of set-off, and the question was, whether these counter demands should be paid out of the undisposed residue or out of the funds of the establishment. According to the view I have taken, the bequest was of the whole commercial capital employed at Laurens Court House. What that is, can only be ascertained by an account and settlement of the affairs of the concern; collecting the debts due to it, and paying those due by it. If there were a certain stated capital employed by the testator, and a surplus regarded as profits, I should think the debts ought to be paid out of the profits; or, if these were not sufficient, out of the capital.

It is, therefore, ordered and decreed, that it be referred to the Commissioner to inquire of and report the residue of the estate of Samuel Todd, deceased, undisposed of by his will, in the hands of the defendant Samuel B. Lewers, and also what are the stock in trade, notes and book accounts, bequeathed by the said testator to his nephew, Samuel R. Todd. Costs to be paid out of the said undisposed residue.

Rich. Eq. Cas. *469

*C. JEANNERETT, Trustee, v. J. J. RADFORD and Others.

[*Equity* ⇐124.]

It is not necessary that a Sheriff's return on a sub. ad resp. should appear, on the process, to have been sworn to.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 303; Dec. Dig. ⇐124.]

Practice in relation to continuing causes under the Acts of 1784, 1789 and 1810.

[Ed. Note.—Cited in Bennett v. Calhoun Loan & Bldg. Ass'n, 9 Rich. Eq. 178, 179; Bulow v. Witte, 3 S. C. 326; Hagood v. Riley, 21 S. C. 145, 146.]

[*Equity* ⇐429.]

A Chancellor may re-hear a cause so as to correct any apparent error of a decree delivered by himself; provided the application be made before the time for appealing has expired: doubted whether he could do so after that time.

[Ed. Note.—Cited in Hill v. Watson, 10 S. C. 276; Barrett v. James, 30 S. C. 335, 9 S. E. 263.

For other cases, see Equity, Cent. Dig. § 1022; Dec. Dig. ⇐429.]

[*Equity* ⟸429.]

The authority of one Chancellor to re-hear the decree of another for error apparent, is more than questionable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1021; Dec. Dig. ⟸429.]

[*Equity* ⟸392.]

In England, application for re-hearing may be either for error in the decree, or error apparent: the former is an erroneous judgment or mistake in law "to be collected from all the pleadings and evidence;" the latter a plain error in law, apparent from the terms of the decree itself. In this State, where the evidence is not reduced to writing, but the witnesses are examined viva voce, a re-hearing will not be allowed for error in the decree, because it cannot appear whether the judgment was erroneous or no.(a)

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 844; Dec. Dig. ⟸392.]

[*Equity* ⟸427.]

It is so common that a case should be made somewhat different from that stated in the bill, and a decree made accordingly, without the formality of amendment, that it would be of dangerous consequence to permit a decree to be impeached on account of the insufficiency of the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1001; Dec. Dig. ⟸427.]

Before Harper, Ch., at Charleston, April, 1830.

HARPER, Ch. This was a petition for rehearing on the part of the defendants in the cause above stated, in which a decree was made by Chancellor DeSaussure in April, 1828. It was also prayed that the proceedings might be taken from the file, on two grounds:

1. That the defendants had never been made parties to the suit by the service of a subpœna ad respondendum.

2. Supposing the defendants to have been made parties, the proceedings were at an end and the cause out of Court, in consequence of the delay in the prosecution—no decretal order having been made for three years, as required by the Act of the Legislature, and, therefore, the decree was unauthorized.

As to the first ground, it is sufficient to say that a subpœna ad respondendum was produced, returned duly served by the Sheriff. It was objected that the return does

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not appear to *have been sworn to: but in the case of Belser v. Graves, 1 N. and McC. 125, it was decided, by the Constitutional Court, to be unnecessary that the Sheriff's return should appear to have been sworn to, on the process itself. It will be presumed that he has made his return according to law, and if the parties have sustained any injury, their redress must be against the Sheriff by an action for a false return. The complainants in the cause, in their answer to the petition, state that the petitioners were duly served; and the petitioners must have been aware that a suit was depending, as they appeared by counsel to a motion for injunction in the beginning of the cause, which was granted to continue till the further order of the Court. Persons may make themselves parties defendant without service of process.

Nor do I think the petition can prevail on the second ground. The bill was filed on the 15th Nov. 1822: injunction was granted 27th Nov. 1822: on the 16th Nov. 1824, an order was made that the bill be taken pro confesso. On the 16th May, 1826, an order appears on the minutes, that the case be restored to the docket: on the 1st Feb. 1828, it was ordered that the order of reference in the case should be extended, and on the 29th of April, 1828, the report was read, and on hearing, the Chancellor delivered the decree.

The Act of 1784 (7 Stat. 209) declared that all suits in this Court shall be decided within one year from the time they are commenced, unless on sufficient cause shewn for their continuance. That of 1789 (7 Stat. 252) extends the time to two years. The Act of 1810 (7 Stat. 310) provides that the Court may continue a cause for more than three years by consent; or without consent, on sufficient cause shewn, in any case where a decretal order shall have been made within three years. Under this Act, no doubt a party defendant may have a bill dismissed at the end of three years after a decretal order made, whatever cause may be shewn for a further continuance. But the uniform practice of the Court has shewn that the cause is not, ipso facto, out of

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Court, if such motion be *not made. If the party be in Court and does not move to dismiss, this may be held evidence of consent; for, as I understand the Act, in cases of consent, it is not necessary that a decretal order should have been made within three years. Or the parties' being in default, may be equivalent to consent to whatever shall be done in the cause. No hardship can be done to one of the defendants, who is in Court and does not move to dismiss, and he who is in default has still less reason to complain. The Act of 1810, making the continuance depend on consent, shews, the regulation not to have been made on grounds of public policy, but for the benefit and convenience of parties in Court.

The petition also alleged error in the decree, as a ground of re-hearing. The bill alleged that William Moer, deceased, was indebted to the complainant, Jeannerett, a balance on a bond, in trust for the complainant Eliza Steedman, wife of Thomas Steedman: that certain property had been mortgaged to secure the said bond, which had been exhausted and proved insufficient for the pur-

(a) By Act 1830, (6 Stat. 411,) and Act 1840, (11 Stat. 111) the evidence may be reduced to writing.

pose: that while so indebted, the said William Moer executed a voluntary conveyance to the defendant Curtis, in trust for his (Moer's) wife, Jane Moer, now the defendant Jane Radford, wife of John J. Radford, and charged that the trustee Curtis was about to sell the slaves. The bill prayed an injunction against the sale, and for general relief.

The decree of the Court was, that the defendants, Radford and wife, should pay the balance due on the bond, and that the conveyance from Moer to Curtis should be set aside.

The error relied on is, that the case stated by the bill could not authorize the decree. No facts are charged which could render the defendants personally liable to pay the bond, nor was such relief prayed for. As to the prayer, the rule is, that if there be a prayer for any specific relief, and likewise a prayer for general relief, the Court may grant any relief that the case authorizes and requires, not inconsistent with the specific relief prayed. 2 Madd. Ch. 139. The specific relief prayed for in this case, was the injunction against the sale, and the relief granted was not inconsistent with this.

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*As to the question of re-hearing, the organization and practice of the Courts of Chancery in this State are so different from those of the country from which we derive our jurisprudence, that it is exceedingly difficult to apply the rules which obtain there. It was decided by the late Court of Appeals in Equity, that after a full and final hearing, the Court is not at liberty to open cases for re-hearing, on account of error in the decree. Burn v. Poaug, 3 Desaus. 596; Haskell v. Raoul, 2 Tread. 896. The present Court of Appeals, in the case of Haskell v. Raoul, 1 McC. Eq. 22, held the same opinion. The Court, to be sure, decides on the ground, that the specific motion had been disposed of by the former Court; but strongly intimates its concurrence in the doctrine established. If the Court of Appeals cannot re-hear its own decree, it would seem to follow that this Court cannot re-hear a decree sanctioned by that Court; as, in England, there can be no re-hearing after an appeal to the house of Lords. But, by the Act of Assembly of 1808, (7 Stat. 304) orders and decrees of the Judges, not appealed from, "shall have the same effect with decrees sanctioned by the Court of Appeals." I think that I ought to re-hear, so as to correct any apparent error of a decree delivered by myself; provided, the application be made before the time for appealing has elapsed. It may save the necessity of appealing, or prevent delay and expense. But, under the Act of Assembly referred to, I should greatly doubt my authority to do so after that time. It was argued, that in the present case, it was not in the parties' power to appeal or apply for a re-hearing within the time mentioned, as they were not aware of the pendency of the suit or of the decree. But, as I have decided that they were properly made parties, I must hold their ignorance to have been the consequence of their own laches.

I have said, "a decree made by myself:" for my authority to re-hear the decree of another Chancellor for error apparent, would be more than questionable. In England, if

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the party *against whom the decree has gone, supposes that there is error, it is at his option either to appeal or to apply for a re-hearing. The appeal is either from the Master of the Rolls to the Chancellor, or from the Chancellor to the House of Lords; but the application for re-hearing is, of course, to the Judge who made the decree. In this State, there is more than one Chancellor of equal authority; and that one of them should re-hear the decree of another, for error apparent, would be, in fact, to entertain an appeal. And it will not do to say, that though different individuals, they constitute the same Court, and may re-hear, as a Chancellor in England re-hears the decree of his predecessor. As distinct individuals, they may have different opinions, and might re-hear and reverse each other's determinations as long as the difference continued.

But, though I were of opinion that I could re-hear after the time for appeal had elapsed, or re-hear the decree of another Chancellor, I should be satisfied that I could not do so on the grounds alleged in the present petition. The application for re-hearing in England, as explained by Lord Eldon in Perry v. Philips, 17 Ves. 178, may be either for error in the decree, or error apparent. Lord Eldon says the distinction is a wide one. The former is an erroneous judgment or mistake in law, "to be collected from all the pleadings and evidence:" the latter, as the words import, a plain error in law, apparent from the terms of the decree itself; as in the instance put, of an absolute decree against an infant, without a day to show cause, or that mentioned by Cooper in his treatise on Equity pleading, 90, of a decree to distribute the legacy belonging to an infant intestate between his mother, brothers and sisters, when, by the statute law, it vested entirely in the father, who survived the child. Now, with respect to the erroneous judgment to be collected from all the pleadings and evidence, it is plainly impossible, in this State, where the evidence is not reduced to writing, but witnesses are examined viva voce, to determine whether the judgment was erroneous or no. The party who impeaches the decree must show the er-

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ror; but, it would open the door to a *new and most hazardous sort of litigation, to admit evidence, to show what facts were established on the former hearing, and thence to deduce error in the decree. In the present case, there is no error apparent on the face of the decree itself. It is only to be collected from the pleadings, and from inference as to what the testimony must have been.

It was argued, however, that the decree must have been erroneous, as is evident from comparing it with the bill, without reference to the testimony. The bill states no case—charges no facts, to render the defendants personally liable for the balance due on the bond. On this bill, testimony was not admissible to make out such a case as would render them so liable, and it cannot be presumed that such was given. Now, according to the English practice, I am not aware of any authority for opening a decree and rehearing, on account of the insufficiency of the bill, if a sufficient case to warrant the decree be made out from the testimony. If the defendants had been present at the hearing, and testimony had been offered to make out a case not made by the bill, that testimony would have been rejected if objected to; but, if the justice of the case had required it, leave would have been given the complainants to amend. If the evidence were not objected to, it would have been a waiver of the defect of the bill, and the question of rehearing would have been considered on the whole of the pleadings and testimony. But, as I before observed, it must be taken as the default of defendants that they were not present at the hearing. If the testimony in the present case had been in writing, and it appeared that a sufficient case was made out to warrant the decree, and that justice had therefore been done, certainly the Court would not grant a new hearing for the defect of the bill. There would be no purpose to be answered by doing so, as the party might still be allowed to amend, and re-hearing is discretionary in the Court, even though there may have been some error in the decree. Mills v. Bank, 3 Pr. Wms. 1. But, according to our practice, it cannot appear whether there was such testimony or no—nor can the petitioners therefore show wheth-

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er there was *error or no, which is necessary to entitle him to a re-hearing. If it had appeared in evidence, that the defendants were the executor and executrix of Moer, and had received assets to the amount of the balance due on the bond, or that the defendant, Radford, had removed the slaves out of reach of the process of the Court, this would have warranted the decree that was made. And there is reason to suspect, that some testimony to this effect was offered, as the letters testamentary showing the defendant, Mrs. Radford, to have been the executrix of her former husband, were found in the bill. It is so common, that a case should be made out somewhat different from that stated in the bill, and a decree made accordingly, without the formality of amendment, that it would be of dangerous consequence to permit decrees to be impeached for such defect.

It is ordered and adjudged, that the petition be dismissed.

Rich. Eq. Cas. 475

Ex parte J. W. GRAY.

[*Appeal and Error* ⇐85.]

An order made upon the return of a rule to show cause directing a late Commissioner to turn over the official papers, funds, &c. in his hands, to his successor, and, upon his failing to do so, that he be attached, is not the subject of appeal; or, if it be, the appeal does not suspend the execution of the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 548; Dec. Dig. ⇐85.]

Before Harper, Ch., at Chambers, 1830.

HARPER, Ch. At the sitting of the Court in January, 1830, a rule was issued on behalf of J. W. Gray, who had lately been appointed Commissioner of the Court, requiring Thomas Hunt, Esq., the late Commissioner, to show cause why he had not turned over to his successor in office, "the official papers, &c." in his hands. Mr. Hunt showed for cause, as I understand, that he was still legally the incumbent of the office, and en-

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titled *to retain it. Chancellor De Saussure decreed against his claim to the office; but, as an appeal from the decision on that claim was expected, ordered prospectively, that if the final decision should be against Mr. Hunt, he should, with all convenient speed, deliver over all the papers and documents in his hands, belonging to the office. Chancellor De Saussure's decree was affirmed on appeal, and part of the official papers and funds delivered over accordingly. At the sitting in May, 1830, a rule was granted, requiring Mr. Hunt to show cause why he had not turned over the official papers, funds, &c. stated in his "report of funds," filed the 29th January, 1830, to be in his hands, agreeably to the previous order; of which funds, only some specified by reference to the report, had been turned over. To this rule, no return was made. It is true, that, at the return of the rule, Mr. Hunt appeared and stated verbally, some grounds on which he conceived himself entitled to retain certain of the papers and funds in his hands. This, however, could not be received as a return, and a day was appointed, the last of the sitting, for a return in writing to be made. On the day appointed, the counsel of Mr. Hunt appeared, and, I believe, offered a statement in writing; but, if so, it was not sworn to, and being objected to, was not received. For want of any cause shown, it was ordered that the last rule be made absolute, and "that the said Thomas Hunt be attached, unless he comply with the said rule."

A notice of appeal from this order was given; in consequence of which, the Register declined to sign an attachment in pursuance of the order. The present application is for an order to the Register to sign the attach-

ment; founded on an affidavit of Mr. Gray, that certain of the funds and papers have not been turned over.

Independently of any consideration of the appeal which has been taken, I doubted whether the present application was not irregular, as being unnecessary. The order of Court itself provides that an attachment shall issue, if it be not complied with. But the order is, that Mr. Hunt shall turn over

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the funds and *papers, and, provisionally, if he shall not comply, that an attachment shall issue. Perhaps it was proper, that before issuing an attachment, he should be called upon to show whether he had complied or no. But, no injury could be done by proceeding in this manner, and I shall proceed to consider the merits of the motion.

The reason alleged against the granting of the motion is, that an appeal has been taken, which operates a suspension of the order for attachment. After considering the matter as maturely as I can, I am compelled to come to the conclusion, that an order of this sort is not the subject of appeal, or if it be, that the appeal will not suspend the execution of the order. As observed by Chancellor Kent, in the case of Green and Winter, 1 Johns. Ch. 80, "there must, of necessity, exist a power and discretion in the Chancellor, as a like power exists in a Court of Law, (2 T. R. 78,) to determine, in the first instance, upon the operation of the appeal; as, whether it be brought upon an order from which an appeal will lie, and upon what points, and to what extent the appeal operates as a stay of proceedings." Considerable difficulty has been found in deciding what orders are, or are not, the subject of appeal. With respect to orders made in the course of a cause, it has been laid down, that interlocutory orders, such as do not affect the final decision of the cause, cannot be appealed from, though they may occasion inconvenience to the party in the mean time. This, however, was not an order made in any cause, but directed to one who stood in the relation of an officer of the Court, prescribing the execution of his duty to the Court. It is not so properly a judicial order as an administrative one. With the exception of a few instances in our own Courts, I have found no case of appeal from such an order. The case chiefly relied on, is that of The State vs. The Sheriff of Charleston District, (1 Mill, 150,) in which the Constitutional Court entertained an appeal from an order making a rule absolute against the Sheriff, for the paying over of money in his hands. In that case, Judge Bay adverts to the instances in which he

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supposes an appeal would not *lie. Speaking of the right of appeal, he says, "it appears to me to be circumscribed by nothing but such circumstances as are absolutely necessary for the despatch of business in the due course of the administration of justice; and without which, the law could not be speedily and duly executed. To suffer appeals, in such cases, would be to destroy the energy of the law in every stage, and to defeat the very ends and designs for which all laws were formed. Under this head, I would be understood to mean and intend all legal proceedings in a Court of Justice, before verdict and judgment; all refusals in persons attendant on a Court of Justice to do and perform their duties, and in paying proper obedience to the rules of Court," and he refers, generally, to the head of contempts. Now, the order in that case was grounded on a supposed contempt of the Sheriff in not paying over the funds in his hands. As the funds were claimed by different parties, the Court must have gone upon the distinction, that although in form, it was a proceeding for contempt, it was in substance and effect, a determination of private rights. This would not apply to the case of a Sheriff who should refuse to make any return at all. The present order was to turn over funds and papers pertaining to the office of Commissioner in Equity. This seems to me to come within the class of cases referred to by Judge Bay, in which it is absolutely necessary for the due administration of public justice, that the right of appeal should be denied. It is necessary for the public, that the documents and funds pertaining to the Commissioner's office, should be in that office, accessible to the public, and subject to the control of the Court. I cannot make distinctions as to how large a portion of the funds and documents are detained, or what degree of inconvenience the public may suffer from their not being in the proper office. Suppose the case of a Register going out of office, and refusing to turn over any papers. Must the business of the country be suspended, till he can litigate his right to do so on appeal? I do not perceive that any ultimate injustice can be done by this decision. As I before observed, such an

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order is not an adjudication. If Mr. *Hunt is legally entitled to any emoluments arising from the cases in his hands, and these shall be received by the new Commissioner, an action may be brought to recover them.

But, if I supposed that an appeal would lie, I should still think that the order ought to be carried into effect. In England the practice is perfectly well settled, that an appeal from the Chancellor to the House of Lords, does not suspend the execution of a decree, unless a special order for that purpose be made by the House or the Chancellor. The Warden and Minor Canons of St. Paul's vs. Morris, 9 Ves. 316; Gwynn vs. Lethbridge, 14 Ves. 585; Waldo vs. Caley, 16 Ves. 206; Willan vs. Willan, 16 Ves. 216. In New-York, where the right of appeal is allowed almost in the terms of our Statute of 1808, (see Blake's Chancery, 174,), a different

rule is adopted, to wit, that further proceedings are suspended by appeal, unless a special order be made that the cause shall go on. In general, the English law is ours, and I can perceive nothing in our statute inconsistent with the rule I have referred to. Yet, the practice has been so uniform, to suspend the execution of decrees until the appeal shall be determined, that I should respect it, though there has been no adjudication on the subject, so far as I know. Appeals in this country are so quickly determined, that little inconvenience can arise from suspending the execution. Yet I cannot conceive, that this practice will warrant me in saying, that in no case, where the most irreparable injury is likely to be occasioned by the suspension, can a decree be enforced pending an appeal. This is not the case of a decree, but of an order to an officer of the Court; which, according to the views I have taken, public interest and the due administration of justice require to be promptly enforced. If the appeal shall be sustained, no material injury can be done to Mr. Hunt. The order of the Court can, at once, put him in statu quo; by directing the present Commissioner to refund and restore to him whatever he may be entitled to receive.

Certain statements have been submitted to me, on the part of Mr. Hunt, to show the

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grounds on which rests his claim to re*tain some of the funds and papers in his hands. I cannot consider these now. They ought to have been presented in his return to the rule, during the sitting of the Court. I have no authority to rescind an order made by the Court, though it is my duty to make other orders which may be necessary to carry such into effect. I do not think I have a legal discretion to suspend the order. I should find it difficult to draw any conclusion from the statements, if I thought myself at liberty to consider them; nor do I understand that they have been submitted to the opposite party.

The irregularity of the order itself is relied on as a ground for suspending its execution. The alleged irregularity is, that the order directs an attachment to issue, when the rule had not required Mr. Hunt to show cause why an attachment should not issue. The process of attachment is the ordinary means by which this Court enforces its orders. The order in question is, that Mr. Hunt shall turn over the papers and funds in his hands. If it had stopped there, and said nothing about an attachment, the motion would have been, of course, to grant the attachment, upon a showing that the order had been disobeyed. I cannot suppose that the order can be rendered irregular by the express insertion of that which the law would have implied. The order to an officer of the Court, to show cause why he has not obeyed a former order, is of course a rule to show cause why he should not be attached. The order of Chancellor De Sanssure had already directed Mr. Hunt to transfer "all the papers and documents" in his hands. He was called upon to show cause why he had not obeyed that order. No cause being shown, it would have been perhaps regular that an attachment should have been ordered at once, without any further order to turn over the papers. I should have little doubt as to this, but that the order of May, 1830, includes "funds," as well as papers and documents.

It is therefore ordered, that the Register sign the writ of attachment demanded by the Commissioner, James W. Gray.

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